



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>

LNA

JCD

JF

Cape of Good Hope. Supreme Court. 1900

"CAPE TIMES" LAW REPORT

OF ALL CASES DECIDED

IN THE SUPREME COURT

OF THE

CAPE OF GOOD HOPE,

DURING THE YEAR 1900

(WITH INDEX OF CASES AND DIGEST).

REPORTED BY

J. D. SHEIL, Q.C.,

OF THE INNER TEMPLE, BARRISTER-AT-LAW, ADVOCATE OF THE SUPREME
COURT, AND ASSISTANT LAW ADVISER TO THE CROWN.

VOL. X.

1900

CAPE TOWN :

PRINTED AND PUBLISHED AT THE "CAPE TIMES" OFFICE, ST. GEORGE'S STREET,
1901.

JUDGES OF THE SUPREME COURT DURING THE YEAR 1900.

DE VILLIERS, THE RIGHT HON. SIR J. H., K.C.M.G., P.C. (Chief Justice).

BUCHANAN, THE HON. E. J. (Senior Puisne Judge), acted as Chief Justice from the 11th April until 4th September.

LAWRENCE, THE HON. P. M. (Judge-President of the High Court), from 1st January to the 24th March (during the absence on leave of the HON. MR. JUSTICE MAASDORP).

MAASDORP, THE HON. C. G. (Junior Puisne Judge), from the 24th March.

SOLOMON, THE HON. W. H., from 30th April to the 29th September.

Attorneys-General.

THE HON. RICHARD SOLOMON, K.C. (resigned 17th June.)

THE HON. JAMES ROSE-INNES, K.C.

Many of the cases which appear in this Volume were reported by Howel Jones, Esq., and P. S. Jones, Esq., of the Supreme Court Bar, to whom I desire to express my great indebtedness.

J.D.S

TABLE OF CASES.

VOLUME X.—1900.

ERRATA ET CORRIGENDA.

- Page** 1. *Queen v. Oliphant* read *conviction* for connection in 3rd line of head-note.
- .. 119. In the 11th line of judgment read *mortgagees* for *mortgagors*.
- .. 198. In 8th and 9th lines of left hand column omit the words : " But the effect their power of action."
- .. 219. In *East London Municipality v. Colonial Government* in paragraph 4 of plea, insert before declaration the words : *the laws referred to in paragraph 2 of the plaintiffs.*
- .. 283. In 6th line from bottom of right hand column read *it* for *is*.
- .. 258. In *Lawrence v. Romain and Gronitzki* insert "a" before declaration in 1st line.
- .. 365. In 6th line of right hand column read *Act 28 of 1883* for *Act 20 of 1883*.
- .. 376. In 25th line of right hand column omit the words "is 38 of 1887," and in 36th line read *therefore* for *there*.
- .. 378. In 23th line of head-note in *Botha v. De Klerk* omit the comma between the words *son* and *informally*.

| | PAGE |
|---|---------------|
| Abrahams v. Abrahams | 656 |
| Abzolom, <i>in re</i> | 686, 752 |
| Adams Brothers v. Executors of De Villiers | 62 |
| Adams' Estate, <i>re</i> | 406 |
| Adendorff & Co. v. Sonnenberg ... | 686 |
| African Banking Corporation v. Searelle | 124, 244, 274 |
| African Lands and Hotel Co. v. Ballingall... .. | 508 |
| Ahlbom v. Groman | 720 |
| Ahlbom v. Lithman & Co. | 292, 623 |
| Albertyn v. Udwin | 184 |
| Aleman v. Parazo | 720 |
| Alexander, <i>ex parte</i> | 655 |
| Alexander v. Alexander | 138 |
| Alexander v. Jones | 397, 455 |
| Alford, Wills & Co. v. Johnson ... | 138 |
| Algoa Tanning Company v. Rautenbach | 298 |
| Allan, Ross & Co. v. Crisp | 3 |
| Anders, <i>ex parte</i> | 584 |

| | PAGE |
|--|-------|
| Anderson & Co. v. Coetsee | 2 |
| Arderne v. Davod | 65 |
| Atkins v. Northcote | 410 |
| Atkinson v. Colonial Government ... | 152 |
| Attwell v. Myburgh | 706 |
| Auret, <i>ex parte</i> | 2, 22 |
| Auret v. Auret, W. B. | 580 |
| Auret v. Pinker | 123 |
| Bachman, <i>in re</i> | 187 |
| Badenhorst v. Badenhorst, 398, 462, 486. | 624 |
| Bam v. Steyn | 483 |
| Barr v. Warner | 578 |
| Barron v. Hunter | 277 |
| Barry Bros. v. Louw... .. | 513 |
| Barry's Estate v. Kasner | 578 |
| Bartholomew v. Stableford | 144 |
| Barwell & Co. v. Civil Commissioner of Oudtshoorn and others ... | 4 |
| Bassano, <i>ex parte</i> | 464 |
| Basson, <i>ex parte</i> | 412 |
| „ <i>in re</i> | 68 |

| | PAGE | | PAGE |
|---|---------------|--|---------------|
| Battenhausen v. Schneider ... | 123 | Broembsen, <i>ex parte</i> ... | 484 |
| Beamish and another v. Lategan ... | 684 | Brookes v. Muller and Israelson, 129, 143, 211 | |
| Bear, <i>in re</i> ... | 317 | Brophie v. Brophie ... | 589 |
| Beattie's Estate, <i>re</i> ... | 414 | Brown, <i>ex parte</i> ... | 577, 739 |
| Beaufort West Municipality v. Maddison ... | 124 | Brown v. Davids ... | 454 |
| Bekker, <i>ex parte</i> ... | 719 | Brown v. Short ... | 483, 705 |
| Belvliet Park Estate Syndicate v. Matthews... .. | 633 | Buchanan, <i>ex parte</i> ... | 464 |
| Bennett, <i>ex parte</i> ... | 757 | Buirski & Son v. Reed ... | 49 |
| Bennett v. Bennett ... | 515 | Burghersdorp Dutch Reformed Church, <i>in re</i> ... | 719 |
| Bennett v. White, Ryan & Co. ... | 353 | Burghersdorp Dutch Reformed Church v. Van der Walt ... | 587 |
| Beplat v. Van Heerden ... | 655 | Burnard v. Snyman ... | 184 |
| Bernstein v. Ferreira... .. | 121 | Burton v. Samuels ... | 484 |
| Beyers, <i>ex parte</i> ... | 191, 317 | Butter's Estate, <i>re</i> ... | 399 |
| „ <i>in re</i> Minors ... | 349 | Buyskes v. De Marillac ... | 509, 554 |
| „ <i>in re</i> ... | 622 | Cabrita v. Du Preez ... | 185, 429, 563 |
| „ and another v. Willowmore Licensing Court and Raphael ... | 347 | Callahan v. Philip ... | 123 |
| Beyleveld and others v. Jordaan, 463, 486 | | Cameron, <i>ex parte</i> ... | 684 |
| Birkett (minor), <i>in re</i> ... | 139 | Campbell & Co. v. Goldstein ... | 273 |
| Blake, <i>ex parte</i> ... | 705 | Cannon, <i>in re</i> ... | 192 |
| Blakeway v. Hewat ... | 577 | Cape Commercial Bank (in liquidation) ... | 418, 485 |
| Blanckenberg v. Owen ... | 588, 626 | Cape District Waterworks Co. v. Woodstock and Claremont Municipalities ... | 160 |
| Board of Executors v. Van Zyl ... | 587 | Cape of Good Hope Permanent Land, Building and Investment Society (in liquidation), <i>in re</i> ... | 9 |
| Boett, <i>ex parte</i> | 508 | Cape of Good Hope Permanent Land, Building and Investment Society v. Bank of Africa ... | 597 |
| Boje, <i>ex parte</i> ... | 272 | Cape Times Ltd. v. W. A. Richards & Sons ... | 727 |
| Boldman, <i>ex parte</i> ... | 278 | Cape Town Town Council v. Bomberg ... | 274 |
| Bolger v. Henning ... | 579 | Cape Town Town Council v. Falconer ... | 383 |
| Boltman, <i>in re</i> | 367 | Cape Town Town Council v. Kaiser ... | 383 |
| Booth v. McKechnie ... | 577 | Cape Town Council v. Willemse ... | 547 |
| Border Printing and Publishing Co., <i>in re</i> ... | 623 | Cape Town Tramways Co. v. Eastern and South African Telegraph Co. ... | 162, 620 |
| Bosman v. Falconer ... | 462, 514, 577 | Cardinal, Estate of v. Coe ... | 393 |
| Bosman, Powis & Co. v. Carter ... | 154 | „ <i>re</i> Minor ... | 403 |
| „ „ v. Corlett ... | 65, 243 | Cardwell v. Jordaan ... | 402, 514 |
| Botha v. De Klerk ... | 378 | Carman and Workman v. Railway Sick Fund Board ... | 568 |
| Bothma, <i>in re</i> ... | 721 | | |
| Brady v. Kamp ... | 503 | | |
| Brandes v. Wobbe ... | 23 | | |
| Breed, <i>in re</i> ... | 746 | | |
| Brill v. Olivier ... | 547 | | |
| Brink v. Bomberg ... | 185 | | |
| Brisley, <i>in re</i> ... | 363 | | |
| Brisley, <i>in re</i> Minors... .. | 348 | | |
| „ v. Davis ... | 24 | | |
| British S.A. Co. v. Furber ... | 749 | | |
| „ „ v. Trustees of Lyle Bros. and Wright ... | 431 | | |

| | PAGE | | PAGE |
|--|---------------|--|--------------------|
| Carter v. Cape Town Council ... | 722 | Colonial Orphan Chamber v. Cohen | 394 |
| Cartwright v. Horne | 745 | " " " v. Philips | 394 |
| Castleman, <i>re</i> Minor | 415 | " " " v. Jackson | 184 |
| Cathcart v. Jansenville Licensing Court | 436 | Combrinck & Co. v. British South Africa Co. | 624, 726 |
| Chandler v. Lombard Junior ... | 586 | Conradie, <i>ex parte</i> | 550, 583 |
| Chandler v. Steenkamp | 184 | " and others, <i>in re</i> | 26, 620 |
| Chick, <i>ex parte</i> | 38 | " v. Conradie... .. | 414 |
| Church of South Africa, Trustees of v. Webster and others | 243 | Cook v. Gardiner | 463, 568 |
| Christie v. Cape Town Tramways Co. | 26 | Coomer v. Smith | 32, 183 |
| Cilliers, <i>ex parte</i> | 547 | Coote, Noble & Co. v. Tiran... .. | 123 |
| Clarke v. Frisby | 466 | Coppenhagen v. Wijgt | 546 |
| Clarke v. Pamla | 345 | Corlett v. Gourlay & Co. | 612 |
| Cleghorn and Harris v. Taylor ... | 185 | Cormack and another, <i>ex parte</i> ... | 159 |
| Clingen v. Clingen | 320, 403, 591 | Cotterell v. Van Aarde | 298 |
| Cockburn's Estate, <i>re</i> | 514 | " v. J. G. van Aarde | 298 |
| Coetzee, <i>ex parte</i> | 508 | Court Crown Foresters v. Clement... | 625 |
| Coetzee, <i>re</i> | 439 | Crafford v. Du Toit | 583, 595 |
| Cohen v. Cohen | 412 | Cramer's Estate, <i>re</i> | 439 |
| Cohen v. Falconer | 262, 280, 395 | Crooks & Co. v. Jones | 686 |
| Cohen v. Groman | 317, 714 | Crowder v. Whelan | 183, 279, 487, 568 |
| Coten and Philips, <i>in re</i> | 726 | Cuthbert, <i>ex parte</i> | 580 |
| Coleman & Co. v. Atkins and the Standard Rank | 186 | Cuthbert & Co. v. Lulham & Co. ... | 243 |
| Collier and others v. Sibbert ... | 123 | Dale v. Norwich Union Fire Insurance Co. | 499 |
| Collison & Co. v. Colonial Government | 249 | Dauids, <i>re</i> | 442 |
| Colonial Assurance Co. v. Lategan... | 460 | Davies v. Hapelt and Roos | 515 |
| Colonial Government v. Barks ... | 462 | Dawson v. Dawson | 15 |
| " " v. Bartlett | 462 | De Beer, <i>ex parte</i> | 515, 546 |
| " " v. Brady | 580 | De Beers Coy. v. McCarthy | 687 |
| Colonial Government v. Cape Town Town Council | 285 | De Jager, <i>ex parte</i> | 584 |
| Colonial Government v. Hartung ... | 157, 402 | De Jager v. Vorster | 239 |
| " " v. Hyde | 402 | De Jong & Co. <i>ex parte</i> | 720 |
| " " v. Locke | 140 | De Kock, <i>re</i> | 415 |
| " " v. Logan & Co. (Ltd.) ... | 299 | De Klerk v. Jordaan... .. | 274 |
| " " v. Lyer | 579 | De Lorme v. Murison... .. | 3, 23 |
| " " v. Mathys | 435 | Dempers v. Abdol Rahim | 121 |
| " " v. Miller and others | 462 | " v. Louis | 185 |
| " " v. Mills | 43 | Deneys Estate, <i>re</i> | 414, 514 |
| " " v. Rautenbach, Estate of ... | 579 | Denoon, <i>ex parte</i> | 435 |
| " " v. Stephan Bros., 68, 566, 626 | 462 | De Smidt v. Scott and others ... | 138 |
| " " v. Uitlander | 462 | De Villiers, <i>ex parte</i> | 405, 460 |
| " " v. Winterbach | 112, 286 | " <i>in re</i> | 620 |
| | | " v. Abdullah | 435 |
| | | " v. Muil | 185 |
| | | De Waal and Co. v. Barker and another | 706 |
| | | De Waal & Co. v. Joubert | 435 |
| | | " " v. Pearce | 398 |
| | | " " v. Vorster... .. | 578 |
| | | " " v. Van Zyl | 138 |

| | PAGE | | PAGE |
|--|----------|--|---------------|
| Dewar and McAlister v. McNaughton & Son | 207 | Fachidien v. City Tramways Co. ... | 38 |
| De Wet, <i>ex parte</i> | 546 | Faehse v. Marincowitz and another | 317 |
| De Wit, <i>in re</i> | 655 | Fairbridge v. Gous | 344 |
| „ and others v. Van Tonder and others | 187, 191 | „ v. S.A. Newspaper Co. ... | 10 |
| Diocese of Cape Town Trustees v. Priser | 507 | „ Arderne and Lawton v. De Villiers | 123 |
| Divine, Gates & Co. v. Hendricks ... | 156 | Fairfield Brick and Land Co., Ltd., <i>in re</i> ... 161, 192, 280, 407, 418 | |
| D'Oliveira, <i>ex parte</i> | 546 | Falconer, <i>in re</i> Estate of | 48 |
| Doobey & others v. Sala & others ... | 761 | Falconer v. Law | 190 |
| Douglas, <i>ex parte</i> | 507 | Falconer (minor), <i>re</i> | 415 |
| Donian, <i>ex parte</i> | 183 | Fehr & Co. v. Joubert | 317 |
| Dreyer, <i>in re</i> | 746 | Fleming and others, <i>in re</i> | 37, 66 |
| Dunn v. Fowler | 113 | Flemmer v. Venter | 579, 657, 679 |
| „ v. Kohler | 587 | Fletcher's Retail v. Dean | 4 |
| Du Plessi, <i>ex parte</i> | 753 | „ Wholesale v. Spiers Bros. ... | 4 |
| „ and others, <i>ex parte</i> | 624 | Fletcher and another v. Joliet's Estate | 513 |
| „ v. Stapelberg | 273 | Forrest v. Lucas and another ... | 24, 589 |
| Durbanville Kerkeraad, <i>in re</i> | 158 | Fort Beaufort Public School, <i>in re</i> ... | 17, 66 |
| Dutch Reformed Church, Maraisburg, <i>in re</i> | 319 | Foster v. De Vos | 310 |
| Du Toit, <i>ex parte</i> | 15 | Fothergill, v. S.A. Breweries ... | 643, 530 |
| „ A. F., <i>ex parte</i> | 435, 483 | Fourie's Estate, <i>re</i> | 399, 485 |
| „ J. S., <i>ex parte</i> | 580 | Fraser v. Bischofswerder | 685 |
| „ Estate, <i>re</i> | 405 | Freeman & Co. v. Clews | 393 |
| „ v. Keyter and Van Eeden ... | 123 | „ v. Hendricks | 243, 316, 393 |
| „ v. Oosthuizen | 2 | Fresh Fish and Fruit Supply Company, <i>in re</i> | 188, 243 |
| „ v. Venter | 2 | Friedgood v. Cardinal's Estate ... | 572 |
| Dykman v. City | 54 | Frost, <i>ex parte</i> | 187 |
| | | Fuchs, <i>ex parte</i> | 398 |
| | | Fyne v. Lee | 335 |
| East London Municipality v. Colonial Government | 218, 318 | Gadow, <i>in re</i> | 278 |
| East London Municipality v. Nangle | 651 | Gadow v. De Villiers | 377 |
| Eastern and South African Telegraph Co. v. Cape Town Tramways Co., Ltd. | 72, 162 | Galliers and others v. Rycroft ... | 777 |
| Eaton, Robins and Co. v. Nassar ... | 507 | Galloway, <i>in re</i> | 139 |
| Eayrs' Trustee v. Muir & Co. | 625 | Garlick v. Richold | 138 |
| Ebert & Co. v. Goldman | 741 | Gazant, <i>in re</i> | 68 |
| Edinberry (minors), <i>re</i> | 726 | Goldenhuys, <i>ex parte</i> | 68 |
| Edison Bell Co. v. Hasken | 636 | Genis v. Jordaan | 189 |
| Edwards, <i>in re</i> | 687 | Gie v. South African Supply and Cold Storage Co. | 656 |
| Elliott, <i>ex parte</i> | 753 | Gill, <i>ex parte</i> | 24 |
| Epstein v. East London Harbour Board | 697 | Gillis v. Kleyn | 191, 274 |
| Epstein v. Krachmel | 139 | Glaasterg v. De Wit | 257 |
| Equitable Assurance and Trust Co. v. Le Grange | 655 | Gobelanga v. Grand Junction Railways | 655 |
| Errington v. Katzen | 477 | Goldman v. National Bank | 234 |
| | | Goldstone v. Swiss Watch Co. ... | 453 |

| | PAGE |
|--|------------------|
| Goodison v. Tate ... | 346, 399, 411 |
| Gordon, <i>in re</i> ... | 319 |
| Gordon & Co. v. Minnaar ... | 3 |
| Gordon and Gotch v. Woodburn ... | 578 |
| Gourlay v. Carney ... | 345, 417 |
| Grant & Co. v. Reid ... | 745 |
| Graser, <i>ex parte</i> ... | 349 |
| Greeff's Estate v. Estate of Fourie ... | 193 |
| Greenfield v. Frieslaar ... | 621 |
| Greyling, <i>ex parte</i> ... | 406 |
| Griebelhorn & Louw v. Van der Spuy ... | 634 |
| Griffiths, <i>ex parte</i> ... | 513 |
| Grimbeck v. Colonial Government ... | 268 |
| Groenewald, <i>ex parte</i> ... | 319 |
| Grossman v. Lewis ... | 337 |
| Gruber, <i>ex parte</i> ... | 405, 486 |
| Haarhoff, <i>ex parte</i> ... | 187 |
| Haarhoff, <i>re</i> (Minor) ... | 439 |
| Hall Bros. v. Gott ... | 185, 344, 410 |
| Hammerschlag & Co. v. Laubscher ... | 578 |
| Hanmer v. De Villiers ... | 413 |
| Harris, <i>in re</i> ... | 44 |
| Harris v. Levy ... | 187 |
| Hausman v. Hausman ... | 589, 636 |
| Havenga and Dickinson v. Van Niekerk ... | 190, 395 |
| Hayes v. Hayes ... | 24, 38, 193, 414 |
| Haylett, <i>ex parte</i> ... | 622 |
| Hayne, <i>ex parte</i> ... | 398 |
| Heathcote v. De Wet ... | 745 |
| Heatlie v. Stephan ... | 65, 187 |
| Hedley Bros. v. Barnard and another ... | 394, 436 |
| Hendrickse, <i>ex parte</i> ... | 484 |
| Henry v. Henry ... | 399, 553, 716 |
| Herman, <i>ex parte</i> ... | 187 |
| Herman, <i>in re</i> ... | 14 |
| Herman and another v. Hendricks ... | 152 |
| Hertzog v. Hendricks ... | 189 |
| Heydenrych v. Van Driel ... | 187, 193 |
| Heydenrych v. Sabers and others ... | 129 |
| Heyl v. Heyl ... | 317 |
| Higte, <i>in re</i> Minor ... | 318, 347 |
| Hilliard v. Ransome ... | 662 |
| Hoffmester, <i>in re</i> ... | 753 |
| Hofmeyr, <i>ex parte</i> ... | 410 |
| Hofmeyr and another v. Steensma ... | 706 |
| Hogsett v. Van Heerden ... | 745 |

| | PAGE |
|--|-----------------|
| Holmes v. Preuss ... | 510 |
| Holmes & Co. and another v. Frier's Estate ... | 578 |
| Howard and Scott v. Grady ... | 65 |
| Howse, <i>in re</i> ... | 621 |
| Hudson v. Smythe ... | 461 |
| Hughes and another v. Henning ... | 583, 655 |
| Hughes and Rogers v. White, Ryan and Co. ... | 157, 324 |
| Human, <i>ex parte</i> ... | 348 |
| Hunter v. Cape Electric Tramway Co. ... | 8, 56, 141, 160 |
| Hull v. Viljoen ... | 394 |
| Incorporated Law Society v. Vermooten ... | 408 |
| Industrial Life Assurance Co. v. Crawford ... | 623 |
| Ingleaby v. Cay ... | 317 |
| Ingram v. Graaff-Reinet Licensing Court ... | 368 |
| Isaac v. Mills's Estate ... | 112 |
| Isaacs and others v. De Marillac ... | 16, 304, 463 |
| Jackson v. East London Municipality ... | 514, 583 |
| Jacob v. Freeman ... | 123 |
| Jacobs, <i>ex parte</i> ... | 398 |
| Jacobsohn v. Verasamy ... | 316 |
| Jagger and Co. v. Hawkins ... | 546 |
| Jampies v. Jampies ... | 439 |
| Jandrell, <i>ex parte</i> ... | 7 |
| Jardine v. Colonial Government ... | 656 |
| Jeffrey, <i>ex parte</i> ... | 277 |
| Jenkinson and others v. Fairfield Brick and Land Co., Ltd. ... | 138 |
| Jenodien, <i>in re</i> ... | 280 |
| Jevon, <i>ex parte</i> ... | 66 |
| Jones, <i>ex parte</i> ... | 35, 739 |
| „ v. Maartens ... | 316 |
| Jones's Estate, <i>re</i> ... | 486 |
| Joseph v. Hahne ... | 740 |
| Joseph v. Mulder ... | 2 |
| Juta & Co. v. Biden and another ... | 3 |
| Kaiser v. Falconer ... | 23 |
| Kannemeyer v. Henning ... | 345 |
| Kaplansky, Stern & Co v. Holt and others ... | 750 |

| | PAGE | | PAGE |
|---|--------------|---|---------------|
| Keese v. Basson | 578 | Leonard v. Leonard | 416, 437, 637 |
| Kemsley's Estate, <i>re</i> | 399 | Le Roex v. Heatlie | 427 |
| Keys, <i>ex parte</i> | 38 | Le Roux, Estate of v. Phillipson ... | 183 |
| Keyter, <i>ex parte</i> | 398 | Lever Bros. v. Nanucci | 660 |
| Keyter v. Keyter | 550, 707 | Levenkind v. Du Plessis | 274 |
| Kidney and Philip v. Lewis... | 487 | Levinkind v. Vorster... .. | 546 |
| Kift, <i>ex parte</i> | 418 | Levy, <i>ex parte</i> | 589 |
| Kift v. Town Council of Cape Town | 439, 701 | Levy v. De Villiers | 649 |
| Kingswood v. Obree | 746 | Lewis v. Grossman | 395 |
| Kinnes v. Anderson | 547 | Lewis v. Lewis | 24, 318 |
| Kirkland, <i>ex parte</i> | 410 | Lilian Syndicate, <i>in re</i> | 348 |
| Kleinhuys, <i>in re</i> | 318 | Lind v. Oudtshoorn Municipality ... | 158 |
| Kleyn v. Theunissen... .. | 185 | Lindenberg and De Villiers v. Hesse | 155 |
| Knuppel v. Knuppel | 15, 346, 553 | Lithman and Co. v. Marcus | 394 |
| Knuppel v. Steese | 587 | " " v. Saban | 155, 394 |
| Koch v. Koch | 72, 318 | Lithner & Co. v. Markus | 317 |
| Kohne <i>in re</i> | 320, 405 | Lockhardt, <i>ex parte</i> , <i>in re</i> Jervis ... | 193 |
| " v. Beckman... .. | 344 | Locke's Estate, <i>re</i> | 485 |
| Koopman v. Vixseboxse | 123 | Logan & Co. v. Colonial Government | 379 |
| Koorts v. Nel | 184 | Lombard and another v. Young ... | 65, 122 |
| Korler v. Korler | 25 | London Loan and Discount Co. v. Herman | 189 |
| Kotze, <i>re</i> | 551 | Londt v. Jones | 767 |
| Kotze v. Civil Commissioner of Namaqualand | 12 | Lotter's Estate, <i>re</i> | 414 |
| Kotze's Estate v. Krachmel ... | 23 | Loubser v. Pickard | 547 |
| Krachmal's Trustees v. Epstein ... | 418 | Louw, <i>in re</i> | 43, 139 |
| Krahe's Trustee v. Walker and Co. | 641 | Louw, <i>ex parte</i> | 399, 752 |
| Kroman (minor), <i>re</i> | 547 | Louw v. Smith | 577 |
| Kruger, E., <i>in re</i> | 746 | Louw's Estate v. Groenewald ... | 578 |
| Kruger, H. C., <i>in re</i> | 621 | Lucke v. Van Coller | 338 |
| Kruger, H. M., <i>in re</i> | 622 | Lucheram v. Lucheram's Executors | 144 |
| Kuys, <i>in re</i> | 141 | Lucheram's Executors v. Lucheram... | 144 |
| Lachiran and others v. Lachiran's Executors... .. | 412 | Luck (minor), <i>in re</i> | 34 |
| Lamb v. A. and I. Peters | 669 | Lunderstedt v. Lunderstedt... .. | 431 |
| Lampa, <i>ex parte</i> | 753 | Lynch v. Verster | 590 |
| Lamprecht v. Lamprecht | 686 | Maasdorp, <i>in re</i> | 726 |
| Laing v. Laing | 686 | Macinindona v. Macinindona ... | 16, 412, 589 |
| Lang v. Hay | 483 | Mackie, Young & Co. v. Amsterdam | 43 |
| Lange's Estate, <i>re</i> ; G.T.H.B. Society Trustees, <i>ex parte</i> | 406 | Macleod v. Horne | 243 |
| Loughton & Co. v. Andrews & Co.... | 438 | Madeson v. Vierasamy | 394 |
| Lawrence & Co. v. Walsh | 184 | Mahomed v. Louw | 349 |
| Lawrence v. Romain and Gronitzki | 236, 358 | Malherbe's Estate, <i>re</i> | 621 |
| Leffler v. Joseph | 397 | Mansfield and others v. O'Reilly and the Cape Town Municipality ... | 559 |
| Legg v. Baumgarten | 393, 410 | Manuel, <i>in re</i> | 47 |
| Leng v. Goldstein | 547, 577 | Marais, <i>ex parte</i> | 398, 410 |
| | | Marincowitz (Minors), <i>in re</i> | 139, 514 |
| | | Marks v. Mitchell | 622 |
| | | " v. Pratt | 626 |

| | PAGE | | PAGE |
|--------------------------------------|-----------------------|--------------------------------------|----------|
| Marks v. Thomson, Watson and Co. | 516 | Milner v. Batteson | 156 |
| Marr v. Marr | 403, 474 | Mitchell, <i>ex parte</i> | 508, 551 |
| Marshall v van Ryn | 684 | " v. Mitchell | 656 |
| Martianssen v. Corlett | 395 | " & Co. v. Roux | 274 |
| Martin, <i>in re</i> | 4 | Moll v. Civil Commi-sioner of Paarl | 716 |
| Martin v. Esson | 411 | Moorrees and Co. v. Van der Byl | 411 |
| "Mashona," S.S., Prize, <i>in re</i> | 163, 244, 320, 440 | " " v. Vink and Day | 155 |
| Master v. Boardman | 707, 739 | Moravian Missionary Society v. Mona | |
| " v. Brugman and another | 742 | and others | 415 |
| " v. Coetzer's Estate ... | 740 | Morris, <i>in re</i> | 48, 415 |
| " v. Gibbon | 155 | " v. Marat | 317, 460 |
| " v. Hearn and Gibbons ... | 435 | Mostert v. Forde | 344 |
| " v. Kannemeyer | 185 | Mouat v. Carney | 461 |
| " v. Laws | 396 | Mtekisi v. Wright | 375 |
| " v. Semter | 435 | Mudie, <i>ex parte</i> | 514 |
| " v. Strong | 155 | Muller, <i>in re</i> | 48 |
| " v. Viljoen | 546 | " <i>in re</i> Minors | 243 |
| Maxwell v. Table Bay Harbour Board | 770 | Municipality of East London v. Colo- | |
| Maxwell Bros. v. Greer | 514 | nial Government | 218, 318 |
| Mayers v Saperstein | 587 | Municipality of Philip's Town v. | |
| McDonald v. Lowies | 10 | Daniell | 185 |
| Mc Givern and Henry v. Wrangham | 588 | Municipality of Philip's Town v. | |
| McIntyre v. Gous | 344 | Pieters | 185 |
| " v. Keyser | 394 | Munro v. Walker & Co. and others... | 66 |
| McKillop and another v. Joseph, | 396, 435 | Murray and Co. v. Freimond ... | 547 |
| McLeod v. Le Grange | 3 | Musgrave v. Musgrave | 621 |
| McLeroth v McLeroth | 706 | Muszlak v. City Tramways Co. ... | 38 |
| McPhail v. Hall & Co. | 203 | Myburgh, <i>in re</i> | 319, 514 |
| McPherson v. Dowthwaite | 456 | Myburgh v. Myburgh | 745 |
| Meadows v. Gourlay & Co | 637 | Naude, <i>ex parte</i> | 580 |
| Meiring, <i>in re</i> | 746 | Ndabazana Ntapo v. Nguhlini and | |
| Melman v. Butler | 678 | the Surveyor-General | 140 |
| Mercer and another v. Paraza ... | 625 | Nefdt v. Wolfaardt | 344 |
| Meyer v. Beyers | 711 | Nel's Estate, <i>re</i> | 462, 510 |
| Meyer, <i>ex parte</i> | 16 | Nel v. De Wet... .. | 460 |
| Meyer v. Meyer | 26 | Newcombe, <i>ex parte</i> | 547, 583 |
| Meyers, <i>in re</i> | 4 | New Zealand N.M. and A. Coy. v. | |
| Meyers, <i>in re</i> | 160 | Waterston | 621 |
| Michau v. The Argus Printing and | | Nicholl v. Heyns | 155 |
| Publishing Co. | 465, 584, 722 | Nicholls v. Havinga | 513 |
| Michau v The "Cape Times," Ltd. | 733 | Niekerk, <i>ex parte</i> | 622 |
| " v. Westerman | 671 | Nissen, <i>ex parte</i> | 402 |
| " <i>ex parte</i> | 241 | Nortje, <i>in re</i> | 243 |
| Michell v. De Villiers | 150 | Nortje v. Nortje | 124 |
| Miller and Co. v. Anderson | 393 | Norton, <i>ex parte</i> | 344 |
| Miller's Estate v. Boyce and Groneau | 22 | Novella v. Executors of Stephan ... | 732 |
| Mills v. Fitzgerald | 647 | October v. Henning | 428 |
| " v. Estate Mills | 673 | O'Dowd v. Falconer | 508, 684 |
| " and Son v. Clear and Co., | 462, 513 | Oelsching v. Coleman | 684 |

| | PAGE | | PAGE |
|---|-----------------------|-------------------------------------|----------|
| Ohlsson v. Carlsson ... | 745 | Quine v. Marshall and others ... | 231 |
| Ohlsson's Cape Breweries, Ltd v. Power ... | 747 | Rabie, <i>ex parte</i> | 435 |
| Olive v. Falconer ... | 411 | Rampff, <i>in re</i> | 48 |
| Oliver, <i>in re</i> | 349 | Raphael v. Clutterbuck ... | 320 |
| Oliver v. Oliver | 398 | Rathfelder v. Hamilton ... | 460 |
| Oosthuizen, <i>in re</i> | 622 | Rathfelder v. Slabber ... | 154 |
| Oosthuizen v. Gous and another ... | 183 | Ratray v. Stellenbosch Municipality | 557 |
| Oosthuizen v. Oosthuizen ... | 189, 243, 316, 397 | Rautenbach v. Will | 396, 411 |
| Orsmond, <i>in re</i> | 317, 399 | Regina v. Adams | 756 |
| Orsmond v. Steyn | 763 | „ v. Adams and others ... | 7 |
| Page v. Siegmeer | 655, 746 | „ v. Africa | 477 |
| Paraza v. Aleman | 636 | „ v. Bekker | 407 |
| Parker v. E.L. Municipality... .. | 463, 543 | „ v. Bridges | 555 |
| Parkin, <i>re</i> | 584, 621 | „ v. Botha | 387, 391 |
| Parsons v. Eason | 397, 417 | „ v. Cillie | 194 |
| Parsons v. George Licensing Court | 255 | „ v. De Klerk | 738 |
| Paul v. Coetzee | 243 | „ v. Eichhorn | 556 |
| Pedersen v. Edwards... .. | 398 | „ v. Foster | 425 |
| Pelser v. Venter | 393, 578 | „ v. Fourie | 188, 195 |
| Pentelow v. Meyer | 580 | „ v. Goldenhuys | 369 |
| Periera and others v. Anderson | 435, 486 | „ v. Geyer | 707 |
| Perold, <i>in re</i> | 320 | „ v. Grapention and others ... | 759 |
| Perreira, <i>ex parte</i> | 299 | „ v. Herbert | 424 |
| Petersen and another v. Edwards | 348 | „ v. Jansen and Coetzee ... | 7 |
| Petersen v. Webber and Son... .. | 4 | „ v. Jantje and others... .. | 553 |
| Pflugger v. Erasmus | 410 | „ v. Kleinbooy | 759 |
| „ v. Keyser | 410 | „ v. Koning | 754 |
| Pfuhl v. Laughton | 554 | „ v. Liebenberg... .. | 415, 442 |
| Phear, <i>ex parte</i> | 410 | „ v. Louw | 416 |
| Phillips, <i>ex parte</i> | 187, 514 | „ v. Mfenge | 19 |
| Phillipson, <i>ex parte</i> | 2 | „ v. Michau | 45, 72 |
| Philpott v. Van Rensburg | 577 | „ v. Naude and Bekker ... | 443 |
| Pienaar v. Fortuin | 349 | „ v. Ntotwiyana | 737 |
| Pienaar v. Möller | 395 | „ v. Oliphant | 1 |
| Pilkington v. Van Zyl | 313 | „ v. Plank and others | 21 |
| Pillans and Co. v. Ariston M. W. Co. | 452 | „ v. Poelman | 248 |
| Pirie, <i>ex parte</i> | 190, 344 | „ v. Rankin | 735 |
| Potgieter v. New York Mutual Life Insurance Society | 124 | „ v. Roos | 757 |
| Prince, Vincent and Co. v. Green ... | 706 | „ v. Rose and Others | 760 |
| Proctor v. Long | 49 | „ v. Smit | 372 |
| Purcell v. Webster and others ... | 243 | „ v. Smith | 486 |
| Purcell, Yallop and Everett v. Algie | 655 | „ v. „ | 773 |
| Purcell, Yallop and Everett v. Harsteln | 484 | „ v. Soekender | 452 |
| Purcell, Yallop and Everett v. Peder- sen... .. | 397 | „ v. Soesman | 141 |
| | | „ v. Van der Merwe | 439 |
| | | „ v. Vermooten | 17, 189 |
| | | „ v. Visser | 392 |
| | | „ v. Wolmarans | 402 |
| | | Reich, <i>ex parte</i> | 186 |

| | PAGE |
|---|----------|
| Reid v. Reid | 406, 721 |
| Remy, <i>ex parte</i> | 186 |
| „ <i>in re</i> | 14 |
| Reus, <i>ex parte</i> | 620 |
| Rennie's Estate, <i>re</i> | 621 |
| Review... .. | 284 |
| Rex, <i>in re</i> | 583 |
| Ryneveld v. Jordaan... .. | 189 |
| Riddell v. Sherwood | 616 |
| Rimer, <i>ex parte</i> | 9 |
| Riversdale D.R. Church, <i>ex parte</i> | 621 |
| Roberts v. Devlin | 739 |
| Robbtree v. Divine, Gates & Co. | 158 |
| Robertson, <i>in re</i> | 4 |
| Robertson v. Rieve | 42 |
| Robertson v. Reynolds | 345 |
| Rocklands Seminary, <i>in re</i> | 624 |
| Roe v. Roe | 772 |
| Rolfes, Nebel & Co. v. Manchester and Another | 706 |
| Rooskop v. Bester | 763 |
| Roome v. Brown & Co. | 185 |
| Rose v. Poole | 274 |
| Rosen v. Cohen | 2 |
| Rosen v. Otto | 418 |
| Rosenberg v. Van Straaten | 746 |
| Rostofski v. Finkelstein | 161 |
| Roux v. Church | 580 |
| Rowan, <i>ex parte</i> | 186 |
| Rowson, <i>ex parte</i> | 392 |
| Rushton v. Jordaan | 184, 552 |
| Rynhoud v. Murison | 155 |
| Sadie, <i>ex parte</i> | 346 |
| Salie, <i>ex parte</i> | 404, 552 |
| „ v. Abrahams | 414 |
| „ and Hadien v. Abrahams | 471 |
| Sanders, <i>ex parte</i> | 720 |
| Sandford v. Graaff-Reinet Muni- cipality | 399 |
| Sauerlander & Kruger v. Lindeman... .. | 625 |
| Saunpe v. Westermann | 155 |
| Savage & Son v. Marcus and Others | 42, 138 |
| Savage and Sons v. Timmerman | 396 |
| Sawkins v. Watson | 684 |
| Sayers, Estate of v. Muller | 183, 246 |
| Saymann v. Grady | 588 |
| Schaap, <i>in re</i> | 621 |

| | PAGE |
|--|---------------|
| Schaff v. Freeman | 650 |
| Schivedban v. Van der Walt | 396 |
| Schmal v. Jacobson | 621 |
| Schneider, <i>in re</i> | 139 |
| Schoeman v. Meyer | 48 |
| Scholtz, <i>ex parte</i> | 417 |
| Schonken Bros., <i>ex parte</i> | 186 |
| Schroder, <i>ex parte</i> | 398 |
| Schroder and Others v. Kotze | 2 |
| Schweitzer, <i>ex parte</i> | 405 |
| Schweizer v. Gous | 578 |
| Schweizer v. Smit | 299 |
| „ v. Viljoen... .. | 577 |
| Sciama v. Table Bay Harbour Board | 145 |
| Scott, <i>in re</i> | 187 |
| „ v. Ahrens | 694 |
| „ v. Scott... .. | 622 |
| „ v. St. George's Home... .. | 644 |
| Sea Point Municipality v. Peder- sen... .. | 35, 6f, 139 |
| Seuright & Co. v. Cape Town Town Council | 34, 133 |
| Searle and Co. v. Koningsberg | 397 |
| Sellar Bros. v. Greer | 486 |
| Serrurier's Estate v. Baker | 543 |
| „ „ v. Heyer | 513 |
| Seydell v. Boltman | 437 |
| Shaw's Estate v. Van Zyl | 578 |
| Sherwood v. Carter | 484 |
| Sigidi's Executors v. Mjokolo | 397 |
| Simkins and Adams v. Schroeder, 155, | 184 |
| Slabber v. Heyns | 138 |
| Sluiter's Will, <i>re</i> | 549 |
| Smalberger v. Smalberger | 316 |
| Smit, <i>ex parte</i> | 412 |
| „ v. Corbett | 656 |
| „ v. Jooste | 466 |
| „ v. Kollman | 514 |
| „ v. Mulligan | 513 |
| „ v. Smit | 496, 620 |
| „ v. Vlok | 260 |
| Smith, <i>ex parte</i> | 622 |
| „ <i>in re</i> | 139 |
| „ v. Hall... .. | 140, 156, 160 |
| „ Webster & Co v. Droomer | 2 |
| „ v. Mulligan | 547 |
| „ and Co. v. Erasmus | 547 |
| „ „ v. Rheeda | 503 |
| Smythe v. Hudson | 394 |

| | PAGE | | PAGE |
|---|----------|--|----------|
| Smuts and Koch v. Van der West- huizen | 274 | Strydom, <i>in re</i> | 44 |
| Snyman, <i>in re</i> | 319 | Strydom v. Divisional Council of Oudtshoorn | 187 |
| Solomon, <i>ex parte</i> | 584 | Strydom and others v. Steenkamp... .. | 299 |
| Solomon v. Hoole & Co. | 206 | Stuttaford, <i>ex parte</i> | 187 |
| „ v. Oosthuizen | 740 | Swain, <i>in re</i> | 319 |
| „ v. Pfuhl | 624 | Swart's Estate, <i>re</i> | 547 |
| South African Association v. King, 155, 243 | | | |
| „ Breweries v. Fothergill | 584, 658 | Table Bay Harbour Board v. N.Z. Steamship Co. | 486 |
| „ „ v. Graser | 740 | Taboryski & Co. v. Henckels & Co., 36, 160, 346 | |
| South African Breweries v. Wynberg Licensing Court | 364 | „ „ v. Levin | 183 |
| South African Brick and Lime Co. in Liquidation, <i>in re</i> | 188 | „ „ v. McLoughlin | 559 |
| South African Mutual v. Cloete | 706 | Taljaard v. Jacobs | 589 |
| South African Mutual v. Van Niekerk | 396 | Templeman, <i>in re</i> | 278, 403 |
| „ „ v. Zinn | 396 | Tennant v. Bredekamp | 410 |
| S.A. Milling Co. v. Johnson | 461 | „ v. Milner | 706 |
| S.A. Missionary Society, <i>ex parte</i> | 418 | Terblanche and Co. v. Delarue | 410 |
| Spanior and Co. and Others v. Venter | 394 | Teubes, <i>ex parte</i> | 507 |
| Spilhaus and Co. v. Muntweyler | 410, 550 | Theron, <i>ex parte</i> | 435 |
| Spilhaus and Another v. Muntweyler and Dubler | 124 | Theron v. Harris | 346 |
| Standard Bank v. De Wet and Another | 396 | Thomas v. Thomas | 399 |
| „ v. Van Aardt | 396 | Thompson and Others, <i>ex parte</i> | 10 |
| „ v. Viljoen | 392 | Thorne, <i>in re</i> | 277 |
| Stanley & Co. v. Botha's Executor... .. | 28 | Thwaits' Estate v. Fsterhuizen | 578 |
| Stapelberg v. De Wet | 745 | Thwaits v. S.A. Cold Storage Co. | 746 |
| Starck v. Laubscher | 396 | Tillard, <i>ex parte</i> | 17, 66 |
| Steenkamp v. Steenkamp | 551, 591 | Titterton v. Titterton | 407 |
| Steer v. Kuze | 655 | Tooch v. Tooch | 509 |
| „ and Co. v. Beckman | 410 | Town Council of Cape Town v. Steer | 706 |
| „ & Co. v. Leffler and Wardell... .. | 3 | Town Council of Cape Town v. Vixseboxse | 43 |
| Stegman, <i>ex parte</i> | 435 | Townshend, Taylor and Snashall v. Williamson | 497 |
| Stein and Wife, <i>ex parte</i> | 685 | Transatlantic Assurance Co. v. Bor- chert | 123, 186 |
| Stephen Fraser & Co. v. Port Eliza- beth Harbour Board | 292 | Truter, <i>in re</i> | 139, 160 |
| Steyn, <i>ex parte</i> | 405, 721 | Truter v. Aitcheson | 439 |
| Steytler v. Green and Sea Point Municipality | 193 | Truter v. Krynauw | 35 |
| Stevenson v. Schalk | 317 | Tucker, <i>ex parte</i> | 344 |
| St. Leger v. Watkins... .. | 155 | Turner v. Brown | 184, 189 |
| Stockdale, <i>ex parte</i> | 589 | Turok, <i>ex parte</i> | 584 |
| Stoeke v. Stapelberg | 314 | Turok v. Woodstock Municipality | 523 |
| Stoffberg, <i>ex parte</i> | 483 | | |
| Stormont and Others v. Mzimba and Others | 7 | United Mines of Bultfontein v. De Beers Consolidated Mines | 665 |
| Strangman v. Beyers | 417, 484 | Uys, <i>re</i> | 510 |
| Strußen and Philips v. Colonial Government | 329 | Uys and Others v. Estate of Uys | 318 |

| | PAGE | | PAGE |
|--|---------------|--|--------------------|
| Van Blerk and Crawford v. Van Niekirk | 185 | Vermaak v. New York Mutual Life Insurance Society | 124 |
| Van der Byl & Co. v. Abrahamse ... | 4 | Verwey, <i>in re</i> | 348 |
| " v. Brodie | 154 | Viljoen v. Viljoen | 546 |
| " v. Carstens | 43 | Vincent & Co. v. Paterson and another | 684 |
| " v. De Vries | 588 | Visser, <i>ex parte</i> | 507 |
| " v. Spiers Bros. | 3 | Visser v. Louw | 625 |
| Van der Hoven, <i>ex parte</i> | 721 | Vorster v. Jonkers | 184 |
| Van der Horst v. Chabaud | 56 | Vos, <i>ex parte</i> | 684 |
| Van der Merwe, <i>ex parte</i> | 319 | Vos v. Farmer... .. | 43 |
| " " v. Van der Merwe... .. | 434 | | |
| " " v. Van Dyk... .. | 748 | Wakefield, <i>ex parte</i> | 746 |
| Van der Spuy v. Sasson | 397 | Walker & Co. v. Dalldorf | 3 |
| Van der Walt, <i>re</i> | 620 | Walder v. Coieman | 345 |
| Van Driel v. Heydenrych | 187, 193 | Wallwork and Harris v. Freeman ... | 771 |
| Van Dyk v. Udwin | 70 | Walsh Bros. v. Brown & Co. | 317 |
| Van Heerde v. Liquidators Cape of Good Hope Building Society ... | 160 | Walters v. Cortis and another | 654 |
| Van Heerden (minors), <i>re</i> | 484 | Ward v. Ward's Trustees | 464, 582, 750 |
| " <i>ex parte</i> | 621 | Ward and Co. v. Endley | 273, 316, 396, 435 |
| " A. M., <i>ex parte</i> | 621 | War Department v. McKenzie & Co | 591 |
| Van Niekirk, <i>in re</i> | 158, 415 | Watermeyer, <i>ex parte</i> | 191 |
| Van Niekirk v. Grand Junction Railway Co. | 26 | Watson, <i>ex parte</i> | 507 |
| Van Niekirk v. Van Noorden | 116 | Watson (minors), <i>re</i> | 551, 747 |
| Van Niekirk's Estate v. Van Niekirk, | 397, 592 | Weakley v. De Jong | 241 |
| Van Noorden v. Van Niekirk and Another | 2 | Webber, <i>ex parte</i> | 589 |
| Van Rensburg, <i>in re</i> Minor | 319 | Weber v. Du Plessis | 43, 184 |
| Van Rensburg, <i>re</i> | 464, 746 | Webner, <i>ex parte</i> | 746 |
| Van Rensburg, <i>ex parte</i> | 551 | Webster, <i>ex parte</i> | 363 |
| Van Rensburg v. Van der Spuy ... | 122 | Webster, Executors of v. Solomon | 299 |
| Van Rooy & Co. v. Jordaan... .. | 154 | Wegner v. Wegner | 297, 413 |
| Van Ryn v. Van Ryn | 14 | Wegner v. Twine | 113 |
| Van Ryneveld v. Van der Riet, ... | 186, 624 | Weil v. Baumgarten | 436 |
| Van Schalkwijk v. Du Plessis and Others | 680 | Wentzel v. Wentzel | 509, 653 |
| Van Velden, <i>re</i> | 753 | West's Trustees v. Steyn and others | 3 |
| Van Wijk v. Greef | 739 | Whitaker v. Stewart | 587 |
| " v. Kogelenberg | 490 | White, <i>in re</i> | 26 |
| Van Zyl v. Henning | 655 | White Brothers v. Jacobs | 34 |
| " v. Pienaar | 546 | " v. Rapp and Lenk... .. | 23 |
| " and Buissinné v. Olsen | 156 | White v. Harries | 461, 484, 508 |
| " and Buissinne v. Smuts | 274 | White, Ryan & Co. v. Schlenszka ... | 43 |
| Vasco Limited (in Liquidation) v. Day | 263 | Wiener & Co v. Clarke | 484 |
| Venter, <i>ex parte</i> | 579, 657, 679 | Wiener & Co. v. Cohen | 186 |
| Venter's Estate, <i>re</i> | 621 | Wiley & Co. v. Amsterdam | 42 |
| | | " v. Pedersen | 123 |
| | | " v. Combrinck | 398 |
| | | Wilkinson, <i>ex parte</i> | 183 |
| | | Will v. Van der Walt | 184 |
| | | Willcocks, <i>ex parte</i> | 483 |

| | PAGE |
|----------------------------------|---------------|
| Willcocks v. Willcocks | 278, 405, 589 |
| Williams's Estate v. Gideon... | ... 426 |
| Wilmot v. Le Grange | ... 578 |
| Withinshaw v. Reeve... | ... 394 |
| Wood v. Gill | ... 721 |
| Woodhead, Plant & Co. v. Cohen | ... 42 |
| Wooding (Minor), <i>ex parte</i> | ... 686 |
| Woolven v. Woolven... | ... 704 |

| | PAGE |
|--|-------------------|
| Wordon & Pegram v. Ariston | |
| Mineral Water Company | ... 240 |
| Wright, <i>ex parte</i> | ... 577 |
| Wright v. Wright | ... 485, 552, 685 |
| Wright v. Hart | ... 508, 546 |
| Ziervogel and Another, <i>ex parte</i> | ... 48 |
| Zoer v. Theron | ... 577 |
| Zuidmeer v. Zuidmeer | ... 552 |

INDEX OF TITLES IN THE DIGEST.

| | PAGE |
|--|----------------------------|
| Accomplice | 553 |
| Account | 32, 49 |
| Act | 378 |
| Affidavit of Merits | 745 |
| Agency... .. | 249, 206 |
| Agent | 771 |
| Alien | 547 |
| Allegiance | 707 |
| Annexation | 707 |
| Antenuptial Contract | 685 |
| Arbitration | 624 |
| Architect | 338, 650, 662 |
| Architect's Certificate | 644 |
| Arrest | 387, 559 |
| Articled Clerk | 24, 159, 584, 515 |
| Assault... .. | 194, 424 |
| Attachment of Person | 550 |
| Attachment of Property | 551 |
| Attorney | 408 |
| Auditor | 438 |
| Bail | 391, 369, 464, 443, 45, 17 |
| Bailment | 696 |
| Bills of Exchange | 741 |
| Book | 623 |
| Boundaries | 329 |
| Brokerage | 767 |
| Building Contract | 644 |
| Building Lots... .. | 633 |
| Building Society | 244, 597 |
| Burgher Rights | 547 |
| Cargo | 480 |
| Carriers | 292, 145 |
| Cape Town Municipal Acts 26 of 1893 and 25 of 1897 | 418 |
| Cause of Action | 68 |
| Cession of Articles | 584 |
| Change of Domicile | 461 |
| Civil Commissioner | 717 |
| Civil Imprisonment | 413 |
| Company | 10 |
| Compensation... .. | 218, 318 |
| Condition of Licence... .. | 555 |

| | PAGE |
|--------------------------------------|--------------------|
| Conditions | 364 |
| Conditions of Sale | 158 |
| Conformation of Ground | 329 |
| Consideration... .. | 70 |
| Contract | 124, 353 |
| Construction | 379 |
| Continuous Service | 515, 584 |
| Contributory Negligence | 141 |
| Correspondence | 686 |
| Costs | 239, 440, 704, 768 |
| Creditor | 244 |
| Criminal Prosecution | 428 |
| Crown Lands | 218 |
| Damages | 133, 338, 353 |
| Declaration of Rights | 68 |
| Delivery | 129, 324 |
| <i>De Lunatico Inquirendo</i> | 595 |
| Destruction of Building | 320 |
| Diagram | 329 |
| Disqualification | 368 |
| Documentary Evidence | 453 |
| Domicile | 673 |
| Edictal Citation | 656 |
| Election of Mayor | 559 |
| Electricity | 72 |
| Electric Wire | 701 |
| Employer | 735 |
| Enemy... .. | 372 |
| Evidence | 203, 530, 590 |
| Exception | 236, 763 |
| Execution | 367 |
| Executor | 746 |
| Executor's Account | 742 |
| Executor's Fees | 742 |
| Expropriation | 218, 318 |
| <i>Fidei-commissum</i> | 28 |
| Field-Cornet | 4 |
| Fine | 1, 461 |
| Flooding | 133 |
| Foreign Hostile Concession... .. | 234 |

| | PAGE | | PAGE |
|--|---------------------------------|--|--|
| Gaoler | 407 | Magistrate's Jurisdiction | 647 |
| General Law Amendment Act ... | 665 | Magistrate's Ordinary Jurisdiction... | 477 |
| Governmente | 218, 318 | Mahommedan Church Property ... | 761 |
| Grant | 329 | Malice | 337 |
| <i>Habeas Corpus</i> | 46 | Malicious Injury to Property ... | 241 |
| Harbour Board | 292, 696 | Malicious Prosecution | 671, 763 |
| Hawker | 738 | Mandamus | 464 |
| High Treason | 391, 416 | Marriage | 466 |
| High Water Mark | 329 | Marriage in England... .. | 14 |
| Holder in due course... .. | 597 | Martial Law | 188, 195, 369, 407 |
| Hotel | 530 | Master and Servant | 21, 454, 754 |
| Holograph Will | 549 | Master and Servant's Act | 378 |
| Horses | 62 | Memorial | 255 |
| Hostile Occupation | 647 | Midwife | 466 |
| Hostilities | 249 | Military Occupation | 372 |
| Husband and Wife | 14, 589, 592 | Minor Son | 378 |
| Hut-tax | 375 | Minor | 657, 679 |
| Imperial Licence | 234 | Misappropriation | 597 |
| Innuendo | 337 | Mistake | 471 |
| Insolvency | 129, 367, 377, 431, 669, 641 | Mortgage Bond | 3, 150, 402, 406 |
| Insurance Society | 623 | Mosque | 404 |
| Interdict | 240, 590 | Municipal Act 45 of 1882, section 28 | 204, 383, 399 |
| Invasion by Enemy | 195 | Municipal Regulation | 557, 722 |
| Joint-stock Bank | 234 | Murder... .. | 486 |
| Justification | 194 | Mutual Will | 260 |
| Judicial Sale | 406 | Native | 555 |
| Judicial Separation | 704 | Native Law | 375 |
| Jurisdiction | 461, 741 | Native Location | 19 |
| Jury | 530 | Native Servant | 425 |
| Kerkeraad | 581 | Natives | 347 |
| Landing Agent | 480 | Negligence | 38, 56, 72, 141, 145, 292, 338, 637, 651, 701 |
| Latent Defect | 516 | Net Fishing | 759 |
| Lease 35, 54, 320, 516, 530, 647, 658, 750 | | New Trial | 141, 658 |
| Libel | 722, 727, 733 | Notice | 379 |
| Life-interest | 43 | Occupation | 383 |
| Liquid Document | 583 | Occupiers of Property | 399 |
| Licensing Court 255, 347, 364, 368 | | Onus of Proof | 555 |
| Lien | 286 | Option | 12 |
| Liquor | 555 | Oral Evidence... .. | 763 |
| Liquor Licence | 747, 758 | Ordinance | 316, 367, 387 |
| Liquor Licensing Act 425, 436, 452 | | Ownership | 268 |
| Licensing Court | 530 | Owners of Property | 399 |
| Lost Debentures | 35 | Partnership | 113, 402, 438, 456 |
| | | Patent Rights... .. | 636 |
| | | Payment by Instalments | 203 |

| | PAGE | | PAGE |
|--------------------------------------|--------------------------------|--|---------------|
| Payment into Court | 157 | Sea-shore | 329 |
| Peril of the Sea | 292 | Secretary | 597 |
| Personal Attachment... .. | 463 | Service | 24 |
| Plea | 156 | Servitude | 471, 580, 748 |
| Pleading 157, 236, 429, 465, 566, | 679 | Shareholders | 234 |
| Pledge | 129 | Set-off | 431 |
| Police Offences Act | 756 | Sir John Cradock's Proclamation ... | 566 |
| Possession of Liquor... .. | 452 | Slander ... 281, 335, 337, 649, | 773 |
| Postal Convention | 249 | Soldier | 773 |
| Postponement... .. | 239 | Splitting up of Criminal Charge ... | 1 |
| Power of Attorney | 116 | Stamp | 461 |
| Practice | 745, 746, 749 | Substitution | 777 |
| Premium | 124 | Superior Officer | 773 |
| Presumption of Death | 753 | Summons | 16 |
| Principal | 686 | Survivor | 260 |
| Prisoner of War | 46 | | |
| Privilege | 316, 335 | Tenants' Rate | 339 |
| Privacy | 145 | Tender | 150, 286, 379 |
| Proclamation 10 of 1879 | 375 | Theft | 337, 372, 553 |
| Procurator <i>in rem suam</i> | 116 | Town Council... .. | 559 |
| Promissory Note | 70, 239, 395, 426, 559, 763 | Trade-mark | 660 |
| Proprietary Rights | 687 | Trading with the Enemy | 234 |
| Provisional Sentence... .. | 3, 461, 587, 633 | Tramcar | 38, 651 |
| Provocation | 194 | Transfer | 389, 583 |
| Public Enemy... .. | 234 | Transfer Duty | 12 |
| Public Interest | 335 | Transkei | 375 |
| Public Purposes | 566, 626 | Treason | 45, 707 |
| Public Road | 680 | Trespass | 152, 427 |
| Railway Acts | 268, 268 | Trial Pits | 686 |
| Railway Platforms | 580 | Trust Property | 404 |
| Railway Station | 580 | | |
| Rates | 418 | <i>Ultra Vires</i> | 383 |
| Rebellion | 188, 195 | User of Thing Purchased | 206 |
| Rectification of Contract | 124 | | |
| Registering Officer | 4 | Verbal Agreement | 320 |
| Re-marriage | 260 | Vesting in Trustee | 377 |
| Removal of Cause | 582 | Vinegar | 556 |
| Renewal | 54 | Voters | 399 |
| Rent | 665 | Voters' List | 4, 717 |
| Resident Magistrate's Court ... | 768 | | |
| Restriction on Licence | 347 | Wages | 21, 378 |
| Right of Way... .. | 557 | Warehouse | 770 |
| Rights in Future | 647 | Warehousing Goods | 696 |
| Road of Necessity | 680 | Warrant | 387 |
| Rule of Court 315 | 490 | Will ... 28, 260, 278, 549, 732, | 777 |
| Rule of Court 329(D) | 386 | Winding up | 10 |
| Sale | 324 | Witness Expenses | 162, 490 |
| Scab Act 20 of 1894 | 737, 759 | Writ <i>de libero exhibendo</i> | 443 |
| | | Writ of arrest | 636 |

DIGEST OF CASES.

VOLUME X.—1900.

| | PAGE |
|---|----------|
| Accomplice, <i>see</i> Theft ... | 553 |
| Account—Stock—Verbal agreement. | |
| Coomer v. Smith ... | 32 |
| Account—Partnership—Entries. | |
| Proctor v. Long ... | 49 |
| Act 15 of 1856, <i>see</i> Wages ... | 378 |
| 2. —20 of 1856, Section 11—Pay- ment by instalments—Evidence. | |
| <i>Where a Magistrate had, in giving judgment in favour of a plaintiff in an action, ordered the defendant to pay the amount of the judgment in instalments of £10 per mensem, Held, on appeal, that as the Magistrate had no evidence before him to justify the exercise of his discretion, the case must be re- mitted to take such evidence.</i> | |
| [Le Roux v. Hofmeister, 8 Juta p. 42, approved.] | |
| McPhail v. Hall & Co. ... | 203 |
| 3. —20 of 1856, section 9, <i>see</i> Pro- missory note ... | 426 |
| 4. —20 of 1856, section 33, <i>see</i> Slander ... | 335 |
| 5. —19 of 1861, section 8, <i>see</i> Tender ... | 286 |
| 6. —8 of 1879, <i>see</i> Civil imprison- ment ... | 413 |
| 7. —23 of 1880, <i>see</i> Informal Agreement ... | 218, 318 |
| 8. —27 of 1882—Sentence. | |
| <i>Where two persons were charged with riotous behaviour and resist-</i> | |

| | PAGE |
|---|------|
| ing the police, and the one was found guilty on both counts, and the other on the second count, and the Magistrate sentenced them both to three months' imprisonment, The Court, on appeal, upheld the conviction and sentence. | |
| Regina v. Rose and others ... | 760 |
| 9. —41 of 1882, section 2, <i>see</i> Arrest ... | 387 |
| 10. —45 of 1882, <i>see</i> Municipal Act ... | 399 |
| 11. —28 of 1883, section 28, <i>see</i> Licensing Court ... | 368 |
| 12. —28 of 1883, section 47, <i>see</i> Licensing Court ... | 364 |
| 13. —28, 1883, sections 75, 94— Payment of portion of fine to trap. | |
| Magistrate's Court Case Re- viewed ... | 1 |
| 14. —37, 1884—Government No- tice No. 642, 1899—Native loca- tion. | |
| <i>Where an inhabitant of a native location was convicted by a Resi- dent Magistrate on a charge of having cultivated certain ground without having obtained the per- mission of his headman, and with- out the approval of the Inspector of Native Locations, by reason where- of he contravened section 2 of Government Notice No. 642, 1899, and it was shown that the accused had cultivated the land since 1880, and was cultivating the land at</i> | |

| | PAGE |
|--|------|
| <i>the time of publication of the regulations, and that the land had been allotted to him by his headman, with the concurrence of his Chief, the Court, on appeal, quashed the conviction.</i> | |
| Queen v. Mfenge | 19 |
| 15. — 5 of 1890, <i>see</i> Vinegar ... | 556 |
| 16. — 25 of 1891, section 13, 14, <i>see</i> Licensing Court | 255 |
| 17. — 26 of 1893, <i>see</i> Town Council | 559 |
| 18. — 15 of 1893—Proclamation 189 of July 3rd, 1894—Net fishing—Governor. | |
| <i>Act 15 of 1883 gives the Governor power to make regulations in regard to fishing with nets and provides a penalty for the contravention of any such regulations. The Governor by proclamation prohibited the fishing with nets in the Nahoon River. The appellants contravened the proclamation and were fined.</i> | |
| <i>Held on appeal, that the proclamation was not ultra vires, and that there was no necessity to provide a penalty by such proclamation as the Act itself did so.</i> | |
| Regina v. Grapention and others. | 759 |
| 19. — 19 of 1893, <i>see</i> Building Society. | |
| 20. — 26 of 1893, section 170. <i>see</i> Municipality | 383 |
| 21. — 36 of 1896, sub-sections 30, 31, <i>see</i> Carriers | 292 |
| 22. — 28 of 1898, <i>see</i> Employer ... | 735 |
| 23. — 28 of 1898, <i>see</i> Liquor ... | 555 |
| Affidavit of merits, <i>see</i> Practice ... | 745 |
| Agency, <i>see</i> Postal Convention ... | 249 |
| 2. — <i>see</i> Purchase | 206 |
| Agent—Broker—Sale of shares. | |
| <i>The defendants as brokers were intrusted by the plaintiff with the sale of 100 shares in a joint-stock</i> | |

| | PAGE |
|--|------|
| <i>company at not less than 19s. per share. The defendants informed the plaintiff that they had sold the shares at 19s. 6d., and accounted with him upon that basis, but the plaintiff subsequently discovered that although the defendants did purport to sell the shares at 19s. 6d. to one W., who purported to sell them at £1 2s. 6d. to H., who again, according to the defendants' statement, sold them to R. at £1 4s., such intermediate sales were not bona-fide, and that the real sale was by the defendants to R. at £1 4s. The Magistrate upon the facts and the state of the defendants' books having found these facts to be proved gave judgment in favour of the plaintiff, The Court refused to interfere with the finding.</i> | |
| <i>Held, that the plaintiff was entitled to recover the difference between 19s. 6d. and £1 4s.</i> | |
| Wallwork and Harris v. Freeman | 771 |
| Alien—Proof of burgher rights. | |
| <i>V.'s parents who were British subjects went to reside in the Orange Free State where V. was born. V. subsequently came to the Colony, became domiciled there, and was elected Mayor of Paarl. It was sought to order him to vacate his seat on the ground that he was an alien.</i> | |
| <i>Held, that the proof of alienage was on him who asserted it, and that as a mere statement by one burgher of the Orange Free State was not sufficient proof that V.'s father was a burgher of that State, the applicants must fail.</i> | |
| Blignant and others v. De Villiers | 547 |
| Allegiance, <i>see</i> High Treason ... | 707 |
| Annexation, <i>see</i> High Treason ... | 707 |

| | PAGE |
|---|---------|
| Antenuptial contract—Husband and wife—Registration subsequent to marriage. | |
| Where two persons were married in Germany and entered into a bona fide agreement to be married according to the provisions of the German Law, the Court allowed the terms of the agreement to be embodied in an antenuptial contract and registered. | |
| Ex parte Stein and Wife | ... 685 |
| Arbitration—Award. | |
| Solomon v. Pfuhl | ... 624 |
| Architect—Plans and specifications—Negligence Damages. | |
| Where an architect offers his services to a person, such services must be of utility to the person to whom they are offered before he can claim payment for them. Where in answer to a claim for the preparation of plans and specifications and the supervision of work on those plans, the defendant pleaded carelessness and negligence on the part of the plaintiff, Held, that as the defendant had had the benefit of the work and the carelessness and negligence had caused no damage to the defendant and the defendant had taken the work out of the plaintiff's hands, the latter was entitled to succeed. | |
| Lucke v. Van Coller | ... 338 |

2. ———

S. employed F. to prepare certain plans for the improvement of his premises, which were licensed, for the purpose of inducing the Licensing Court to grant him fuller privileges than he had heretofore enjoyed. He alleged that F. agreed to have the plans ready for production before the Licensing Court. The plans were not com-

pleted at the date of the sitting of the Court and S. consequently did not obtain fuller privileges and sued F. for £20 damages. F. denied that he agreed to have the plans ready for production before the Court and counter-claimed for £10 10s., the cost of drawing the plans, which S. refused to pay. The Magistrate gave judgment for F. in both claims.

On appeal, the Magistrate's decision was upheld.

Schaff v. Freeman ... 650

3. ——— Negligence—Damages.

Hilliard v. Ransome ... 662

Architect's certificate, see Building Contract ... 644

Arrest—Warrant — Telegram — Act 41 of 1882, section 2—Reasonable suspicion—Ordinance 40 of 1828, section 23—Ordinance 73 of 1830, section 12.

A warrant for the arrest of B. upon a charge of high treason was issued by a Justice of the Peace for the Colony upon information sworn before him. The warrant was sent from Aliwal North to Cape Town, but returned to Aliwal North. B. was subsequently arrested in Cape Town by a police constable who had no warrant in his hands at the time but had a telegram from the Commandant of Aliwal North to the Chief of Police, Cape Town, stating that a warrant had been issued for B.'s arrest. The constable had also seen the original warrant.

Upon application by B. for his release from custody,

Held, that the police had reasonable grounds to suspect him of having committed the crime laid against him and sufficient grounds

- PAGE
- upon which to arrest him, and that the application must be refused.*
- Regina v. Botha 587*
2. —Promissory notes not yet due—Intended absence.
- Where for an amount due to the applicant, he had accepted two promissory notes payable in February and May, 1901, The Court refused to grant an order for the arrest of the debtor, who had sold all his goods and was leaving for England, on the ground that there was as yet no debt due.*
- Taborski v. McLoughlin ... 559*
- Articled clerk—Clerk to Judge—Service.
- Where a clerk to a Judge asked that his term of service should be allowed to count as service for the purpose of his admission as an attorney, and the Judge had been away on leave for six months, during which time applicant had served in the Cape Civil Service, the Court refused to allow the term of the Judge's absence to count.*
- Ex parte Gill 24*
2. —Locum tenens—Attorney.
- Where an attorney had temporarily left the Colony, entrusting his business to the charge of an attorney in his employ, as locum tenens, the Court refused to allow the registration of articles of clerkship to the locum tenens, the intention of the applicant being that on the return of the principal in the firm, the articles should be ceded to him by the locum tenens.*
- Ex parte Cormack and Another 159*
3. —Attorney—Admission—Cession of articles—Continuous service—Rule 213.
- A. became articled to M., a partner in the firm H. and H., attorneys*

- PAGE
- practising in Kimberley, on October 9, 1897, and served with him until October 15, 1899, when M. left Kimberley for a short visit, and owing to the place being immediately invested by the enemy could not return.*
- A. continued to serve with the firm until January 1st, 1900, when on the advice of one of the partners of the firm, he joined the Kimberley Town Guard and served therein until February 15th 1900, attending at the firm's office for a part of each day.*
- From February 15th 1900, to May 1st, 1900, he continued in the office and then his articles were in turn ceded to each of the remaining partners, but no registration of such cession with the Registrar of the Supreme Court was made.*
- The Court refused to allow A. to be admitted as an attorney, as Rule of Court 213 requires a registration of any transfer or cession of articles.*
- It was further ordered that A. serve another six months under duly registered articles. The six months service with the firm being allowed to count together with the six months to be served as continuous service.*
- Ex parte Anders 584*
4. —Continuous service.
- Where a break in the service of an articled clerk had been occasioned by war and invasion, The Court dispensed with compliance with the rule requiring continuous service, but required the full period of three years to be made up afterwards.*
- In re De Beer 515*
- Assault—Provocation—Justification.
- Where at the request of a station-master a military picket had been*

| | PAGE |
|---|------|
| <i>provided to keep the platform free, when military trains arrived, and, on the arrival of one of these trains, accused had, on refusal to leave the platform, been forcibly ejected therefrom by one of the members of the picket.</i> | |
| <i>Held, on appeal, that such ejection wit out any excessive violence was no justification for a serious assault on that member of the picket, committed by the accused.</i> | |
| Regina v. Cillie | 194 |
| 2. — Resident Magistrate—Conviction. | |
| <i>Where the appellant, a magistrate, under the belief that one W. was wearing on his cap the colours of the Transvaal Republic, the Queen's enemy, lifted the cap from W.'s head and was found guilty of assault in so doing, an appeal against the conviction was dismissed.</i> | |
| Regina v. Herbert | 424 |
| Attachment of person— <i>Ad fundandam jurisdictionem</i> —Subsidiary action. | |
| <i>An application for the attachment of defendant's person ad fundandam jurisdictionem was refused where it was sought to attach his person for the purpose of founding jurisdiction in an action for civil imprisonment arising out of a judgment in a prior action against him.</i> | |
| Spilhaus and Co. v. Munt Wijler | 550 |
| Attachment of property— <i>Ad fundandam jurisdictionem</i> —Domicile—Long absence. | |
| <i>Where a person had left the Colony for the purpose of joining the Queen's enemies the Court granted an application for the attachment of his immovable property to found jurisdiction in an action to be instituted against him,</i> | |

| | PAGE |
|---|------|
| <i>on the ground that it might be presumed from his long absence, and the fact of his joining the Queen's enemies, that he had changed his domicile.</i> | |
| Steenkamp v. Steenkamp ... | 551 |
| Attorney—Suspension—High treason. | |
| <i>An attorney and notary public who had been convicted of high treason suspended from practice, and ordered to transmit his certificate to the Registrar of the Court.</i> | |
| Incorporated Law Society v. Vermooten | 408 |
| Auditor—Partnership—Books—Retention. | |
| <i>Auditors ordered to deliver to the managing partner of a firm the books of the firm which they had received for the purpose of auditing and which they had been directed to retain by one of the partners.</i> | |
| Laughton and Co. v. Andrews and Co. | 438 |
| Bail, <i>see</i> High Treason | 391 |
| 2. — See Martial Law | 369 |
| 3. — Magistrate—Mandamus. | |
| <i>An application for an order on a Magistrate to compel him to entertain an application for bail refused, the Magistrate not having received notice of the application.</i> | |
| <i>Ex parte Bassano</i> | 464 |
| 4. — Murder. | |
| <i>Application by a prisoner awaiting trial on a charge of murder to be admitted to bail refused.</i> | |
| Regina v. Liebenberg | 442 |
| 5. — High Treason—Preliminary examination—Residence. | |
| <i>Where a preliminary examination had been taken on a charge of high</i> | |

| | PAGE | | PAGE |
|--|------|--|------|
| <i>treason, and a postponement of such examination was made for a considerable time without any further evidence being forthcoming, the Court, on the Attorney-General consenting, released the accused person on bail, with certain conditions as to residence.</i> | | Brokerage—Agency. | |
| <i>Queen v. Michau</i> | 45 | <i>L. advertised her property for hire. J. approached her and asked her to sell, whereupon she gave him the refusal. On J. presenting a broker's note L. repudiated it, saying she found she had no power to sell. J. sued her for commission as a broker, and obtained judgment in the Magistrate's Court.</i> | |
| 6. —Trial. | | <i>Held on appeal, that as there was no proof of agency between L. and J. the judgment ought to have been absolution from the instance with costs.</i> | |
| <i>Application of a prisoner, committed for trial on a charge of high treason, refused on the grounds (1) that there was prima facie evidence of his guilt; (2) that the district in which he resided and was alleged to have committed the offence was still in the occupation of the enemy, and (3) that the Attorney-General opposed the application.</i> | | <i>Londt v. Jones</i> | 767 |
| <i>Queen v. Vermooten</i> | 17 | Building contract—Architect's certificate—Extras ordered by employer—Fines for failure to finish in stipulated time. | |
| <i>Bailment, see Harbour Board</i> ... | 696 | <i>Where in a building contract there was a clause providing that the contractor could not charge for any extras which were not authorised in writing by the architect, and the architect in giving his final certificate did not include certain extra work specially ordered by the employer who practically superseded the architect,</i> | |
| <i>Bills of Exchange, see Jurisdiction...</i> | 741 | <i>Held, that the architect's certificate was not conclusive between the employer and the contractor, but that as far as it went it was to be taken as final in the assessment placed on the value of the extra work ordered by the architect.</i> | |
| Book — Insurance Society — Policy-holders—Employee. | | <i>Scott v. St. George's Home</i> ... | 644 |
| <i>C., a former employee of an Insurance Society, with the consent of his employers, substituted a book which he had specially designed and printed at his own cost for certain returns which had previously been used by the society in its business.</i> | | Building Lots, see Provisional Sentence | 633 |
| <i>The book contained the names of policy-holders and the amount of premiums paid by them to C.</i> | | Building Society - Bank—Misappropriation by secretary—Defective title—Holder in due course—Notice and knowledge—Act 19 of 1893, section 27. | |
| <i>Held, that the society, which was about to institute an action against C. for an account of moneys received by him on its behalf, was entitled to delivery of the book.</i> | | <i>H., the secretary of the plaintiff society, misappropriated the proceeds of certain cheques drawn by</i> | |
| <i>Industrial Life Assurance Society v. Crawford</i> | 329 | | |
| <i>Boundaries, see Grant</i> | 623 | | |

| | PAGE |
|---|------|
| customers of the society, some being in favour of the society and others in favour of the secretary of the society. These cheques were deposited by him to the credit of his private account with the defendant bank. The majority of the cheques were endorsed by H. himself as secretary before being so deposited to the credit of his private account, but three of them were endorsed during his absence by M., the acting secretary, and by him deposited to the credit of H.'s account with the defendant bank. Some of the cheques were upon the defendant bank, and some upon other banks, but it was admitted that the proceeds of them all came into the hands of the defendant bank, and were drawn by H. in the usual course in his individual capacity. The liquidators of the society sought to recover the proceeds of the cheques on the ground that the bank, when it received the cheques, had notice that H. and M. were secretary and acting secretary respectively of the society, and that there was no title in H. to any of the cheques in his private capacity or in M. as to the cheques deposited by him. | |
| The defence was, in substance, that the defendant bank became the holder in due course of the cheques within the meaning of the 27th section of Act 19 of 1893, having taken the cheques in good faith, and for value and without notice of any defect in the title of the persons negotiating the same, and that it was therefore not liable. | |
| Held, that this was a good defence. | |
| Cape of Good Hope Permanent Building, Land and Investment Society v. the Bank of Africa | 597 |

Building Society—Creditor.

Upon proof that V. who had previously been a shareholder of a building society, nor in liquidation, had, before the liquidation, had the amount standing to his credit in the shareholders account transferred to the depositors account.

The Court ordered that he should be ranked as a depositor and creditor.

Van Heerden v. Cape of Good Hope Building Society ... 244

Burgher rights, *see* Alien ... 547

Cargo, *see* Landing agent ... 480

Carriers—By sea and by land—Negligence—Peril of the sea—Harbour Board—Sections 30, 31 of Act 36, 1896.

Carriers, whether by land or by water, are not insurers, but will be liable in respect of any goods entrusted to them for injury arising from the negligence of themselves or their servants. The exercise of all reasonable care will exempt them. No exact definition can be given of a peril of the sea, and any definition must be taken with some limitations, dependent on the special circumstances of each case.

Stephen Fraser & Co. v. Port Elizabeth Harbour Board ... 292

2. — Mandate — Negligence — Privity.

The master of a tug belonging to the defendants received from the captain of a mail steamer for conveyance to the shore a case of ostrich feathers consigned to the plaintiffs. Owing to the want of great care in handling the case it fell into the water, and the feathers were damaged. It having been found by the Court that the previous course of dealing was such as to justify the inference

| | PAGE | | PAGE |
|--|------|--|----------|
| <i>that the captain of the steamer acted and had authority to act on behalf of the plaintiffs in delivering the case of feathers to the master of the tug,</i> | | Cession of Articles, <i>see</i> Articled Clerk | 584 |
| <i>Held, that the plaintiffs were entitled to sue for the damage.</i> | | Change of domicile, <i>see</i> Provisional Sentence | 461 |
| <i>Held, further, that inasmuch as the defendants were not to receive any remuneration for the conveyance of the goods, they did not incur the liability of common carriers, but that, as mandatories, they were responsible for damage caused by want of great care and vigilance on the part of their servants.</i> | | Civil Commissioner, <i>see</i> Voters' List | 717 |
| <i>Sciama v. Table Bay Harbour Board</i> | 145 | Civil imprisonment—Act 8 of 1879—Subsequent release on proof of no property. | |
| <i>Cape Town Municipal Acts, No. 26 of 1893, and No. 25 of 1897—Preference — Rates—Insolvent Ordinance, section 8.</i> | | <i>Where a person who had been civilly imprisoned showed that he had no property or means wherewith to pay the debt due, the Court on his application ordered his release.</i> | |
| <i>The trustees of an insolvent estate, in distributing the proceeds of the sale of landed property situate within the Municipality of Cape Town, held entitled to award in full to the Council the amount of the rates assessed upon the property within a year of the sale, in preference to the claims of holders of mortgage bonds upon the property annexed on the ground that such payment was a payment made with the object of realising the property to the best advantage, and that the position of the mortgagees was not injuriously affected by such payment, as the price, which the land realised, would not have been so high if the purchaser had had to pay the rates.</i> | | <i>Hanmer v. De Villiers</i> | 413 |
| <i>The Trustees of the Insolvent Estate of Jacob Krachmal v. Epstein</i> | 418 | Company - Winding up—Carrying on business at a loss. | |
| <i>Cause of action, see Declaration of Rights...</i> | 68 | <i>Fairbridge v. South African Newspaper Company</i> | 10 |
| | | Compensation, <i>see</i> Informal agreement | 218, 318 |
| | | Condition of licence, <i>see</i> Liquor | 555 |
| | | Conditions, <i>see</i> Licen-ing Court | 364 |
| | | Conditions of sale—Agreement—Contempt. | |
| | | <i>Lind v. Oudtshoorn Municipality</i> | 158 |
| | | Conformation of ground, <i>see</i> Grant... .. | 329 |
| | | Consideration, <i>see</i> Promissory Note | 70 |
| | | Contract, <i>see</i> Rectification of Contract | 124 |
| | | Contract—Breach—Vital condition—Damages. | |
| | | <i>The parties entered into a contract for the purchase of a certain quantity of tea during the year 1900, the defendants undertaking to furnish plaintiff with letters of credit in October, 1899, and June, 1900 to cover his purchases for a period of six months at a time in advance. The plaintiff incurred considerable expense in preparing to carry out his part of the agreement, but the defendants failed to furnish letters of credit or to give any orders for the first six months. Held, that this was a breach of a</i> | |

| | |
|---|----------|
| <i>vital condition, entitling plaintiff to sue for damages on the whole contract.</i> | PAGE |
| Bennett v. White, Ryan & Co. | 353 |
| Construction—Term—Notice. | |
| <i>The conditions of tender annexed to a contract stated that "the contract is for a period of five years, to be thereafter continued subject to twelve months' notice on either side." The contract itself set out that it was to continue "for a period of five years, and thereafter subject to twelve months' notice on either side."</i> | |
| <i>Held, that, these words meant that there was to be a contract for at least six years, and that twelve months' notice could only be given at the end of the fifth year.</i> | |
| Logan & Co. v. Colonial Government | 379 |
| Continuous service, <i>see</i> Articled clerk | 584, 515 |
| Contributory Negligence, <i>see</i> New Trial | 141 |
| Correspondence, <i>see</i> Principal ... | 686 |
| Costs, <i>see</i> Judicial Separation ... | 704 |
| 2.— Order of Court—Interpretation. | |
| <i>In re Prize Mashona</i> | 440 |
| 3. — <i>see</i> Promissory Note ... | 239 |
| 4. — <i>see</i> Resident Magistrate's Court | 768 |
| 5. — <i>see</i> Resident Magistrate's Court | 768 |
| Creditor, <i>see</i> Building Society ... | 244 |
| Criminal prosecution — Malicious prosecution — Malice. | |
| <i>H. on information which he believed laid a charge of theft against O. The Magistrate acquitted O. the evidence of the informer not being reliable. O. then sued H. for £20 damages for malicious prosecution, but failed to obtain judgment.</i> | |

| | |
|--|------|
| <i>On appeal, the Magistrate's decision was upheld, the Court finding that as H. had no reason for disbelieving his informant he had not acted without reasonable and probable cause, he being under no duty to personally interrogate O. before prosecuting him.</i> | PAGE |
| October v. Henning | 428 |
| Crown Lands—Informal agreement—Government — Municipality—Expropriation—Compensation—Act 23 of 1880. | |
| <i>An informal agreement was come to between the Government and the E. Municipality that certain Crown lands within the Municipal limits should be secured to the town for pasturage, subject to the condition that all lands required for public purposes should be reserved to Government. Subsequently, Act No. 23 of 1880 transferred and vested these lands in the Corporation, but contained no reference to the informal agreement or any express reservation in favour of the Government. The Government having now expropriated certain land for railway purposes, the Corporation claimed compensation therefor.</i> | |
| <i>But held, by the majority of the Court [Buchanan, A.C.J., diss.], that the informal agreement previously entered into barred any such claim.</i> | |
| East London Municipality v. Colonial Government ... | 218 |
| Damages, <i>see</i> Architect | 338 |
| 2. — <i>see</i> Contract | 353 |
| 3. — Flooding—Act of God. | |
| Searight & Co. v. The Municipality of Cape Town ... | 133 |
| Declaration of rights—Cause of action—Exception. | |
| <i>A plaintiff is not entitled to claim a declaration of rights merely be-</i> | |

| | PAGE |
|--|------|
| <i>cause such rights have been disputed by the defendant, but he must prove an infringement of one or more of such rights.</i> | |
| Colonial Government v. Stephan Brothers | 68 |
| Delivery, <i>see</i> Pledge | 129 |
| 2. — Delivery order, <i>see</i> Sale | 324 |
| <i>De lunatico inquirendo</i> | 595 |
| Destruction of Building, <i>see</i> Lease... .. | 320 |
| Diagram, <i>see</i> Grant | 329 |
| Disqualification, <i>see</i> Licensing Court | 368 |
| Documentary evidence—Ground for reversing decision of an inferior Court on facts. | |
| A. <i>sued Max and David G. of Rietrei in the, Magistrate's Court, Montagu, for £15.4s., being balance of an account for watches sold and delivered, and obtained judgment. Defendants appealed and the judgment of the Court below was reversed, it being clear from documentary evidence forming part of the record that one Daniel G. was the purchaser of the watches he having initialled the invoice "D.G.," paid £5 on account, and taken a receipt for the same.</i> | |
| Goldstone and another v. The Swiss Watch Company | 453 |
| Domicile—Presumptions and burden of proof as to change of domicile. | |
| <i>The late James Spencer Mills was a partner in a certain mercantile firm in Cape Town, and was domiciled there. In 1898, he and plaintiff (by whom he had had issue) went to England, and were there married. The evidence as to Mills's intention to return to the Colony was conflicting. Before leaving the Colony he had made provision by will for the plaintiff and his issue by her. He took a three years' lease of a house in</i> | |

| | PAGE |
|--|------|
| <i>England, and died there in 1900. Counsel for plaintiff contended arguendo that the onus of proving a change of domicile lies on him who asserts such change.</i> | |
| Held: (1) <i>That repeated assertions of the late Mills that he intended to leave the Colony for good, coupled with the act of his removing and taking a lease of a house in England, was proof of a change of domicile.</i> | |
| (2) <i>As the Court found as a fact that there had been a change of domicile, they were not called upon to say on whom the burden of proving such change was cast.</i> | |
| (3) <i>Everybody is presumed to know the law of the country in which he lives, hence Mills must be presumed to have intended the legal consequences which would follow on a change of domicile to England.</i> | |
| Mills v. Estate Mills | 673 |
| Donation, <i>see</i> Husband and wife | 592 |
| Edictal Citation—Summons—Service. | |
| <i>Where M. had left her husband and resided with her parents at the Paarl, but had since left that district, and had been traced as far as Robertson,</i> | |
| <i>The Court refused leave to sue her for divorce by edictal citation, but ordered service of summons on her father.</i> | |
| Macinindona v. Macinindona | 16 |
| Edictal citation—Restitution of conjugal rights—Husband and wife. | |
| <i>Where the husband left his wife in England and came to live in the Colony, the Court granted him leave to sue her by edictal citation for restitution of conjugal rights, she having refused to join him in the Colony.</i> | |
| Abrahams v. Abrahams... .. | 656 |
| Electric wires, <i>see</i> Negligence | 701 |
| Election of Mayor, <i>see</i> Town Council | 559 |

**Electricity—Damage—Negligence—
Telegraph Company—Tramway
Company—Right of action—
Statutory powers—Construction
of Act—"or otherwise"—Dam-
num sine injuria.**

An Act incorporating the defendant company authorised it to work its lines of tramway by electric power, provided that the company "specially undertakes that in the event of any electric leak taking place, and any damage being thereby caused at any time by electrolysis or otherwise it will make good to the Town Council, or other body or person, all costs, damages and expenses; and provided that nothing in the Act contained shall entitle the company to use the rails as a part of its system of conductors for the return electric current without the consent of the Council." Such consent was obtained, but it was found that there was an escape of current from the rails into the earth over a considerable area with the result that the outside sheathing of the cable laid by the plaintiff company in the bed of the sea, picked up a portion of such current, and by "induction" caused disturbances to the plaintiffs' signalling apparatus upon the stopping of tram cars.

Held, that such an escape of current from the rails did not constitute a "leak" in terms of the Act, and that even if it did the disturbance to the signalling apparatus was not a damage "caused by electrolysis or otherwise."

A short section of the lines of tramway was not included in the lines authorised by the Act, but the road authority granted permission to the defendant company to lay tramways in such section.

PAGE

PAGE

Held, that under these circumstances, there was no negligence on the part of the defendant company in using the rails on such section for the return of the electric current, that the disturbance of the plaintiff company's signalling apparatus did not constitute an infringement of any clear legal right, and that the indirect and incidental damage, if any, caused by such disturbance was a "damnum sine injuria."

Eastern and S.A. Telegraph Co.
v. Cape Town Tramways
Company 72

Electric wires, *see* Negligence ... 701

Employer—Natives—Permit—Act
28 of 1898, section 4.

R. a checker in the Cape Government Railways, was charged with contravening section 4 of Act 28 of 1898, in that he gave permits to obtain liquor to two persons alleged to be natives. He raised the defence that being the European employer of these two men he was entitled to give them the permits.

Held, on appeal, that as the persons to whom the permits were given were engaged for employment under himself by the accused, and that as he could dismiss them, he was their European employer, and so could not be convicted of contravening the section.

Regina v. Rankin 735

Enemy, Acts of, *see* Theft 372

Evidence, *see* Act 20, 1856 203

2. ——— Lease 530

3. ——— Conflict—Interdict.

Where in an application for an interdict, there was such a conflict of evidence that it was impossible to determine which side was speaking the truth, the Court re-

| | PAGE | | PAGE |
|---|----------|--|------|
| <i>fused the application, ordered an action to be instituted, and allowed the notice of motion to stand as the summons.</i> | | Fire, <i>see</i> Lease | 320 |
| Lynch v. Verster | 590 | Flooding, <i>see</i> Damages | 133 |
| Exception, <i>see</i> Malicious prosecution | 763 | Foreign hostile concession, <i>see</i> Joint-stock Bank | 234 |
| Exception, <i>see</i> Pleading | 236 | Gaoler, <i>see</i> Martial Law | 407 |
| Execution, <i>see</i> Insolvency | 367 | General Law Amendment Act, <i>see</i> Rent | 665 |
| Executor — Removal, <i>re</i> Breed's Estate | 746 | Government, <i>see</i> Informal agreement, 218, 318 | |
| Executor's account—Executor's fees —Master of Supreme Court—Ordinance No. 104. | | Grant — Boundaries—Conformation of ground—Diagram. | |
| <i>Where an executor has failed, without lawful and sufficient excuse, to lodge his account of administration with the Master within the time prescribed by the 33rd section of Ordinance No. 104, the Master is justified in refusing to assess or allow any fees in respect of such administration, such refusal however being subject to an appeal to the Supreme Court.</i> | | <i>Where the description of the boundaries in the original grant differ from the conformation of the ground as represented by the diagram, the description and not the picture must be taken in ascertaining the true boundaries.</i> | |
| Master of Supreme Court v. Brugman and another | 742 | <i>In the absence of circumstances to indicate that the words are not to be understood in their ordinary and natural acceptation, the description of land, as extending to the sea shore, must be taken as meaning that the boundary on that side is high water mark.</i> | |
| Executor's fees, <i>see</i> Executor's account | 742 | Struben and Phillips v. Colonial Government | 329 |
| Expropriation, <i>see</i> Informal agreement | 218, 318 | Habeas Corpus—Prisoner of war—Service of writ—Military commandant. | |
| Fidei-commissum, <i>see</i> Will | 28 | <i>The petitioners having been arrested by British troops, and detained as prisoners of war at Simon's Town for upwards of two months, applied for a writ of habeas corpus on the grounds that they were British subjects, that they had never taken up arms against the British Government, and that at the time of their arrest they were peaceably employed in the cultivation of their farms. After service on the military custodian at Simon's Town of a notice of application for the writ, the petitioners' attorney was informed by the attorneys of the military</i> | |
| Field-Cornet—Voters list—Registering Officer—Revising Court—Civil Commissioner—Irrregularity—Reopening Court. | | | |
| Barwell and Others v. Civil Commissioner of Oudtshoorn and Others | 4 | | |
| Fine—Payment to trap—Act 28, 1883, sub-sections 75, 94. | | | |
| Magistrate's Court Case Reviewed | 1 | | |
| Fine—Promissory note—Stamp. | | | |
| <i>The Court imposed a fine of £5 where provisional sentence had been claimed on an unstamped promissory note.</i> | | | |
| White v. Harries | 461 | | |

| | PAGE |
|--|------|
| <i>authorities that the prisoners had been removed to the district in which they had been arrested.</i> | |
| <i>Held, that the writ must issue and be served on the persons into whose custody the prisoners had been removed, as well as on the attorneys for the military authorities.</i> | |
| <i>Postea : The General in charge of communications accepted service of the writ, and before the return day of the writ the prisoners were released.</i> | |
| <i>Uys and Others v. The Queen...</i> | 46 |
| <i>Harbour Board, see Carriers ...</i> | 292 |
| Harbour Board—Bailment—Land- ing and warehousing goods. | |
| <i>The Harbour Board of East London having landed and warehoused a certain number of bags of grain consigned to the plaintiff by bills of lading which referred to the bags as being marked "M.E.," found that a considerable number were not so marked. Notwithstanding such knowledge, the proper officials of the Board received the rent and other charges for the full number, and gave the plaintiff a written receipt for the amount paid by him. Subsequently, however, the Board refused to give delivery of any bags not marked "M.E." without a guarantee of indemnity, although it was not alleged that any of them belonged to a third party. The Court having found, as a fact, that all the bags belonged to the plaintiff,</i> | |
| <i>Held, that the Board was bound to deliver the unmarked bags or pay their value and were liable for damages for the delay.</i> | |
| <i>Epstein v. East London Harbour Board ...</i> | 696 |

| | PAGE |
|--|------|
| Hawker—Travelling trader—Act 13 of 1870, section 6. | |
| <i>K. travelled about in a wagon offering for sale pictures of foreign manufacture without holding a licence in accordance with section 6 of Act 13 of 1870. He was charged with contravening the section and convicted.</i> | |
| <i>Held, on appeal, that the number of pictures in accused's possession at the time he offered them for sale was immaterial.</i> | |
| <i>A hawker is a travelling trader, and any one who while travelling offers foreign goods for sale becomes a hawker.</i> | |
| <i>Regina v. De Klerk ...</i> | 738 |
| High treason—Bail—Consent of the Crown. | |
| <i>The Court, the Crown consenting, admitted to bail a person charged with High Treason.</i> | |
| <i>Regina v. Botha... ..</i> | 391 |
| High treason—Application for bail refused. | |
| <i>Regina v. Louw</i> | 416 |
| High-water mark, see Grant ... | 329 |
| Holder in due course, see Building Society | 597 |
| Hotel, see Lease | 530 |
| Holograph will—Executor testamen- tary—Usufruct—Legacy. | |
| <i>Application for letters of administration by executors testamentary under a holograph will, by which the testator bequeathed the whole of his estate valued at £30,000 to his only daughter subject to a life usufruct in favour of the surviving spouse, and the payment of a legacy of £2,500 to the testator's brother, granted.</i> | |
| <i>Re Sluiter's Will</i> | 549 |
| Horses—Injuries—Repairs. | |
| <i>Adams Bros. v. Executors of De Villiers</i> | 62 |
| Hostile occupation, see Lease ... | 647 |

| | PAGE | | PAGE |
|--|------|---|------|
| Hostilities, <i>see</i> Postal Convention ... | 249 | Imperial licence, <i>see</i> Joint-stock Bank | 234 |
| Husband and wife—Marriage in England—Death of husband in the Colony—53 and 54 Vict., c. 29. R. married in England in 1872, but in 1877 came to the Cape Colony and died here intestate in 1891. The proceeds of his estate having been paid into the Guardians' Fund, The Court on the application of his widow, who had remained in England, granted a rule nisi calling on all concerned to show cause why the said proceeds should not be paid to her in terms of 53 and 54 Vict., c. 29 In the Estate of the late H. W. Remy | 14 | Innuendo, <i>see</i> Slander | 337 |
| Husband and wife—Divorce—Costs. The Court refused to order a lance-corporal in the Cape Town Highlanders, who was in receipt of 5s. <i>per diem</i> (there being no evidence that he had any other means), to contribute a sum of money to enable his wife to institute an action against him for divorce. Hausmann v. Hausmann | 589 | Insolvency—Doctor's fees—Date of vesting in Trustee. A debt due to an insolvent, a medical practitioner, for medical attendance given after the preparation of his schedules but before the acceptance of surrender, becomes vested in the trustee, and is not recoverable by the insolvent himself. The date of the sequestration must be taken as fixing the period when the insolvent is divested of his property, which afterwards becomes vested in the trustee. Gadow v. De Villiers | 377 |
| Husband and wife—Donatio—Insolvency—Creditors. Creditors of an insolvent held entitled to a sum of £250 which the Court found on the evidence had been given by the insolvent to the defendant, his wife, without consideration. The fact that the defendant, who had obtained a decree of judicial separation, returned to live and cohabit with her husband was not a sufficient consideration to support the gift as against the claim of the creditors. Van Niekerk's Trustee v. Van Niekerk | 592 | 2. —Ordinance 6 o. 1843, section 127—Execution. A writ against an unrehabilitated insolvent for the deficiency in his estate does not issue under the 127th section of the Insolvent Ordinance as a matter of course, but the Court must first be satisfied that there are reasonable grounds for believing there are assets belonging to the insolvent capable of satisfying the writ, wholly or in part. In re Boltman | 367 |
| Hut-tax, <i>see</i> Transkei | 375 | 3. —Trustee—Costs <i>de bonis propriis</i> . Where a trustee in an insolvent estate brought an action for undue preference without consulting the general body of creditors, there being practically no assets in the estate, and the action failed and he was ordered to pay the costs <i>de bonis propriis</i> . The Court, on appeal, declined to interfere with the judgment. Lamb v. A. and I. Peters | 669 |
| | | 4. —Set-off—Ordinance No. 6 of 1843, sections 28, 130. Where an application for execution against an unrehabilitated | |

PAGE

insolvent had been refused with costs, the creditor making the application,

Held not entitled to set off against the costs so incurred his debt, which had originated before the sequestration and which had been proved on the estate.

Seydell v. Boltman ... 437

5. — Set-off—Act of insolvency.

Where a right of set-off exists before sequestration, such right continues after insolvency except in the cases in which it is specially restricted by the Insolvent Ordinance.

The 28th section of the Insolvent Ordinance, No. 6 of 1843, requires that the person claiming the benefit of the set-off had not notice, at the time when his cause of debt accrued, of the order for sequestration having been made, or of any act of insolvency in virtue of which such order shall have been made :

Held, that the notice required by the 1st section of Act No. 38 of 1884, by the insolvent of his intention to apply for the surrender of his estate is not an act of insolvency within the meaning of the 28th section of the Ordinance.

British South Africa Company
v. Trustees of Lyle Brothers
and Wright ... 431

6. — Furniture—Hire and Purchase system. Krahe's Trustee

v. Walker & Co.... 641

7. — *see* Pledge ... 129

Insurance Society, *see* Book... 623

Interdict, *see* Evidence ... 590

2. — *see* Trade-mark ... 240

Invasion by enemy — Rebellion —
Martial law—Military tribunal.

Where a district of the colony had been invaded by the enemy, and there had been rebellion

PAGE

among the inhabitants, and in consequence martial law had been proclaimed, and the district was in the occupation of the military force engaged in defending it and restoring peace and order therein, the Court refused to interfere where one of the inhabitants had been imprisoned within the district by a military tribunal, as a punishment for enlisting in the forces of the enemy.

Regina v. Fourie ... 195

Joint-stock bank—Shareholders—
Public enemy—Imperial licence
—Foreign hostile concession—
Trading with the enemy.

The mere fact that one shareholder in a joint stock bank is a public enemy would not of itself make the bank a hostile company.

Where a bank, holding a concession from the Government of an enemy's country, but licensed by both the Imperial and Colonial authorities to carry on business in the Colony, sues a debtor, it is no ground of defence that dealings with the bank are prohibited as constituting trading with the enemy.

Goldman v. National Bank ... 234

Justification, *see* Assault ... 194

Judicial sale—Mortgage bond—High
Sheriff—Transfer.

In 1870 the Graham's Town Mutual Benefit Society, at that time the first and second mortgagees of certain property, there being also a third mortgagee, obtained judgment on their bonds and the property was declared executable.

At the sale in execution, the property was bought in by the society and transfer, as they thought, of the entire property was passed to them.

Subsequently they discovered that only half of the property had been

| | PAGE | | PAGE |
|---|------|---|------|
| <i>transferred to them and on making application to the Court for cancellation of the third bond, the mortgagees being a company which had ceased to exist, they were referred to the High Sheriff, the sale having been a judicial sale.</i> | | Jury, <i>see</i> Lease | 530 |
| <i>Re Lange's Estate</i> | 406 | Kerkeraad, <i>see</i> Slander | 281 |
| Judicial separation—Claim in reconvention—Divorce—Costs. | | Landing agent—Loss of cargo—Harbour Board. | |
| <i>Where a wife sued her husband for judicial separation on the ground of cruelty, and he claimed in reconvention a decree of divorce, the Court, on being satisfied that the plaintiff had committed adultery, granted a decree of divorce, but, as the Court was also satisfied on the evidence that the defendant had been guilty of cruelty to his wife, ordered him to pay the cost of the action.</i> | | <i>The defendants, who had been appointed by the Table Bay Harbour Board to land cargo from a vessel and to give to the ship a discharge for the same on behalf of the consignees, on accepting such appointment,</i> | |
| <i>Woolven v. Woolven</i> | 704 | <i>Held, liable to an owner of cargo whose goods had been received and not delivered or accounted for by them.</i> | |
| Jurisdiction — Summons — Attachment—Domicile. | | <i>Lister v. McKenzie</i> | 480 |
| <i>The defendant while resident in the Orange Free State accepted certain bills of exchange payable there. After maturity of the bills he was expelled by the military authorities of Great Britain, which was then at war with the Orange Free State, and he came to the Colony, where he was alleged to carry on some commercial business.</i> | | <i>Latent defect, see</i> Lease | 516 |
| <i>Held, that this allegation might have afforded a good ground for attaching his property ad fundandam jurisdictionem, but that in the absence of proof that he had permanently changed his domicile, the objection to his being sued in this Court without such an attachment was a good one.</i> | | Lease — Licensing Court — Verbal conditions—Knowledge of licensee — Damages—Jury. | |
| <i>Ebert & Co. v. Goldman</i> | 741 | <i>A. sued B. for £3,500 as and for damages for deprivation of the use and benefit of a liquor licence in connection with a hotel which B. had leased to A.</i> | |
| Jurisdiction, <i>see</i> Provisional sentence | 461 | <i>The licence had been granted to a previous licensee on the verbal condition that enlarged premises were to be erected in which a good family hotel could be carried on, plans of such reconstruction having been produced at the meeting of the Licensing Court.</i> | |
| | | <i>A. applied for a renewal of the licence the following year, and it was refused him because the condition had not been carried out. Vide supra (page 364). He immediately approached B. who promised to carry out the necessary alterations, but did not do so. A. accordingly sued B, and B. pleaded that he had no knowledge of the condition, and therefore was not liable on the second claim, but subsequently made a tender of £300 in full settlement of both claims. A. re-</i> | |

PAGE

fused the tender, and it was then clearly understood that the only question at issue between the parties was the amount of damages.

Held, that although A. led no evidence at the trial before a jury that B. had knowledge of the verbal condition, the question of damages in regard to the claim for deprivation of use of the licence could be put to the jury, as it was admitted in the correspondence that the amount of damages was the only issue between the parties.

Fothergill v. South African Breweries ... 530

2. — Destruction of building—
Latent defect—Damages.

Premises which had been let as a store, and which had been properly shored by the tenant for the purpose of storing grain therein, collapsed through the supports giving way owing to a latent defect in the soil under the floor of the building.

Held, that in the absence of negligence on the part of the tenant, he was not liable to the landlord for the destruction of the building.

Held, further, that the landlord was not liable in damages to the tenant for loss sustained through damage done to the goods stored.

Marks v. Thomson, Watson & Co. ... 516

3. — Sheep—Delivery.

Truter v. Krynauw ... 35

4. — Renewal—Agreement.

Although in a contract affecting land, or the sale of land, there is no rule that there must be a written document, still the proof must be conclusive, and, where there is any reasonable doubt as to the existence of the contract, the

L 6

PAGE

person against whom it is sought to enforce such a contract must have the benefit of that doubt.

Dykman v. City ... 54

5. — Hostile occupation—Magistrate's jurisdiction—Rights in future—*Bona fide* defence.

M. sued F. under a lease for rent, which included rent for a period during the hostile occupation by the Republican forces of the district within which the property was situate, and also rent for a period subsequent to the occupation. In correspondence prior to the trial the defendant F. claimed that he was not liable for rent during the hostile occupation and expressed his regret that he was unable to pay the rent for the period subsequent thereto. At the trial before the Magistrate, however, he claimed that the hostile occupation had the effect of cancelling the lease and that therefore he was liable for no rent at all, and that any decision on the lease was beyond the Magistrate's jurisdiction as binding rights in future. The Magistrate held the defence to be a bona fide one and dismissed the case as being beyond his jurisdiction.

On appeal, it was held that this was in the circumstances not a bona fide defence, and the case was accordingly remitted to the Magistrate for trial, the appeal being allowed with costs.

Mills v. Fitzgerald ... 647

6. — Verbal agreement—Fire—
Destruction of building.

The defendant leased certain buildings to the plaintiff in writing for a period of five years. During the currency of this lease a written lease was entered into between them for an additional period of ten years.

- | PAGE | PAGE |
|--|---|
| <p><i>It was also verbally agreed that in the event of the destruction of the buildings by fire the defendant should rebuild the premises in a reasonable time and that the plaintiff should continue to pay rent during such rebuilding. The buildings were destroyed by fire during the currency of the original lease.</i></p> <p><i>Held, that the plaintiff was entitled to an order declaring that the original lease was still running and that he was entitled to the further lease for ten years.</i></p> <p>Raphael v. Clutterbuck ... 320</p> | <p>8. — Evidence.</p> <p><i>A contract of lease not in writing must be established by the clearest evidence or the Court will not give effect to it.</i></p> <p>Koplansky, Stern and Co. v. Holt and others ... 750</p> |
| <p>7. — Tender—New trial—Act 23 of 1891, section 36.</p> <p><i>B. leased to F. certain premises as an hotel, and in the lease undertook that F. should have and enjoy quiet and peaceable possession, and the use and benefit of the licence attached to the premises. At the next annual meeting of the Licensing Court F. applied for a renewal of the licence, but this was refused because certain improvements, imposed upon the previous licensee as a condition to renewal, were not carried out. F. sued B. before a jury for damages for the loss of the use of the premises and the licence, and obtained judgement on both claims, and the learned judge presiding held that B. was liable under the lease to carry out the improvements, and that, even if this were not so, as B. made a tender of £300 "in full settlement of all claims" and wrote to the plaintiff saying "that the on y question at issue is the measure of damages," B. could not raise any defence as to the legal liability on either claim.</i></p> <p>S.A. Breweries v. Fothergill ... 658</p> | <p>Libel—Newspaper company—Innuendo.</p> <p><i>R., a newspaper company, published of C., which was also a newspaper company, and as such printed and published the daily "Cape Times," and an annual record of the proceedings in Parliament styled "Hansard" the following passage:</i></p> <p><i>"The 'Cape Times' is understood to supply the 'Hansard' reports which are expected to be correct productions of every member's utterances, irrespective of party or rank or personality. That they are nothing of the sort is notorious amongst the general body of honourable members. Nay, more, not a few of them are painfully aware that the 'exigencies of space' permit of a style of reporting which is nothing short of being scandalously one-sided, and which consists of either wholly suppressing, or cruelly distorting in the process of shortening speeches of members who, for a variety of reasons, may be safely boycotted in the newspaper or 'Hansard' reports."</i></p> <p><i>C. sued R. for damages for libel, stating that the innuendo to be drawn was that C. carried on business in a dishonourable and dishonest manner, and for its own purposes wilfully suppressed and distorted the speeches of members and published false information. R. excepted to the declaration that</i></p> |

PAGE

it contained no ground of action. Held, that the words were susceptible of a defamatory meaning. Held, at the trial, that as "Hansard" purported to be nothing more than a reprint of the Cape Times Parliamentary Reports, which did not pretend to be full reports of the proceedings of Parliament, R. had not gone beyond the limits of fair comment and was not liable in damages.

Cape Times Limited v. W. A. Richards and Sons ... 727

2. — Defamatory letter.

Where the defendants took an exception to a declaration by the plaintiff that a letter published by the defendants containing a statement that the plaintiff was arrested and on his way to Cape Town, and that two rifles and a magazine containing expanding bullets and engraved with plaintiff's name, which were taken at the Modder River fight were also being sent to Cape Town as evidence against the plaintiff, was not defamatory.

Held, that the words were capable of having a defamatory meaning attached to them, and that therefore the exception must be overruled.

Michau v. The Cape Times ... 733

3. — Damages, Michau v. The Argus Co. ... 722

Life-interest—Attachment.

V. obtained a judgment against F. for payment of a certain sum of money, and a return of nulla bona was made to the writ of execution against the movables. Application was thereupon made for the attachment and sale of the life interest owned by F. in a certain farm. F. alleged that she

PAGE

had sold the life interest to M., but in the absence of any proof of delivery or transfer, The Court granted the application.

Vos v. George and Hendrina Farmer ... 43

Liquid document, see Transfer ... 583

Licensing Court — Application to set aside proceedings — Irregularity — Qualification of members — Section 28 of Act 28 of 1883.

An application to set aside the proceedings of a Licensing Court, on the ground that a member of one of the municipalities constituting the Court who had been elected to represent that municipality in the absence on private business of the Mayor or Chairman was not allowed to take his seat, was refused on the ground that the 28th section did not give a municipality power to appoint a substitute when the Mayor or Chairman was "absent," but only when he was under some "disqualification."

Ingram v. Graaff-Reinet Licensing Court... 368

2. — Review of proceedings — Conditions of licence — Representations by original licensee — Renewal — Powers of Board — Section 47 of Act 28 of 1883.

A licence was granted on representations made by the licensee that the licensed premises would be enlarged in accordance with plans and specifications produced, but these conditions were not endorsed on the licence. On a subsequent application for a renewal of the licence by a transferee of the licence who did not know of these conditions the Licensing Board refused the application on the report of the police authorities that

| PAGE | PAGE |
|--|---|
| <i>the conditions as to erection of new premises on which the licence had been granted had not been fulfilled,</i> | <i>A resolution which provided that all retail licences should be subject to the restriction that the licensee should supply liquor to natives only between the hours of 9 a.m. and 5 p.m. and that no native should be supplied with liquor unless he produced a pass signed by his European employer, a J.P., or a Field-cornet, was held to be one that could be passed.</i> |
| <i>The Court refused to declare the proceedings irregular on these grounds.</i> | Beyers and another v. Willowmore Licensing Board and Raphael 347 |
| <i>The refusal of an application for re-opening made at a subsequent meeting of the Licensing Board after the case had been properly disposed of, is no ground for setting aside the proceedings on the ground of gross irregularity.</i> | Lien, see Tender 286 |
| <i>The Licensing Court has power to take cognizance of any facts within its own knowledge when considering an application for the granting or renewal of a licence.</i> | Liquor—Selling to non-registered voter—Condition of licence—Onus of proof—Act 28 of 1898, Sections 1 and 2. |
| <i>South African Breweries v. Wynberg Licensing Court</i> 364 | <i>Where accused was convicted of selling liquor to an aboriginal native who was not a registered voter in contravention of sections 1 and 2 of Act 28 of 1898, it being specially endorsed on his licence that no sale to a non-registered native was allowed,</i> |
| 3. —Sections 13, 14 of Act 25 of 1891—Section 6 of Act 28 of 1898—Memorial. | <i>The Court held on appeal, that the onus of proving that the native was a registered voter lay on the defendant, it being a matter more specially within his knowledge than in that of the Crown.</i> |
| <i>Before a Licensing Court can under section 6 of Act 28 of 1898, refuse to grant a renewal of a licence because a memorial has been lodged objecting to a renewal, proof must be given that notice of such memorial has been served on both the occupier and the owner of such premises.</i> | Regina v. Bridges 555 |
| <i>Parsons v. The George Licensing Court</i> 255 | Liquor Licence—Condition—Prohibition—Act 28 of 1883—Act 44 of 1885, section 5. |
| 4. —Special meeting—Resolution—Restriction on licences—Natives. | <i>R., the holder of an hotel liquor licence on which was endorsed the following condition, viz., “any licensee who serves or sells to any recognised habitual frequenter of a canteen at his hotel bar after the prescribed hours for the closing of canteens shall not be entitled to a renewal of his licence at the next meeting of the Board,” sold liquor to two habitual frequenters</i> |

| | PAGE |
|---|------|
| of his canteen and was convicted of contravening section 5 of Act 44 of 1885. | |
| The Court, on appeal, quashed the conviction, holding that the condition did not amount to a prohibition, although it subjected the accused to a penalty at the hands of the Licensing Court. | |
| Regina v. Roos | 758 |
| 2. — Lease. | |
| P. signed an agreement of lease by which he agreed at the termination thereof to hand over to C. the licence attached to the premises leased. He stated that the agreement was signed by him in ignorance of its terms with regard to the handing up of the licence which he said was his own property. | |
| On an application by C. at the termination of the lease for an order on P. to deliver up the licence, | |
| The Court granted the order as prayed, holding that the document signed by P. gave rise to a clear case for relief. | |
| Ohlsson's Cape Breweries v. Power | 747 |
| Liquor Licensing Act—Condition of licence—Native servant. | |
| A licence was conditioned that the holder should not supply liquor to a native in service without a permit from his master. A native who had been engaged as a day labourer had left his master's employ, but was under agreement to re-enter his service on a future day. The canteen keeper was convicted of contravening the condition of his licence in having sold liquor to the native after the agreement had been made but before the actual resumption of service. | |

| | PAGE |
|--|------|
| On appeal, the conviction was quashed. | |
| Regina v. Foster | 425 |
| 2. — No. 28 of 1883, sections 47 and 52. | |
| Objection may, by virtue of the 47th section of the Liquor Licensing Act No. 28 of 1883, be taken by a Licensing Court of its own motion, but such objection must be founded on one of the grounds specified in the 52nd section of the Act. | |
| Cathcart v. Jansenville Licensing Court | 436 |
| 3. — No. 28, 1883, section 75. | |
| The mere being in possession of liquor by an unlicensed person, without any evidence of selling, or offering or exposing for sale any such liquor, is not an offence under the 75th section of Act No. 28 of 1883. | |
| Regina v. Soekender | 452 |
| Licensing Court, see Lease | 530 |
| Lost debentures — Cancellation of covering bond—Issue of duplicate—Act 43 of 1895. | |
| Ex parte Jones | 35 |
| Magistrate's jurisdiction, see Lease... .. | 647 |
| Magistrate's ordinary jurisdiction—Imprisonment. | |
| A Magistrate's ordinary jurisdiction in criminal cases allows him to impose imprisonment to the extent of three months only, and such sentence cannot be increased because of a previous conviction. | |
| Regina v. Africa... .. | 477 |
| Mahommedan Church property—Leave to sell. | |
| S. applied for leave to sell certain property belonging to the Mahommedan Church and after granting a rule nisi the Court on hearing objections thereto made the rule | |

| | PAGE |
|--|------|
| <i>absolute. D. and others applied on the day before the advertised sale for a rule nisi to stay the order authorising the sale on the ground that the sale of church property was contrary to the Mahomedan religion, as stated in the Koran.</i> | |
| <i>The Court, finding that the Koran was silent on the question of the sale of church property, refused the application.</i> | |
| Doobey and others v. Sala and others | 761 |
| Malice, <i>see</i> Slander | 337 |
| Malicious injury to property. | |
| <i>Where accused was charged with, and convicted of, the crime of malicious injury to property in that he did wrongfully, unlawfully and maliciously destroy a flagstaff attached to a cart driven by complainant and he appealed on the grounds that there was no evidence of malice, that the property in the flagstaff was not sufficiently established, and that the property was not such as could form the subject of such a charge, the appeal was dismissed, the Court refusing to interfere with the finding of the Magistrate since there was sufficient evidence to justify a conviction.</i> | |
| Regina v. Poolman | 241 |
| Malicious prosecution—Summons—Exception—Magistrate's discretion—Amendment. | |
| <i>R. sued B. for malicious prosecution, but failed to set out in his summons that B. in causing his arrest and his being charged acted "falsely and maliciously and without reasonable and probable cause." B. excepted to the summons and the exception was upheld, whereupon B. applied to amend the summons.</i> | |

| | PAGE |
|---|------|
| <i>This the Magistrate refused. Held, on appeal, that the summons was bad and that the Magistrate was not shown to have done anything improper in the exercise of his discretion in refusing to allow the amendment.</i> | |
| Rooikop v. Bester | 763 |
| Malicious prosecution—Damages—Absolution from the instance. | |
| <i>M. sued W. for damages for malicious prosecution, in that W. falsely, maliciously and without reasonable and probable cause made certain charges against M. on affidavit, thereby inducing a criminal charge for high treason to be commenced against him.</i> | |
| <i>After a preliminary examination the proceedings against M. were abandoned and he was discharged. The Court held, that, as W. was merely a witness against M., and did not himself institute the criminal proceedings, he was not liable for damages for malicious prosecution, and granted absolution from the instance.</i> | |
| Michau v. Westerman | 671 |
| Mandamus, <i>see</i> Bail | 464 |
| Marriage—Breach of promise—Justification. | |
| Smit v. Jooste | 466 |
| Marriage in England, <i>see</i> Husband and Wife | 14 |
| Martial law—Gaoler. | |
| <i>Where applicant on an ex parte application complained that he was being confined in a civil gaol without lawful cause, in a district in which martial law was in force, an order was granted on the gaoler to return to the Court by what authority the applicant was being detained.</i> | |
| Regina v. Bekker | 407 |

| | PAGE |
|--|----------|
| 2.—Bail—Copy of proceedings before military—Proclamation—Evidence of necessity. | |
| <i>An application for an order on the military authorities to admit applicant to bail, to deliver to him copies of the evidence taken against him, to pay to him certain money being the value of a wagon and oxen belonging to him, and to allow him leave to dispose of his stock by sale,</i> | |
| <i>Refused, because as long as martial law exists in any one district, and it is not shown that there is no necessity for it, the Court will not interfere and grant relief.</i> | |
| <i>The proclamation of martial law is strong "prima facie" evidence of the necessity for such proclamation, and it would require very strong evidence to justify the Court in going behind the proclamation. By applying for bail instead of a writ of Habeas corpus applicant recognised the validity of the proceedings before the military.</i> | |
| <i>Regina v. Geldenhuyts ...</i> | 369 |
| 3. — Military tribunal, <i>see</i> | 188, 195 |
| Master and Servant—Act 18, 1873, section 2, sub-section 6—Wages. | |
| <i>Where certain labourers were engaged for a period of six months at the rate of £3 per month, and worked from November 1 to November 30, on which date, as they were not paid their wages, they refused to continue working, and the Magistrate convicted them under section 2, sub-section 6 of the Masters and Servants Act of 1873,</i> | |
| <i>Held, on appeal, that the conviction was wrong, as the labourers were entitled to be paid on November 30, and were justified in refusing to continue working upon failure to obtain payment.</i> | |
| <i>Queen v. Plank and Others ...</i> | 21 |

| | PAGE |
|--|------|
| 2. — Minor—Contract of service—Prejudice to minor. | |
| <i>A minor who has attained the age of sixteen years and is not under articles of apprenticeship may enter into a valid contract of service terminable at a month's notice provided that such contract is not to his prejudice, and in determining as to the validity of the defence that such contract is to his prejudice, his age and position in life, the wishes of his parents and such like matters must be taken into consideration.</i> | |
| <i>Queen v. Koning... ..</i> | 754 |
| 3. — Dismissal—Notice. | |
| <i>A monthly servant seriously misconducting himself by absenting himself without cause from his master's service may be summarily dismissed, on payment of his wages up to date of dismissal. The fact that such servant might be punished under the Master and Servants Act, does not render the master liable to pay, in addition to wages earned, a further month's wages in lieu of notice.</i> | |
| <i>Brown v. Davids</i> | 454 |
| Master and Servants Act, <i>see</i> Wages | 378 |
| Memorial, <i>see</i> Licensing Court | 255 |
| Midwife—Contract—Breach—Question of fact—Magistrate's decision upheld. | |
| <i>Clarke v. Frisby... ..</i> | 466 |
| Military Occupation, <i>see</i> Theft | 372 |
| Minor Son, <i>see</i> Wages | 378 |
| Minor—Landed property—Costs. | |
| <i>Flemmer v. Venter</i> | 657 |
| Minor, <i>see</i> Pleadings | 679 |
| Misappropriation, <i>see</i> Building Society | 597 |
| Mistake, <i>see</i> Servitude | 471 |
| Mortgage bond—Partnership—Absence of partner. | |
| <i>Where land the property of a partnership was registered in the</i> | |

| | PAGE |
|--|------|
| <i>name of H., one of the partners, the Court, H.'s whereabouts being unknown, refused to authorise the passing of a mortgage bond on the land by H.'s partner.</i> | |
| In the Estate of Gustave Nissen and Carl Hennings, trading as Nissen Bros. ... | 402 |
| Mortgage bond, <i>see</i> Judicial sale ... | 406 |
| Mortgage bond—Provisional sentence. McLeod v. Le Grange ... | 3 |
| Mortgage bond—Tender—Costs. | |
| <i>Where a bond has been passed to secure a loan, the debtor, on repayment of the loan, is entitled to have his bond returned to him, receipted for cancellation.</i> | |
| <i>A bond passed to secure a loan contained a clause giving the bondholder a right of pre-emption within two years, and the debtor tendered the amount of the loan and interest to date, and asked that the bond be handed to him receipted for cancellation. The bondholder refused to do this, and returned the amount tendered and sued for the interest. The Magistrate gave judgment against the debtor for interest and costs.</i> | |
| <i>Held, on appeal, that the debtor was not liable for costs.</i> | |
| Michell v. De Villiers ... | 150 |
| Mosque—Trust property—Leave granted to sell. | |
| <i>Ex parte Salie ...</i> | 404 |
| Municipal Act No. 45, 1882, section 28—Voters—Owners and occupiers. | |
| <i>An occupier of any immovable property within a Municipality constituted under the General Municipal Act of 1882, who is not otherwise disqualified, is entitled to be enrolled as a voter, notwithstanding that no tenants' rate for the year has been assessed by the Council.</i> | |
| Sandford v. The Graaff-Reinet Municipality ... | 399 |

| | PAGE |
|---|------|
| 2. —Municipality — Government Authority to collect rates—Right to sue. | |
| <i>Where the Government had authorised a municipality to sell certain lots situate in the municipality under the condition that the purchasers thereof "shall annually pay to such person or persons as may hereafter be authorised by the Governor to receive the same," the water rates due thereon, Held, on appeal, that this did not deprive the Government of the right to sue for the rates due.</i> | |
| Colonial Government v. Hyde ... | 204 |
| 3. — Regulation—Ultra vires—Occupation—Act 26 of 1893, section 170. | |
| <i>A regulation of the Cape Town Municipality framed under Act 26 of 1893, provided that new buildings erected should not be occupied until the City Engineer had given a certificate to the effect that they were fit for occupation.</i> | |
| <i>K. let certain premises which were being erected to X. from a certain date, but, owing to the premises not having been completed and his having been threatened with legal proceedings, he before the completion of the premises and without having a certificate of occupation allowed X. to enter into occupation for the purpose of carrying on a shop but not for sleeping and other purposes. An interdict was granted restraining K. or his tenants from occupying the premises until a certificate had been granted by the City Engineer.</i> | |
| <i>F. proceeded to build a house and submitted certain drainage plans to the Cape Town Town Council which were adopted. Meanwhile by selling the adjoining house F. by his own act put it beyond his power to carry out the original</i> | |

| | PAGE |
|--|----------|
| <i>drainage plans and refused to connect his pipes with the main sewer by a more circuitous route. The City Engineer accordingly refused to grant a certificate for occupation. F. nevertheless did occupy the premises, in consequence of which a nuisance arose. An interdict was accordingly granted ordering him not to occupy the premises until he had obtained a certificate.</i> | |
| Cape Town Town Council v. Kaiser | 383 |
| Cape Town Town Council v. Falconer | 383 |
| Municipal regulation—Contravention—Right of way—Necessity. Appellant was convicted of contravening a municipal regulation passed in 1853, prohibiting all persons from riding or driving along any avenue in the municipality. | |
| On appeal it was held, that as the municipality had a right to make the regulation and that as it was applicable to the avenue in question, and as the appellant had not shown that it was necessary for him to have a right of way over this avenue as a means of access to his property, the conviction must stand. | |
| Rattray v. The Stellenbosch Municipality | 557 |
| Municipal Regulations—Lease—Assignment. | |
| Carter v. Cape Town Council ... | 722 |
| Municipality, <i>see</i> Informal Agreement | 218, 318 |
| Municipality, <i>see</i> Appeal | 204 |
| Murder—Bail. | |
| <i>Where the applicant was awaiting his trial on a charge of murder, and alleged that he shot the native, whom he was charged with mur-</i> | |

| | PAGE |
|---|----------|
| <i>dering, by order of his superior officer (applicant being then a member of a local police force) and applied to be admitted to bail, the Court refused the application.</i> | |
| Regina v. Smith... .. | 486 |
| Mutual will—Heirs—Survivor—Remarriage—Children of second marriage. | |
| <i>A mutual will of husband and wife, provided that after the death of the survivor certain landed property was to be sold by public auction among the heirs, among whom the proceeds of the sale were to be distributed. The survivor married again and after her death the children of the second marriage claimed to be included among the heirs, and entitled both to bid at the auction, and to share in the proceeds of the property. Held, that they were not so entitled, but that only the heirs under the mutual will of both parents could take the benefits conferred thereunder.</i> | |
| Smith v. Vlok | 260 |
| Native, <i>see</i> Liquor | 555 |
| Native Law, <i>see</i> Transkei | 375 |
| Native Location, <i>see</i> Act 37, 1884 ... | 19 |
| Native servant, <i>see</i> Liquor Act ... | 425 |
| Natives, <i>see</i> Licensing Court... .. | 347 |
| Negligence—Damages. | |
| Parker v. E. L. Municipality .. | 543 |
| Negligence, <i>see</i> Tramcar | 38 |
| 2. —Damages—Tramway. | |
| Hunter v. Cape Electric Tramway Company | 56 |
| 3. — <i>see</i> Electricity | 72 |
| 4. — <i>see</i> New Trial | 141 |
| 5. — <i>see</i> Carriers | 145, 292 |
| Negligence, <i>see</i> Architect | 338 |
| Negligence, <i>see</i> Warehouse | 770 |
| Negligence—Cheese—Natural decay. | |
| Meadows v. Gourlay and Co. ... | 637 |

PAGE

Negligence—Tramcar.

A cart was standing close to the kerb-stone of a road which was 24 feet in breadth from the kerb-stone to the nearest rail of a tram-line. A wagon drawn by oxen, and covering 27 feet in length was passing along the road partially on the tram-line. A tram was going in the same direction. On its approach, the wagon left the tram-way and was a foot and a half away from the line on the same side as the cart. The tram passed at the rate of from 6 to 7 miles an hour and the oxen taking fright and swerving caused the wagon to collide with the cart.

Held on appeal, that the motor man in charge of the tram was not guilty of negligence.

East London Municipality v. Nangle 651

Negligence—Contributory negligence—Town Council—Electric wires.

A wire capable of conducting electricity and belonging to the Town Council was hanging for a period of 48 hours a few feet from the ground across a public thoroughfare in a populous part of Cape Town. The plaintiff while lawfully passing came in contact with the wire and as a consequence sustained serious injuries caused by the electric power in the wire.

Held, that the failure on the part of the Council to ascertain that the wire was down and to repair it, amounted to negligence, and that even if the plaintiff did take hold of the wire he was not guilty of contributory negligence.

Kift v. Cape Town Council ... 701

Net Fishing, *see* Act 15 of 1893 ... 759

New trial, *see* Lease 658

New trial—Verdict of jury—Weight of evidence—Negligence—Contributory negligence.

PAGE

On an application by the defendant for a new trial, on the ground that the verdict of the jury was against the weight of the evidence, Held, that as there was evidence to support the verdict, and there was not such a preponderance in favour of an opposite conclusion that it would be unreasonable and unjust to allow the verdict to stand, the application must be refused.

Hunter v. Cape Town Tramway

| | |
|---|-----|
| Company | 141 |
| Notice, <i>see</i> Contract | 379 |
| Occupation, <i>see</i> Municipality ... | 383 |
| Occupiers of property, <i>see</i> Municipal Act | 399 |
| Onus of proof, <i>see</i> Liquor | 555 |
| Option, <i>see</i> Transfer Duty | 12 |
| Oral evidence, <i>see</i> Promissory note... | 763 |
| Ordinance No. 40 of 1828, section 23, <i>see</i> Arrest... | 387 |
| Ordinance No. 73 of 180, section 12, <i>see</i> Arrest... | 387 |
| Ordinance No. 6 of 1843, section 127, <i>see</i> Insolvency | 367 |
| Ordinance No. 7 of 1883, section 9, <i>see</i> Slander | 316 |
| Ownership, <i>see</i> Expropriation ... | 268 |
| Owners of property, <i>see</i> Municipal Act | 399 |
| Payment by Instalments, <i>see</i> Act 20, 1856, section 11 | 203 |
| Partnership, <i>see</i> Auditor | 438 |
| 2. — Action for an account. McPherson v. Dowthwaite ... | 456 |
| 3. — <i>See</i> Mortgage bond... | 402 |
| 4. — Brokerage—Costs. Dunn v. Fowler | 113 |
| Patent rights—Interdict. Edison Bell Co. v. Hasken ... | 636 |
| Payment into Court—Rule 332. Where money has been paid into court, the plaintiff is entitled to it as a matter of course, unless some good cause is shown to a judge why the money should not be paid out. Hughes and Rodgers v. White, Ryan & Co.... | 157 |

| | PAGE |
|--|------|
| Peril of the Sea, <i>see</i> Carrier ... | 292 |
| Personal attachment—Contempt of Court. | |

Order for personal attachment granted against respondent for contempt of Court.

Isaac and others v. De Marilla 463

Plea—Default—Hostilities.

Milner v. Ratteson ... 156

Pleading—Striking out.

Colonial Government v. Hartang ... 157

2. — Exception — Proclamation of August 6, 1813—Re-assumed land—Claim for transfer—Public purposes.

Under Sir John Cradock's proclamation of 6th August, 1813, the farm Otterdam was granted on perpetual quitrent to defendants' predecessor in title on December 31, 1831. In 1849 and 1899, the Government by virtue of proclamations issued under the provisions of the proclamation of 1813, re-assumed 20 morgen of the farm for public purposes, and now claimed transfer.

The defendants before pleading excepted that the declaration disclosed no cause of action on the ground that by section 5 of the proclamation the Crown could 're-assume,' but could not claim formal transfer.

The exception was overruled inasmuch as the Crown could not re-assume without obtaining transfer from the successor in title of the original grantee.

Per De Villiers, C.J., another objection which might have been raised was that the declaration did not allege what the public purposes were for which the land was required, for not only should that be proved, but it should form part

of the judgment and be stated in the transfer as well.

Colonial Government v. Stephan Brothers ... 566

3. — Exception — Variance — Different causes of action.

An exception to a declaration that different causes of action were included in one suit overruled.

A substantial variance between the summons and the declaration is a ground of exception, but on application made the Court may give leave to amend the summons.

Cabrita v. Du Preez ... 429

4. — Exception Denial and estoppel—Servitude—Tender.

To a declaration founding on a servitude of a right to have certain lights free and unobstructed, plea was filed denying the validity of the servitude, alleging an estoppel, and making a tender of another servitude in place of the one claimed in the declaration.

Held, on exception taken, inconsistent and bad pleading.

Lawrence v. Romain and Gronitzki ... 236

5. — Exception—General denial.

In pleadings a general denial will not be accepted as good; each and every allegation of fact must be specifically dealt with.

Michau v. The Argus Co. ... 465

6. — Exception — Guardian — Minor—Hypothecation.

F., in his declaration against V., in his capacity as father and natural guardian of his minor son, set out that he lent certain money to V. in his private capacity for the purpose of expending it on certain property, and that V. used the money in improving certain other property, which belonged to his minor son. He

| | PAGE | | PAGE |
|---|------|---|------|
| claimed that the minor's property was liable on the ground that the minor had been benefited. | | to his store, and had thus acquired a right by prescription | |
| V. excepted to the declaration on the ground that there was no cause of action alleged against the minor. | | Held, that the appellant could not be convicted of a contravention of section 5, sub-section 6, of the Police Offences Act, 1882, which imposes a penalty on any person "driving a vehicle upon any foot-path or sidewalk." | |
| Held that, as the declaration failed to state that the father was insolvent, or unable to pay in his individual capacity, the declaration disclosed no cause of action against the minor. | | The Act enacts that the first part thereof shall apply to any town in which the Governor shall by Proclamation declare such part to be in operation. Such a Proclamation had been duly published in the "Government Gazette" in regard to Cape Town, but was not put in as evidence in the Court below. | |
| Flemmer v. Venter 679 | | Held, that the Court might take judicial cognizance of the Proclamation without such production. | |
| Pledge — Delivery — Keys — Insolvency — Preference — Fraud — Possession. | | Regina v. Adams 756 | |
| E. pledged certain goods in a store (hired by him) to the plaintiff, who was present when the goods were placed in the store, and there received the key of the same from E. Subsequently E. obtained advances from the defendant S., and fraudulently purported to pledge the same goods to S., to whom he gave a duplicate key of the store. S. obtained an assignment of the lease, but afterwards removed the goods to another store. | | Possession of liquor, <i>see</i> Liquor Licensing Act 452 | |
| Held, that there was a valid delivery of the goods to the plaintiff, and that he was not deprived of his rights as a pledgee by reason of the subsequent fraudulent conduct of the pledgor and removal of the goods by S. | | Postal Convention—Post Office Regulations—Receipt Form—Contract—Agency—Hostilities. | |
| Heydenrych v. Saber and others 129 | | The mere handing by the Postal authorities to any person of an unsigned form of receipt for the payment of a sum of money does not amount to an absolute undertaking to pay such amount. | |
| Police Offences Act—Penalty—Driving vehicle upon a side walk which accused has the right to use —Proclamation—Evidence—Judicial notice. | | The outbreak of hostilities between two countries terminates all conventions existing between the Governments of such countries. | |
| The appellant was a wagon driver in the employment of C., who had for a period of 45 years as of right used a sidewalk in Cape Town for driving wagons | | Where the Postal authorities at Cape Town, on receipt of telegraphic advice on the 12th October, from a Postmaster of the Orange Free State, to pay to A. the sum of £70 which had been paid in to the Free State Government by B., a resident of the Free State, had on the same day in accordance with the terms of the Postal Convention and the Post Office Regulations | |

PAGE

issued to A. a form of receipt for payment, which receipt A. had deposited in a bank for collection, and had on the following day on instructions refused payment of the amount mentioned

Held, in an action by A., that the Postal authorities were not liable for the amount, there being no contract between them and A. Semble, the Postal authorities were merely acting as the agents of the Orange Free State Government: there was only a contract between B. and the Orange Free State Government.

Collison & Co. v. Colonial Government ... 249

Postponement, *see* Promissory Note 239

Power of attorney—Procurator in rem suam—Conveyancer.

In consideration of advances made by the defendant, the plaintiffs gave him a power of attorney to transfer certain property, and receive the proceeds of the sales of such property. The power purported to be irrevocable, and in rem suam until transfer was effected in favour of the purchasers, and the price paid by them, with power of substitution.

Held, that until the advances were duly paid, the defendant was entitled to appoint the conveyancer for effecting the necessary transfers, and that his refusal to appoint the conveyancer proposed by the plaintiffs was not a breach of contract entitling them, without first tendering the amounts due, to claim that all the documents of title be returned to them.

Van Niekerk v. Van Noorden ... 116

Practice—26th Rule of Court—Affidavit of merits.

Special circumstances preventing a defendant from instructing his

PAGE

attorney held sufficient to justify the postponement of a case in order that an affidavit of merits might be filed.

Heathcote v. De Wet ... 745

Practice.

Service of intendit and notice of trial on the wife of a defendant who was on commando with the Boer Forces held sufficient under the circumstances.

Page v. Zuidmeer ... 746

2. — Pleading—Amendment.

British S.A. Co. v. Hurber ... 749

Premium, *see* Rectification of Contract ... 124

Presumption of death—Distribution of estate—Curator—Security.

The wife of H. applied for an order declaring that her husband to whom she had been married in community was dead, and for the appointment of executors on the grounds that, if alive, he would be 80 years of age, and that although repeated inquiries had been made he had not been heard of for thirty years.

Application refused, but ordered that applicant be appointed curator to administer her husband's estate, with power to transfer one half to herself, and the remaining half to the children of the marriage, and security to be given for the restoration of the property in case he should prove to be alive.

In re Hofmeester ... 753

Principal—Agent—Correspondence.

C. and Co. employed J. as manager of a branch business, and during his term of office addressed letters to him dealing with matters relating to the firm's business.

Held, that the letters were the property of the firm.

Crooks & Co. v. Jones ... 686

| | PAGE |
|---|------|
| Prisoner of War, <i>see</i> Habeas corpus | 46 |
| Privilege, <i>see</i> Slander... | 335 |
| 2. — <i>see</i> Slander ... | 316 |
| Privity, <i>see</i> Carriers ... | 145 |
| Proclamation No. 10 of 1879, <i>see</i> Transkei .. | 375 |
| Procurator in rem suam, <i>see</i> Power of Atorney ... | 116 |
| Promissory note—Consideration— Cancellation of void deed of sale. <i>In an action on a promissory note brought in a Magistrate's Court by the payer against the maker, the defendant pleaded that there was no valuable consideration, inas- much as the note had been given as "smart money" in considera- tion of the plaintiff agreeing to the cancellation of a certain deed of sale between the parties "which deed of sale was never in force and of no value." The Magis- trate having decided that he could not go behind the promissory note, Held, that the plea was a valid one, and that, in order to enable the defendant to prove it, the case must be remitted to the Court be- low for decision on the merits.</i> Van Dyk v. Udwin ... | 70 |
| Promissory Note—Signature—Provi- sional sentence. <i>Where provisional sentence was asked against the same defendant on two promissory notes, one of which bore the signature "G. Mulier" instead of "J. G. Mul- ler," the Court refused provisional sentence in the absence of an alle- gation in the summons that "G. Muller" was the same person as J. G. Muller.</i> Pienaar v. Moller ... | 395 |
| 2. — Section 9, Act 20 of 1856— Presentation—Protest. <i>In a suit in the Court of the Resident Magistrate on a pro-</i> | |

| | PAGE |
|--|------|
| <i>missory note for an amount exceeding £20, the 9th section of Act No. 20, 1856, does not make the production of a protest of dis- honour compulsory, but it depends on the terms of the document whether or not a protest is neces- sary.</i> Estate of Williams v. Gideon ... | 426 |
| 3. — <i>see</i> Arrest ... | 559 |
| 4. — Postponement Costs—Dis- missal. <i>Plaintiff sued on a promissory note, and defendant set up a de- fence which required plaintiff's viva voce evidence to meet. Plain- tiff being absent, his agent applied for a postponement. This appli- cation the Magistrate considered a reasonable one, but would only grant it on condition that the plain- tiff agreed to pay all costs of suit to date. Plaintiff's agent not con- senting, the Magistrate dismissed the case with costs.</i> On appeal, case remitted to the Magistrate for further hearing and determination. De Jager v. Vorster ... | 239 |
| 5. — Agreement to renew—Oral evidence. <i>An oral agreement alleged to have been entered into between the parties to a promissory note at the time when it was made that, upon its falling due, an extension of time would be given, constitutes such a variance from the terms of the note as to be inadmissible in evidence, and therefore affords no defence to an action on the note</i> Orsmond v. Steyn ... | 763 |
| Proprietary rights—Selecting and locating claims—Diamond mines. <i>By deed of agreement between the plaintiff and the defendant com- pany as owners of certain prop- erty, the latter gave to the former</i> | |

PAGE

the right to search for diamonds by underground working only within a limited area with the right of obtaining within a certain period a lease of a certain area. One of the articles of the agreement was as follows: "The lessors reserve the right in the event of surface ground being resumed by competent authority to enter on and prospect such ground, but so as not to interfere with the lessee in locating the claims he may elect to take on lease under this agreement, which claims the lessee shall be at liberty to select and locate by means of trial pits." The plaintiff in the course of prospecting having found diamonds,

Held, that the High Court was justified in ordering that the plaintiff be at liberty to make trial pits within a defined area in the neighbourhood of the place where the diamonds had been found "for the purpose of selecting and locating the claims not exceeding one hundred in number."

De Beers Company v. McCarthy 687

Provisional sentence — Change of domicile— Jurisdiction.

Provisional sentence granted on a promissory note made in Johannesburg, and presumably payable there, there being prima facie evidence that the maker of the note had changed his domicile to Cape Town.

Hudson v. Smythe ... 461

2. — Mortgage bond.

Where the terms of a mortgage bond provided that the debt should be payable in certain instalments after notice had been given, and notice was given to pay the full amount, provisional sentence was refused.

McLeod v. Le Grange ... 3

PAGE

3. — Wife as surety—*Senatus Consultum Velleianum* and *Authentica si qua mulier*—Consideration—Public trader.

Provisional sentence on a mortgage bond was refused when claimed by plaintiff against a married woman, who appears to have signed the mortgage bond without consideration, was not a public trader, had not renounced the benefits *Senatus Consultum Velleianum* and *Authentica si qua mulier*, and was merely a surety for her husband.

Whitaker v. Stewart ... 587

4. — Cheque - Building lots.

The B. Syndicate advertised certain building lots for sale and described them as being "most desirable for Villa Residences," inspection of the land by intending purchasers being invited.

M. inspected the land, attended the sale, and purchased a number of the lots in payment of which he drew a cheque in favour of the auctioneers.

Three days after the sale he visited the land and finding some of the lots under water he stopped payment of the cheque.

Held, on a claim for provisional sentence, that in the absence of misrepresentation on the part of the Syndicate they were entitled to judgment for the amount of the cheque.

Belvliet Park Estate Syndicate v. Matthews ... 633

Provocation, *see* Assault ... 194

Public enemy, *see* Joint-Stock Bank 234

Public interest, *see* Slander ... 335

Public purposes, *see* Pleading ... 566

2. — *see* Sir John Cradock's

Proclamation ... 626

Public road—Road of necessity—Prescription,

| | PAGE | PAGE |
|---|----------|------|
| <i>In an action for a declaration of a right of road over the defendants' farm, the evidence showed that, although for a period of more than thirty years some of the public had used the road without hindrance, many others had been prevented by the owners of the farm from using it, and that the plaintiff had access to and egress from his neighbouring farm by another practicable but much more circuitous route.</i> | | |
| <i>Held, that the plaintiff was not entitled to have it declared that the road was either a public road or a road of necessity.</i> | | |
| Van Schalkwyk v. Du Plessis and others | 680 | |
| Railway Acts — Compensation — Ownership — Compulsory and voluntary sale. | | |
| <i>The Government can under the Railway Acts take possession of expropriated land before paying the amount of compensation. The land so expropriated becomes immediately vested in the Government who can thereupon act as full owner & even though transfer has not been effected. The expropriation of land though compulsory, is a sale and when effected the ordinary results of the transference of ownership follow as a matter of course just as in the case of a voluntary sale and purchase.</i> | | |
| Grimbeck v. Colonial Government | 268 | |
| 2. — <i>see</i> Expropriation | 268 | |
| Railway Platforms, <i>see</i> Servitude | 580 | |
| Railway Station, <i>see</i> Servitude | 580 | |
| Rates, <i>see</i> Cape Town Municipal Act | 418 | |
| Rebellion, <i>see</i> Invasion by enemy | 188, 195 | |
| Rectification of contract — Life policy — Premium — Misrepresentation — <i>Restitutio in integrum</i> — Mistake — Consideration. | | |
| <i>The agent of a Life Insurance Company, having explained to the plaintiff the conditions upon which it would issue to him a life policy on payment of a certain annual premium, the plaintiff misunderstood the conditions, which were somewhat complicated, but accepted the policy. Several months afterwards the plaintiff discovered that the policy did not embody the terms as understood by him, and instituted an action either to have the policy rectified or to recover damages and a return of the premium.</i> | | |
| <i>Held, that as the agent had made no misrepresentation, the plaintiff was not entitled either to a rectification of the policy or to damages. Held further, that the plaintiff, having accepted the policy and enjoyed the advantage of having his life insured until he discovered the alleged error, was not entitled to a refund of the premium.</i> | | |
| Poigiet v. New York Mutual Life Insurance Society — Vermaak v. New York Mutual Life Insurance Society | 124 | |
| Registering officer — Voters' list — Field-cornet — Revising Court — Civil Commissioner — Irregularity — Reopening Court. | | |
| Barwell and Others v. Civil Commissioner of Oudtshoorn and Others | 4 | |
| Re-marriage, <i>see</i> Mutual Will | 260 | |
| Removal of cause — Circuit Court — Pleadings incomplete — Ill-health. | | |
| <i>On an application for the removal of a case to a Circuit Court, when the pleadings were not complete and the case was not yet ripe for trial, on the ground of the inability of the plaintiff to come from Uitenhage to Cape Town because of ill-</i> | | |

| | PAGE |
|--|------|
| health, the Court refused the application, there being nothing to show that at the date of the trial the plaintiff would still be unable to come to Cape Town. | |
| Ward v. Ward's Trustees ... | 582 |
| Renewal, see Lease ... | 54 |
| Rent—Abatement—War—General Law Amendment Act, 1879—Lease—Unavoidable misfortune. | |
| The plaintiff company leased to the defendant company certain claims in a diamond mine but, during a portion of the time covered by the lease, Her Majesty's forces occupied the property in consequence of war with the Republics and the defendant company was deprived of beneficial occupation during that period. | |
| Held that, under the General Law Amendment Act 8 of 1879, the defendant company was deprived of any right, which it might otherwise have enjoyed to an abatement of rent. | |
| United Mines of Bultfontein v. De Beers Consolidated Mines, Limited ... | 665 |
| Resident Magistrate's Court—Costs—Judicial discretion. | |
| In an action brought in a Resident Magistrate's Court for damage to the plaintiff's gate, the defendant stated that on a certain Sunday the plaintiff demanded twenty shillings for the damage, and that he (the defendant) answered he would not give a shilling. The defendant further stated in evidence that he would have been willing to pay 2s. 6d. or 5s. if asked for it on a week day. The Magistrate held that the plaintiff had lawfully placed the gate at the spot, and that the defendant was liable for the damage. He found that the damage done actually amount- | |

| | PAGE |
|--|------|
| ed to only one shilling, but gave judgment for five shillings, being the amount which the defendant had said he would have been willing to pay. The majority of the Court being of opinion that the sum of five shillings was a reasonable compensation for the damage done, | |
| Held, that in the absence of any tender or of anything improper in the plaintiff's conduct, the Magistrate ought to have awarded to him his costs. | |
| Buchanan, J., dissentiente. | |
| Loubser v. Cashel ... | 768 |
| Restriction on Licences, see Licensing Court ... | 347 |
| Right of way, see Municipal regulation ... | 557 |
| Rights in future, see Lease ... | 647 |
| Road of necessity, see Public road ... | 680 |
| Rule of Court 315, see Witness expenses ... | 490 |
| Rule 329(p)—Transfer of land—Delivery of stock. | |
| Badenhorst v. Badenhorst ... | 389 |
| Sea-shore, see Diagram ... | 329 |
| Sale—Delivery—Delivery order. | |
| A. sold to B. certain goods which were alleged to be in dock on board a certain vessel, and an order issued by the agents of the vessel was given by A. to B. directing C., the stevedore engaged to break cargo, to deliver to B. the goods sold. This order was not assigned to B. in such a way as to make it an authority for B. to receive the goods. B., however, accepted it and obtained some of the goods under it. | |
| Held, that an order of this kind was not on the same footing as a bill of lading, which is a symbol of the property to which it refers and which by the usages of trade transfers the ownership of the | |

| | PAGE | | PAGE |
|---|----------|--|------|
| <i>goods on the delivery of the negotiable instrument, nor was it equivalent to what are called "delivery orders" upon warehousemen and the like.</i> | | <i>made that certain servitudes should exist in favour of the plaintiff which were however not registered through mistake, the Court allowed these servitudes to be subsequently registered.</i> | |
| Hughes and Rogers v. White Ryan & Co.... | 324 | Salie and Hadien v. Abrahams | 471 |
| Scab Act—Inspector—Reasonable assistance—Sheep. | | Servitude — Railway station — Encroachment—Trespass. | |
| <i>A scab inspector gave notice to certain sheep-owners that he would inspect their sheep on a certain day, and directed the appellant to bring his sheep to a particular spot for inspection on that day. The appellant collected his sheep in a valley within half a mile from the spot thus indicated.</i> | | <i>B., for valuable consideration, granted to the Government certain land for the purposes of a railway station with sidings, platforms, passenger and goods sheds, subject to a reservation in his favour of a portion of the land on which he had erected a house.</i> | |
| <i>The Court, being of opinion on the evidence that it would have been a matter of great inconvenience to the appellant to bring his sheep to the spot indicated, and that it would not have been quite convenient to the inspector to proceed to the valley,</i> | | <i>After he had made the grant, B. built a verandah to the house on the ground reserved, and this verandah encroached on the railway platform some six or seven feet.</i> | |
| <i>Held, that the appellant had been wrongly convicted of refusing to tender every reasonable assistance to the inspector in the execution of his duties.</i> | | <i>B. also authorised a lessee of the house to sell refreshments on the platform.</i> | |
| Queen v. Ntotoviyana ... | 737 | <i>The Court, on the application of the Railway Department, ordered the respondent to remove the verandah, and granted an interdict restraining the respondent from allowing persons to sell refreshments on the platform.</i> | |
| Scab Act 20 of 1894—Proclamation 67 of 1898. | | <i>The Government have the right of excluding persons from its railway platforms.</i> | |
| <i>In order to obtain a conviction under Proclamation No. 67 of 1898, framed under Act 20 of 1894, it is necessary to prove that the person charged did actually introduce the sheep from one district to another.</i> | | Colonial Government v. Brady | 580 |
| Regina v. Kleinbooy ... | 759 | Servitude — Prescription — Interdict — Flow of water — Refuse water — Irrigation water. | |
| Secretary, see Building Society | 244, 597 | <i>In the absence of any right acquired by agreement or by prescription, the proprietor of an upper tenement is not entitled to an interdict restraining the proprietor of a lower tenement from obstructing the free flow of refuse water from a dwelling house on</i> | |
| Service, see Articled Clerk ... | 24 | | |
| Servitude—Registration—Mistake—Transfer. | | | |
| <i>Where at the time of a sale of certain property a stipulation was</i> | | | |

| | PAGE |
|---|------|
| <i>the upper tenement or of surplus irrigation water brought from elsewhere.</i> | |
| Van der Merwe v. Van Dyk ... | 748 |
| Shareholders, <i>see</i> Joint-stock Bank | 234 |
| Set-off, <i>see</i> Insolvency ... | 431 |
| Sir John Cradock's Proclamation, <i>see</i> Pleading ... | 566 |
| Sir John Cradock's Proclamation of August 6, 1813, section 5—Re-assumption — Transfer — Public purposes. | |
| <i>The Government is entitled to claim transfer of land reassumed under section 5 of Sir John Cradock's Proclamation of August 6, 1813, provided the purposes for which the Government requires the land are public purposes.</i> | |
| <i>The following were held to be public purposes under the fifth section of the Proclamation :</i> | |
| 1. Landing and shipping goods imported or exported by the Government or the public. | |
| 2. The erection of buildings for the transaction of business connected with the landing or shipping of such goods and for the temporary storage of such goods. | |
| 3. The excavation of quarries to be used for the construction of wharves for landing and shipping goods and for the erection of buildings for the accommodation of Her Majesty's officials. | |
| 4. The construction of wharves and the erection of buildings referred to in the preceding subdivision. | |
| 5. The erection and construction of buildings, sheds, and yards for the curing and temporary storage of fish by the public. | |
| 6. The erection of stables for the housing of animals used in the conveyance of persons and goods. | |

| | PAGE |
|--|------|
| 7. The erection of buildings for the accommodation of persons having business to transact at Lambert's Bay and for the purposes of a public market | |
| Colonial Government v. Stephan Bros. ... | 626 |
| Slander—Plea of privilege, truth and absence of malice—Ordinance 7 of 1843, section 9—Kerkerad. | |
| <i>The defendant in an action for slander, for words used at a Consistory Court, having admitted the use of the words laid to his charge, pleaded "privileged occasion, truth and absence of malice," and on being ordered by the Magistrate to substantiate his plea, undertook to do so, but did not himself give evidence of bona fides. During the hearing, the Magistrate held that there was no privilege. Subsequently, on the Dutch Reformed Church Ordinance being quoted, he changed his opinion, and held that Ordinance to be an absolute bar, and refused to allow plaintiff to lead evidence of malice and granted absolution from the instance.</i> | |
| <i>Held on appeal, that the Magistrate should have allowed the plaintiff to lead evidence of malice. The case was remitted to the Magistrate to take evidence of both parties and decide on the merits.</i> | |
| Keyter v. Le Roux and Weber v. Van der Spuy. discussed. | |
| Jones v. Maartens ... | 281 |
| 2. —Slander — Theft — Innuendo — Malice. | |
| <i>A parcel of goods sent from the shop of which the appellant was the manager, was not delivered at the place to which it had been addressed, and was believed by</i> | |

- | PAGE | PAGE |
|---|--|
| <p>the appellant to have been delivered at the respondent's house. Upon the respondent subsequently visiting the shop the appellant, in the presence of other persons and in reply to a question put by the respondent, used the following words:—"I have positive proof that the parcel was left at your house: and what is more, there is the driver and Kafir boy and others from the neighbourhood who can prove that it was, but I have nothing further to do with you."</p> <p>The respondent sued, and recovered damages for libel in a Magistrate's Court.</p> <p>On appeal, the judgment was reversed.</p> <p>Grossman v. Lewis ... 337</p> <p>3. —Public interest—Privilege—Act 20 of 1856, section 33.</p> <p>Where a defendant in an action for slander in alleging certain acts of immorality to have been committed by the plaintiff pleaded that the allegations were true and made for the public benefit but did not fully prove the truth of the words complained of although he did prove to the satisfaction of the magistrate that plaintiff was an immoral man, and that the words used were in substance true, though not in actual details,</p> <p>Held, on appeal, that the defendant not having fully proved the truth of the actual words used, the plaintiff was entitled to succeed. To support a plea of privilege a defendant must show that it was his duty or interest to make the communication to a person having a corresponding duty to receive it.</p> <p>Fyne v. Lee ... 335</p> <p>4. —Defamatory words—Hatred and ridicule.</p> <p>The following words were held, on</p> | <p>appeal, to give rise to no cause of action for damages, not being defamatory in the sense of bringing a person into disrepute, or exposing him to hatred or ridicule.</p> <p>"You d——d fellow, I spend more in a day than you spend in your whole life; d——n it, I can prove that I am a more respectable man than you are; I know hundreds of Jews better men than you are; you d——d fool."</p> <p>Levy v. De Villiers ... 649</p> <p>Soldier—Murder—Superior officer—Commands—Legality—Execution by inferior—Justification.</p> <p>The orders of a superior officer so long as they are neither obviously and decidedly illegal nor opposed to the well-established customs of the Army, must be completely and unhesitatingly obeyed by a soldier subordinate to such officer.</p> <p>But if such commands are obviously illegal, the inferior will be justified in questioning or even refusing to execute them.</p> <p>An officer or soldier acting under orders from his superior which are not necessarily nor manifestly illegal, will be justified in obeying such orders.</p> <p>Regina v. Smith... 773</p> <p>Splitting up of criminal charge.</p> <p>Where a criminal offence had been improperly split up into two distinct charges, the conviction and sentence on the second charge was quashed.</p> <p>Queen v. Oliphant ... 1</p> <p>Stamp, see Fine ... 461</p> <p>Substitution, see Will ... 777</p> <p>Superior Officer, see Soldier... 773</p> <p>Summons, see Edictal citation ... 16</p> <p>Survivor, see Mutual Will ... 260</p> <p>Tenants' Rate, see Municipal Act ... 399</p> <p>Tender—Conditional—Under protest —Lien—Section 8 of Act 19,</p> |

| | PAGE |
|--|------|
| 1861—Non-payment of carriage. | |
| <i>Where a defendant to an action had made a tender of the amount due under protest, stating that he had a counter-claim for damages, Held, that such a tender was conditional, and therefore the defendant was liable in costs.</i> | |
| <i>The Government has a right of lien over animals and goods carried on the railway if the costs of the carriage of animals or goods previously carried have not been paid.</i> | |
| Colonial Government v. Winterbach | 286 |
| Tender, <i>see</i> Construction | 379 |
| Tender, <i>see</i> Mortgage Bond... .. | 150 |
| Theft — Evidence — Admission by accomplice. | |
| <i>Where A., B., and C. were charged with and convicted of theft, and the only question as to the guilt of A. and B. was the credibility of the witnesses for the prosecution, the Court upheld the conviction of A. and B.</i> | |
| <i>In the case of C. the only evidence against him was that when A. and B. were found in possession of the stolen property, he had run away, and that A. had then said that C. "the other thief" was to be shielded.</i> | |
| <i>The Court quashed the conviction on the ground that the statement made by A. was inadmissible against C. and that possibly the Magistrate was influenced by it when dealing with C.'s case.</i> | |
| Regina v. Jantje, Sapella and Selani | 553 |
| Theft—Military occupation—Acts of enemy. | |
| <i>During the occupation of Burghersdorp by the enemy two Orange Free State burghers acting in an irresponsible manner, and</i> | |

| | PAGE |
|---|------|
| <i>not acting under any military control, stole certain goods, the property of the Colonial Government. These goods they handed to a British subject who buried them. The latter was convicted of the crime of receiving stolen goods well knowing them to be stolen. On appeal, the conviction was sustained.</i> | |
| Regina v. Smit | 372 |
| 2. — <i>see</i> Slander | 337 |
| Town Council—Election of Mayor— | |
| <i>Tie—Drawing of lots—Rules of Order, 39, 60—Ultra vires—Act 26 of 1893.</i> | |
| <i>Where on an election in the Cape Town Town Council for the position of Mayor, it was found that an equal number of votes had been cast for two of the Councillors who had received the highest number of votes,</i> | |
| <i>The Court ordered that in accordance with Rule of Order No. 39, framed in accordance with Act 26 of 1893, the matter should be decided by the drawing of lots.</i> | |
| <i>The Court also found that this Rule 39 was applicable to the election of Mayor and was not inconsistent with nor ultra vires of Act No. 26 of 1893.</i> | |
| Mansfield and others v. O'Reilly and the Cape Town Municipality | 559 |
| Trade-mark — Infringement — Interdict. | |
| <i>N. manufactured soap and sold it enclosed in wrappers bearing the words "Sunflower—Why does," &c., and on the soap itself impressed the words "Sunflower—Guaranteed." L. who was the registered owner of a trade mark which allowed him to make the impression "Sunlight—Guaranteed" on his soap and sell it in wrappers bearing the words</i> | |

| | PAGE |
|---|------|
| "Sunlight—Why does, &c.," applied for an interdict restraining N. from wrapping and "impressing" his soap in the above-mentioned way. | |
| The Court granted an interdict restraining N. from using the wrapper complained of, but made no order as to the impression on the soap itself. | |
| Lever v. Bros. Nannucci, Ltd. | 660 |
| Trading with the Enemy, see Joint-stock Bank | 234 |
| Tramcar—Running powers—Negligence. | |
| <i>A Tramway Company which has statutory running powers, and the right to run cars along streets, has no greater powers than the drivers of any other vehicle. If, therefore, a motorman on a tramcar, going along a street, sees a carriage in front of him at such a distance that he can pull up and avoid an accident, and does not do so, he will be guilty of negligence.</i> | |
| <i>Where a Tramway Company was not wholly absolved of negligence, but it was not satisfactorily proved that an accident resulted from the negligence of its motorman driving a tramcar,</i> | |
| <i>Held, that the plaintiff claiming damages by reason of such accident had not discharged the burden of proof imposed on him.</i> | |
| Fachidien v. City Tramways Company—Muszlak v. City Tramways Company ... | 38 |
| Tramcar, see Negligence | 656 |
| Tramcar—Liquid document—Practice—Liability. | |
| <i>On an application for an order authorising the transfer of property belonging to a person absent from the Colony, which property had been purchased and paid for</i> | |

| | PAGE |
|--|------|
| <i>by the applicant, the Court refused the application, there being no admission by the respondent that he was liable on the document produced in support of the application. Liability must first be established by taking judgment on the liquid document.</i> | |
| Hughes and another v. Henning | 583 |
| Transfer, see Rule 329 | 99 |
| Transfer duty — Option — Purchase price. | |
| <i>The applicant sold to O. the option of purchasing a farm, on condition that 'if the farm is ultimately bought, the price is to be £11,500, but in the meantime O. is to pay into the hands of a third party a lesser sum as the price of the option; the applicant to transfer the farm to O., who is to retransfer it if the option is not exercised.'</i> | |
| <i>Held, that the transfer duty payable upon such transfer to O. must be calculated upon the full purchase price of £11,500.</i> | |
| Kotze v. Civil Commissioner of Namaqualand | 12 |
| Transkei—Hut-tax—Native law. | |
| <i>When in default of payment of hut-tax in a native territory property is summarily seized by virtue of Proclamation No. 110 of 1879, such property must be that of the debtor, as the law of the Colony, and not native law, is applicable to proceedings between the Government and natives.</i> | |
| Mtsekisi v. Wright | 375 |
| Treason — Domicile — Allegiance — Annexation. | |
| <i>G. was born in the Orange Free State in 1854, and resided until 1871 in a portion of the Orange Free State which was annexed to the Colony by Proclamation No. 67 of 1871. Since that year he</i> | |

| | PAGE |
|---|------|
| <i>continuously resided in the district annexed without, however, having at any time been formally naturalised as a British subject.</i> | |
| <i>Held, that he owed allegiance to the Sovereign of Great Britain during a time when the civil and military administration of that portion of the district in which he resided had temporarily fallen into the hands of the Government of the Orange Free State, and committed the crime of treason against the laws of this Colony by joining the forces of his native country at such a time and by orders of the representatives of the Government of that country.</i> | |
| Regina v. Geyer... | 707 |
| Treason, <i>see</i> Bail ... | 45 |
| Trespass—Injury. | |
| <i>Where a defendant had found an ox belonging to plaintiff trespassing on his land and had in order to drive it out thrown a stone at it, and broken its leg, with the result that it died, the Magistrate on an action being brought for the value of the ox gave judgment for £8 10s. and costs.</i> | |
| <i>On appeal, the Magistrate's decision was upheld, the Court finding that there was sufficient evidence to support the fact that defendant had thrown the stone and caused the death of the ox.</i> | |
| Le Roux v. Heatlie ... | 427 |
| Trespass—Leave and licence—Agent. | |
| Atkinson v. Colonial Government ... | 152 |
| Trial Pits, <i>see</i> Proprietary rights ... | 686 |
| Trust property, <i>see</i> Mosque ... | 404 |
| Ultra Vires, <i>see</i> Municipality ... | 383 |
| User of thing purchased, <i>see</i> Purchase ... | 206 |
| Verbal agreement, <i>see</i> Lease ... | 320 |
| Vesting in Trustee, <i>see</i> Insolvency... | 377 |

| | PAGE |
|---|------|
| Vinegar—Act 5 of 1890, sections 9 and 10. | |
| <i>Although a liquid may resemble vinegar in smell, taste, and appearance, yet it is not vinegar unless it is the product of acetous fermentation of a vegetable infusion or decoction.</i> | |
| <i>Vinegar to be genuine must be the product of acetous fermentation of a vegetable infusion or decoction.</i> | |
| Regina v. Eichhorn ... | 556 |
| Voters, <i>see</i> Municipal Act ... | 399 |
| Voters' list—Registering officer—Field-cornet—Revising Court—Civil Commissioner—Irregularity—Reopening Court. | |
| <i>A registering officer, instead of deciding upon the claims and objections lodged with him, handed them over to the Civil Commissioner who, acting on instructions from the Colonial Secretary, directed the registering officer to fix another day for inquiring into and deciding on objections in terms of the 15th section of Act 9 of 1892. On that day a large number of fresh objections were lodged with him including objections to the applicants' names. Subsequently the Civil Commissioner held a Revising Court at which the applicants did not appear, as they believed it to be illegal in consequence of the previous irregularity, and the Revising Court allowed the objections.</i> | |
| <i>Held, in the absence of clear proof that the applicants were duly qualified to be registered, that the applicants were not entitled to claim that their names be reinserted in the lists.</i> | |
| <i>Held, however, that an opportunity should be given to the applicants to substantiate their claims, and accordingly it was ordered</i> | |

| | PAGE |
|--|------|
| <i>that the Revising Court be re-opened for the purpose of inquiring into and deciding upon the applicants' right to have their names on the lists.</i> | |
| Barwell and others v. Civil Commissioner, of Oudtshoorn and others ... | 4 |
| Voters' list—Revision Court—Mistake—Rectification. | |
| <i>Although the Civil Commissioner may admit that he has made a mistake in inserting certain names in the printed voters' list which had been disallowed by the Revision Court, the Supreme Court will not rectify the mistake without giving the persons concerned the opportunity of showing cause to the contrary.</i> | |
| <i>The Court will however rectify an error admitted by the Civil Commissioner to have been made in excluding from the list names which had been duly allowed by him at the Revision Court.</i> | |
| Moll v. Civil Commissioner of Paarl ... | 717 |
| Wages—Minor son—Master and Servants Acts. | |
| <i>In an action in a Magistrate's Court for £20 for rent, the defendant counter-claimed for £5 damages, breach of contract, in that plaintiff had let the premises to a third person before the expiration of his, defendant's term, and also for £15, being 3½ month's wages due to his minor son. The Magistrate gave judgment for plaintiff for £20, less £1 15s., being the amount of wages admitted by plaintiff to be due, and said that had there been no such admission by plaintiff, the judgment would have been for £20 without any reduction, inasmuch as the contract for the services of</i> | |

| | PAGE |
|---|------|
| <i>defendant's son was not a valid contract according to the authority of Queen v. Kruger (7 Juta 71). Defendant appealed but the judgment was upheld, though not on the same grounds as those on which the Magistrate had decided.</i> | |
| <i>Queen v. Kruger only decided that where a father hires out the services of his son, informally the son cannot be punished for desertion under the Master and Servants Act, but that does not deprive him of his right to sue for wages due.</i> | |
| Botha v. De Klerk ... | 378 |
| Wages, see Master and Servant ... | 21 |
| Warehouse—Rent—Damages for negligence. | |
| <i>It is no defence to an action for rent charged by the Table Bay Harbour Board under its regulations in respect of imported goods left in its warehouses that the goods had been so negligently packed that the importers' agents had been unable to collect all the goods within a reasonable time. Damages for such negligence being unliquidated, cannot be set off against the rent, but must be sued for by claim in reconvention or by a separate action.</i> | |
| Maxwell v. Table Bay Harbour Board ... | 770 |
| Warehousing goods, see Harbours Board ... | 696 |
| Warrant, see Arrest ... | 387 |
| Will, see Mutual will ... | 260 |
| 2. — Loss of original—Copy—Affidavit—Rule nisi. | |

Where evidence on affidavit was adduced showing that though a will had not been cancelled, the original had been lost, the Court, on application being made for an order authorising the Master to

| | PAGE |
|--|------|
| accept a copy thereof made by the agent who drew up the will, granted a rule nisi calling on all persons concerned to show cause why this copy should not be accepted by the Master in place of the original will. | |
| In re Templeman | 278 |
| Will—Codicil—Legacy—Co-legatees— <i>Jus accrescendi</i> —Joinder of legatees <i>verbis tantum</i> . S. by his will left £3,000 to E., and £1,000 each to M. and N., on the condition however that if E. died before attaining the age of 25 without issue, then the £3,000 "shall go to and devolve upon M. and N. in equal shares." M. died before S., and thereupon S. in a codicil revoked all bequests, inheritances and legacies to him, and also revoked the legacy of £1,000 to N. S. died and thereafter E. died without attaining the age of 25, and the executors in estate of S. awarded N. £1,500 and the estate £1,500 of the legacy of £3,000. N. claimed the whole £3,000 on the ground that the <i>jus accrescendi</i> operated in his favour. Held, on a special case stated that the executors were correct in their award, there being no right of accrual when the legatees were joined <i>verbis tantum</i> . Novella v. Executors of Stephan | 732 |
| Will—Construction—Condition <i>si sine liberis decesserit</i> —"Children"—"Kinderen"—Substitution— <i>Fidei-commisum</i> —Vesting. A., by his will bequeathed his whole estate to his wife for the use of herself and his children during her lifetime, and directed that such estate should, after her decease, be equally divided among his children "or such of them as may be then alive." He died in 1864 | |

| | PAGE |
|---|------|
| leaving him surviving his wife, one son and three daughters. The son, died in 1875 after executing a will by which he bequeathed all his property to his wife. He left him surviving his wife and one son, B. A.'s wife died in 1897, leaving her surviving her three daughters and her grandson B. Held, reversing the judgment of the Natal Supreme Court, that the three daughters were entitled to the whole estate to the exclusion of the grandson B. and his mother. The rule of the Roman law that the condition <i>si sine liberis decesserit</i> must be implied where a father or grandfather has instituted his son or grandson who has no children with a <i>fidei-commisum</i> to restore the inheritance to a third person is not applicable to the case of a direct substitution. The term " <i>kinderen</i> " or "children" used in a will must be taken to refer to descendants of the first degree only unless it can be gathered from the context of the will that the testator had regard to descendants of a remoter degree also. The words "or such of them as may then be alive" in the above will prevent such a vesting of the inheritance in any child dying before his or her mother as would make the inheritance transmissible to his or her heirs. Galliers and others v. Rycroft... | 777 |
| Will—Power of appointment— <i>Fidei-commisum</i> . A testator by his will bequeathed a farm to L. on condition that during his lifetime he should have no power of alienation, and that after his death the farm should pass to his (L.'s) eldest son, with power, however, to L., in case he should consider another son to be better qualified to manage the | |

| | PAGE |
|--|------|
| <i>farm, to bequeath it to such other son, upon such conditions as he should deem reasonable. After the testator's death L. enjoyed the life interest and, before his death, he nominated his son J. in lieu of the eldest on condition that J. should pay into his (L.'s) estate the sum of £2,800 for the use of certain beneficiaries. Upon L.'s death the plaintiff claimed that, as one of L.'s creditors, he was entitled to be paid his debt out of the £2,800, there being no other funds available.</i> | |
| <i>Held that L.'s interest in the property ceased with his death and that the plaintiff had no claim in respect of the said sum of £2,800 in preference to the beneficiaries.</i> | |
| Stanley v. Botha's Executor ... | 28 |
| Will, <i>see</i> Holograph Will ... | 549 |
| Winding up — Company — Carrying on business at a loss. | |
| <i>The fact that a company is carrying on business at a loss is not sufficient to justify its being wound up by the Court, although it is an important ingredient in the decision of the question whether circumstances exist which make it just and equitable that the winding up should take place.</i> | |
| Fairbridge v. South African Newspaper Company ... | 10 |
| Witness Expenses. | |
| Cape Town Tramways Company v. The Eastern and South African Telegraph Company ... | 162 |
| Witness expenses—Rule of Court 315—Unauthorised payment—Ratification. | |
| <i>Plaintiff having a case in the Supreme Court asked defendant to give evidence and paid him his maintenance and travelling expenses.</i> | |
| <i>Subsequently one Pocock, who had been, but was not at the time,</i> | |

| | PAGE |
|--|------|
| <i>plaintiff's agent, paid defendant a further sum of £10, as witness expenses, and this payment was ratified by plaintiff repaying Pocock the £10.</i> | |
| <i>Plaintiff then sued defendant for the return of the £10, alleging that there had been an agreement that nothing beyond travelling and maintenance expenses should be paid.</i> | |
| <i>The Magistrate however found that there had been no such agreement.</i> | |
| <i>Plaintiff appealed, but the Court upheld the Magistrate's decision although they intimated that had the summons in the Court below contained an allegation that defendant had been overpaid and there had been evidence to substantiate that allegation the Court might have interfered. The appeal was dismissed with costs.</i> | |
| Van Wyk v. Kogelenberg ... | 490 |
| Writ de libero exhibendo—High treason Procedure—Martial law. | |
| <i>Martial law having been necessarily and properly proclaimed in a district of the colony, and it appearing that the necessity for the continuance of martial law still existed, the Court refused to interfere with the military authorities in charge of the district in regard to the detention of a person arrested and confined by them in gaol within the district.</i> | |
| <i>When it has been established that martial law is necessarily in force, the responsibility for all acts done thereunder must be taken by the authorities administering it. The Supreme Court will neither grant its aid to carry it out, nor assume any responsibility for its administration.</i> | |
| Regina v. Naude; Regina v. Bekker ... | 443 |

"Cape Times" Law Reports.

CASES DECIDED IN THE SUPREME COURT, CAPE COLONY.

SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), and the Hon. Mr. Justice BUCHANAN.]

QUEEN VS. OLIPHANT. } 1900,
} Jan. 11th

Splitting up of criminal charge.

Where a criminal offence had been improperly split up into two distinct charges, the connection and sentence on the second charge was quashed.

Buchanan, J.: In this case the accused was charged before the Magistrate with the crimes of theft, and of contravening Section 26 of Act No. 35, 1893, in being found within a sheep kraal. The evidence showed that the prisoner entered the kraal, caught a sheep, and brought it out, when an alarm was given and he was pursued and caught. The Magistrate convicted the prisoner of attempted theft, and also of contravening the section, and passed sentence of six months' imprisonment for the first offence, and three months for the second. The entering the kraal was with the intention of stealing the sheep. It was improper to split the charge up in the way in which it had been done. The conviction and sentence on the second count will therefore be quashed.

SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), the Hon. Mr. Justice BUCHANAN, and the Hon. Mr. Justice LAURENCE (Judge-President of the High Court of Griqualand West.)]

MAGISTRATE'S COURT CASE } 1900.
REVIEWED. } Jan. 12th.

Act 28, 1883, sub-sections 75, 94—

Payment of portion of fine to trap.

Laurence, J., said: A case has come before me in review from the Resident Magistrate of Caledon, in which the prisoner was convicted of contravening the Liquor Act by selling brandy without a licence. The Magistrate imposed a fine of £10, and directed that half the amount of the fine should be paid to the informer. According to the evidence, the person to whom the Magistrate directed that half the fine should be paid was really a trap employed by the police for the commission of the offence. In the case of *Regina v. Pals* (2 H.C.R., p. 580), it was decided that the section of the Act which authorised the payment of a portion of the fine not exceeding half to the informer did not authorise that half being paid to a person employed by the police for the commission of the offence. The two cases seem to be indistinguishable, and the sentence will therefore be confirmed as regards the fine, but not as to the direction as to the half the fine going to the informer.

ADMISSIONS.

Mr. Buchanan moved for the admission of Henry Walter Phillipson and Charles Samuel Auret as attorneys at law and notaries public.

The orders were granted and the oaths administered.

PROVISIONAL ROLL.

ESCHRODER AND OTHERS V. KOTZE.

Mr. Gardiner applied for a final order for the sequestration of defendant's estate.
Granted.

SMITH, WEBSTER AND CO. V. DROOMER.

Mr. Bisset applied for a final order for the sequestration of defendant's estate.
Granted.

VAN NOORDEN V. VAN NIEKERK AND ANOTHER.

Mr. McGregor moved for provisional sentence for £2,900 upon a mortgage bond for £3,500 passed by the defendant in favour of the General Estate and Orphan Chamber, and ceded to the present owner in June, 1899. The bond had become due by reason of three months' notice having been given on August 1, 1899. He also asked that the property specially hypothecated be declared executable.

Sir Henry Juta, Q.C. (with whom was Mr. Upington), appeared for the defendants. From the affidavits filed it appeared that judgment was opposed on the ground that the plaintiff and defendants had entered into a certain agreement, by which the former was to receive certain moneys belonging to the defendants, and raise a loan to pay off the bond sued upon; that he had received these moneys, but had not raised the loan. The defendants alleged that they had instituted another action against the plaintiff upon this agreement.

After hearing counsel,

The Court refused provisional sentence on the defendants undertaking to go to trial in their action on or before February 16. Leave was given to plaintiff to claim on the bond by way of reconvention in that action, the defendants in the meantime to make no transfer of the property nor to receive purchase moneys in connection therewith. Costs to be costs in the cause.

M. ROSEN V. CONRAD COHEN.

Mr. Buchanan applied for provisional sentence on a promissory note for £20, and also for £40 on a dishonoured cheque, with costs of suit.

Mr. Benjamin appeared for the defendant. The defence was that the note had already been settled for, having been brought up in an account; that the balance of that account was settled by the cheque, and that had since been settled by cash payment. It appeared also that summons had been issued upon an illiquid claim in connection with the transaction, and that the defendant had entered appearance to the summons.

After argument,

De Villiers, C.J., said: The Court is of opinion that the claim being upon a liquid document judgment should be given for the plaintiff. It is not clear from the reasons given by the defendant that he will succeed in the principal case. Provisional sentence will therefore be granted. The defendant can enter appearance in the principal case upon the liquid claim as well as upon the illiquid claim.

Their lordships concurred.

DU TOIT V. ABEL A. OOSTHUIZEN.

Mr. Close applied for provisional sentence on a promissory note for £308 13s. 8d.
Granted.

DU TOIT V. ANDRIES P. VENTER.

Mr. Upington applied for provisional sentence on an unsatisfied judgment of the Resident Magistrate's Court of Steynsburg for £28 11s. 9d. with £2 1s. 6d. costs, and also that the immovable property be declared executable.

Granted.

GUSTAF ANDERSON AND CO. V. JAN J. COETZER.

Mr. Burton applied for a decree of civil imprisonment on an unsatisfied judgment of the Supreme Court for £23 3s. 7d. A writ of execution had been taken out and a return of *nulla bona* made.

Order granted.

JOSEPH V. JOHANNES J. MULDER.

Mr. Nathan applied for the final adjudication of defendant's estate as insolvent.
Granted.

JUTA AND CO. V. BIDEN AND ANOTHER.

Mr. Buchanan moved for judgment in terms of a certain acknowledgment of debt.

Mr. P. Jones appeared on behalf of defendants to consent to judgment.

Order granted.

MCLEOD V. LE GRANGE. } 1901.
} Jan. 12th.

Provisional sentence — Mortgage bond.

Where the terms of a mortgage bond provided that the debt should be payable in certain instalments after notice had been given, and notice was given to pay the full amount, provisional sentence was refused.

Mr. Bisset applied for provisional sentence for £100 on a mortgage bond, on the ground that it had become due by reason of notice having been given, and also by reason of the non-payment of interest. It was also asked that the property specially hypothecated be declared executable.

It was pointed out by the Court that the bond stated that on three months' notice being given, the bond should be paid in instalments of £25 each, whereas notice had been given that the bond would be called up one month from date. The notice was dated 23rd September, 1899. Moreover, the bond did not contain the usual condition that it would become due and payable upon the non-payment of the instalments of interest.

No order was made.

ALLAN ROSS AND CO. V. CRISP.

Mr. Bisset applied for the final order for the sequestration of defendant's estate.

Granted.

GORDON AND ANOTHER V. MINNAAR.

Mr. P. Jones applied for a decree of civil imprisonment on an unsatisfied judgment for £13 16s. 9d.

Granted.

DE LOERME V. MURISON.

Mr. Benjamin applied for the final order for the sequestration of the defendant's estate. Counsel said he intended to oppose

a certain affidavit made by defendant being put in, as it had only been served upon the applicant that morning, at ten o'clock. The matter had been before the Court on the 12th December, and postponed for the affidavit to be filed.

Mr. Searle appeared for the defendant. The act of insolvency upon which the provisional order was obtained was the non-transference of certain land by defendant, for which he had received a portion of the purchase price. Counsel stated that arrangements had been made, and the defendant was now willing to transfer the property. A settlement had been made with the other creditors.

The matter was ordered to stand over until February 1; defendant to pay the costs of the day.

VAN DER BYL AND CO. V. SPIERS BROTHERS.

Mr. Heydenrych applied for provisional sentence for £228 7s. 6d. on a promissory note.

WEST'S TRUSTEES V. STEYN AND OTHERS.

Mr. Maskew applied for provisional sentence for £235, less £2 paid on account.

Granted.

WALKER AND CO. V. HENRY DALLDORF.

Mr. Close applied for provisional sentence for £127 4s. 1d. on a promissory note, less £74 12s. 5d. paid on account.

Granted.

STEER AND CO. V. LEFFLER AND WARDELL.

Mr. Close moved for a decree of civil imprisonment on an unsatisfied judgment for £47 12s. 2d., and costs. A writ of execution had been issued, and a return of *nihil bona* made.

The defendant Leffler appeared, and said that he had arranged with the other defendant to make an offer of payment of one-half of the amount of the claim and costs at the end of January, and the other half at the end of February.

Mr. Close said his clients did not wish to press defendants unduly, and would accept that offer.

Decree was granted with costs of suit, with stay of execution pending payment of half the amount on January 31, and the other half at the end of February.

PETERSEN V. WEBBER AND SON.

Mr. Buchanan applied for the final adjudication of defendants' estate.
Granted.

ILLIQUID ROLL.**FLETCHER'S RETAIL V. DEAN.**

Mr. Buchanan applied under Rule 329D for judgment for £110 14s., goods sold and delivered.
Granted.

FLETCHER'S WHOLESALE V. SPIERS BROTHERS.

Mr. Benjamin applied under Rule 329D for the costs of an action for £80 10s., the principal sum having been paid.
Granted.

VAN DER BYL AND CO. V. ABRAHAMSE.

Mr. Burton applied for judgment under Rule 329D for £52 6s. 4d., goods sold and delivered, with costs of suit and interest *a tempore morae*, less £5 paid on account.
Granted.

REHABILITATION.

Mr. Bisset moved for the rehabilitation of the insolvent estate of Jacobus Esaias Meyers, N. son.
Granted.

GENERAL MOTIONS.**IN THE MATTER OF THE MINORS MARTIN.**

Mr. Uppington moved for an order authorising the Master to make certain payments towards the education of the minors Martin. The petitioner, Arthur James Martin, was the executor dative of his brother, the late James W. Martin, who died in 1899, leaving two minor children, aged fourteen and twelve years respectively, and the sum of £118 14s. 2d. had been awarded to each of such children. The petitioner had placed the children at school, and it was now necessary to have the sanction of the Court for the expenditure of such portion of their inheritance as might be required for that purpose.

The Master recommended that the application should be granted.
Order granted as prayed.

IN THE MATTER OF THE MINOR ROBERTSON.

This was an application by the secretary of the Colonial Orphan Chamber and Trust Company, the tutor dative of the minor Robertson, for leave to sell to the Colonial Government a certain piece of land in the estate for the sum of £1,200. The Government had expropriated that land for defence purposes, and had at first offered £800 for it, but after prolonged negotiations they had increased their offer to £1,200.

Mr. Close appeared for the petitioner.

The Master recommended that the application should be granted.

The Court granted an order authorising the tutor dative to receive £1,200 and costs of the application for the piece of land in question.

**BARWELL AND OTHERS V. THE CIVIL COMMISSIONER OF OUDTS-
HOORN AND OTHERS.** { 1900.
Jan. 12th.

Voters' list—Registering officer—

Field-cornet—Revising Court

—Civil Commissioner—Irregularity—Reopening Court.

A registering officer, instead of deciding upon the claims and objections lodged with him, handed them over to the Civil Commissioner who, acting on instructions from the Colonial Secretary, directed the registering officer to fix another day for inquiring into and deciding on objections in terms of the 15th section of Act 9 of 1892. On that day a large number of fresh objections were lodged with him including objections to the applicants' names. Subsequently the Civil Commissioner held a Revising Court at which the applicants did not appear, as they believed it to be illegal in consequence of the previous irregularity and the Revising Court allowed the objections.

Held, in the absence of clear proof that the applicants were duly qualified to be registered, that the applicants were not entitled to claim that their names be reinserted in the lists,

Held, however, that an opportunity should be given to the applicants to substantiate their claims, and accordingly it was ordered that the Revising Court be re-opened for the purpose of inquiring into and deciding upon the applicants' right to have their names on the lists.

This was an application by Arthur Lees Barwell, James M. P. Gaughan, Henry Courlander, Peter Davis, and 183 others, upon notice to John Cowper Stapleton, Civil Commissioner and Revising Officer for the division of Oudtshoorn, Jacobus Petrus Mostert, Field-cornet and Registering Officer for the ward Grobbelaar's River, division of Oudtshoorn, and Albert Louwrens Matthews, the lodger of certain objections, for a review of the proceedings of the Oudtshoorn Registration Court.

The notice of motion was in the following terms: The Supreme Court will be moved in an application to review the proceedings of the respondent Stapleton, sitting in his Court as revising officer for the electoral division of Oudtshoorn, and to have them corrected by adding to the list of Parliamentary voters for the ward Grobbelaar's River the names of the applicants as detailed in the schedules marked B and C in the affidavit of one Charles Machin Barry, sworn at Oudtshoorn on September 22, 1899. The Court will be asked to declare that all claims and objections received or considered by the respondent Mostert as registering officer for the ward Grobbelaar's River after April 22, 1899, upon which date he held his Court, were wrongfully and unlawfully entertained by him, and are not properly before the respondent Stapleton for consideration in his Court of Revision. The Court will also be asked to re-open his Court and to amend, correct, and revise the list of voters for the Grobbelaar's River ward, in accordance with the decree of the Court, and otherwise, as by law directed, for alternate relief, or such further or other order regarding the costs of this application as shall be deemed meet.

It appeared from the affidavits filed that the Field-cornet had performed all the duties appertaining to him as registering officer for the ward so far as regarded framing a provisional list of voters, publishing the same, exhibiting the same, and calling for

claims to be inserted thereon or objections to names on the list, and had held his Registration Court as laid down by law on April 22. At that date the names of the applicants were upon the provisional list, and no objections had been lodged against them. Thereafter, instead of adjudicating upon the claims and objections, the Field-cornet handed them all over to the Civil Commissioner's clerk, and when the Civil Commissioner held his Revision Court in June, there was no final list put in by the Field-cornet as required by law. Thereupon the Civil Commissioner adjourned his Court and communicated with the Colonial Secretary's Office as to what should be done in the matter, and in consequence of that the Field-cornet gave notice, and held another court on July 11, 1899. At this court objections were lodged to the names of the applicants for the first time, and although protested against, the Field-cornet adjudicated upon these, and allowed twelve of them. The Civil Commissioner's Revision Court then sat again on August 11, and the agent for the applicant again protested against the objections being considered. The Civil Commissioner confirmed the allowance of the objections by the Field-cornet (Schedule B), but postponed the consideration of the rest (Schedule C). On the 13th September, the Civil Commissioner sat again to consider these objections, when the applicant's agent protested further, but did not enter any further appearance. There being no appearance for the persons objected to, the Civil Commissioner allowed the objections, so that these names, 171 in number, did not appear on the roll.

Mr. Graham (with him Mr. Buchanan) for the applicants: All claims had to be sent in within 21 days after the 17th March. Objections could be sent in within 14 days of the last day for sending in claims. When the Field-cornet held his second court he was *functus officio*; the objections lodged with him ought never to have gone before the revising officer at all. Act 14 of 1887, sections 4, 5, and 6. Act 9 of 1892, sections 10, 12, 13, 15, 16, and 19 show the duties of the registering officer. When his Court was re-opened, he should simply have adjudicated upon those objections which were put before him on the 22nd April.

Mr. Molteno, for the respondents Mostert and Matthews: The Field-cornet did not exercise any judicial functions on the first occasion of his sitting. Having failed to decide *in initio* upon the objections, the list of names was void *ab initio*. The only

course was to begin the registration *de novo*. The applicants could not be prejudiced, as they had full notice. The magistrate has to use a judicial discretion in revising and amending the list. If he knows that a certain person is a convicted thief or a minor he should not allow his name to remain on the list on the ground of his own knowledge. But the Court is now asked to put on the list of voters dead persons, illiterates, and others not entitled to be there.

Mr. Ward appeared for the Revising Officer.

Mr. Graham in reply.

[De Villiers, C.J.: I should like to test the real position of the Revising Officer. If he sees on the list the names of people whom he has sentenced, can he not remove them?]

He has that power under the new Act (Act 48 of 1899), but not under the old Act under which this registration took place.

[De Villiers, C.J.: I find it difficult to make any order in the nature of a *mandamus* unless the applicants can make out a *prima facie* case, that they are entitled to be placed upon the list.]

The applicants make out a *prima facie* case by showing that they were upon the provisional list.

The Revising Officer, in dealing with the objections dealt illegally — they were illegally lodged, and the applicants should be placed now in the same position in which they were before.

De Villiers, C.J.: The 25th section of Act 9 of 1892 enacts that the Civil Commissioner "shall finally determine all questions brought before him, and revise and amend the voters' list according to law." This enactment does not exclude the jurisdiction of this Court to correct any illegality committed by the Field-cornet or Civil Commissioner, but, as was pointed out in *Moll v. Civil Commissioner of Paarl* (14 S.C.C. 468), there must be clear proof of the existence and continued infringement of an absolute legal right. In the present case the applicants have not made it perfectly clear that they possess the qualifications required by law, and yet they ask the Court to direct the Civil Commissioner to place their names upon the voters' lists. There have been irregularities on the part of the Field-cornet, but that fact does not justify the Court in placing on the list the names of persons not entitled to be placed there. Suppose, for instance, that any of the applicants are disqualified by reason of being minors or convicted persons, the mistake of

the Field-cornet would not remove their disqualification. The Court must therefore refuse the application in the form in which it has been presented.

On the other hand it seems to be clear that the original irregularity of the Field-cornet led the applicants into the belief that the second Revising Court was illegal, and that they were not bound to appear before it to answer the objections raised to their names after the time first fixed by the Field-cornet had expired. The irregularity of the Field-cornet consisted in sending all claims and objections to the Civil Commissioner, instead of deciding them himself, before or at the date thus fixed. The Civil Commissioner, acting on instructions received from the Colonial Secretary, directed the Field-cornet to fix another date for deciding upon objections in terms of the 15th section of the Act. On the day thus fixed a large number of fresh objections were lodged with him, including objections to the applicant's names. The Field-cornet allowed some of the objections, and disallowed others. Subsequently the Civil Commissioner held a Revision Court, at which the applicants did not appear on account of its supposed illegality. He accordingly allowed the objections, and the applicants now apply in substance for an order directing him not only to re-open the Court, but also to re-insert their names. For the reasons already stated, the latter portion of the application cannot be granted. At the same time I consider that an opportunity ought to be given to the applicants to prove their qualification, and, if they succeed, to have their names re-inserted. There was an undoubted irregularity at one stage of the proceedings, and if, in consequence of such irregularity, they abstained from appearing before the Revising Court in the belief that their names could not be legally struck out, they ought not to be deprived of the opportunity of proving their qualification. The Court will, therefore, order the Revising Court to be re-opened for the purpose of inquiring into and deciding upon their right to have their names re-inserted in the voters' list. As to the costs of this application, the Court will be in a better position to decide after the Civil Commissioner has finally settled the lists.

Buchanan, J., concurring in the judgment, said: This is the only thing that can be done considering the complicated and irregular proceedings which have taken place in this case. That there have been irregularities is admitted on both sides, but

there is no doubt that under the different statutes the decision of the Civil Commissioner as Revising Officer as to the claims of persons to be placed upon the list is final, although there is a certain right of review by the Supreme Court in case of irregularities. A number of points have been raised in the case, which in view of the decision need not be discussed.

Laurence, J. P., also concurred.

Mr. Graham said that to prevent any further application he presumed that the qualification to be placed upon the list would be the qualification under the law which existed at the time the provisional list was framed.

De Villiers, C.J.: I think so; I think the parties should be as nearly as possible placed in the position they would have been in if due inquiry had been made at the time.

[Applicant's Attorneys, Messrs. Van Zyl & Buissinné; Attorneys for the respondents, Messrs. Mostert & Matthews; Attorneys for the Revising Officer, Messrs. J. & H. Reid & Nephew.]

SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), the Hon. Mr. Justice BUCHANAN, and the Hon. Mr. Justice LAURENCE.]

REGINA V. JANSEN AND { 1900.
COETZEE. { Jan. 23rd.

Buchanan, J., said: A case has come before me for review in which Isaac Jansen and Johannes J. Coetzee were charged with stealing a sheep, and further with contravention of section 25 of Act 35 of 1893 by entering an enclosed kraal with intent to steal stock. The kraal of Steyn, mentioned in the second charge, is the one from which prisoners stole the sheep mentioned in the first charge. There was only one entering of the kraal, but the Magistrate by splitting up the charge has been able to pass a sentence on the two charges, exceeding his jurisdiction. The second conviction will be quashed.

REGINA V. ADAMS AND OTHERS.

Laurence, J., said: There is a case from the Resident Magistrate of Ladismith, in which three persons, Willem Adams, sen., Henry Adams, and Kaviat, were charged with stock theft, in that they stole a goat and a calf. The evidence shows that certain portions of the animals were found in the hut occupied by the prisoners, and on certain statements made by Adams, sen., the prisoners were brought up for preliminary examination and committed for trial. The case was remitted by the Attorney-General, and Adams, sen., was called to give evidence, and he then repudiated his former statements. Afterwards, however, he was recalled, and on this occasion he said that his original statements were correct. It seems that this man is very feeble-minded, and to a certain extent an accomplice. However, so far as the prisoner Henry Adams, the son, is concerned, there are certain other suspicious circumstances, but with regard to Kaviat, there is no evidence against him except that of Adams, sen., and the old man himself admitted that what he heard was from his own son. Henry Adams and Kaviat have been convicted and sentenced, but while the sentence against the former will be confirmed, the case against the latter will be quashed.

IN THE MATTER OF THE PETITION OF
BENJAMIN WILLIAM JANDRELL.

Mr. McGregor moved that the rule *nisi* granted under the Derelict Lands Act be made absolute.

Granted.

STORMONT AND OTHERS V. MZIMBA AND
OTHERS.

This was an application for the rule *nisi* granted upon October 13, calling upon one Makatiele to show cause why he should not hand over certain books, papers, and documents in his possession belonging to the late congregation of the Free Church of Scotland at Lovedale to be made absolute, and also for an order upon the respondents to pay the costs standing over from October 13.

Sir Henry Juta, Q.C., appeared for the applicants.

Mr. McGregor for the respondents.

Affidavits were read showing that the books and documents had been burned in a fire which broke out in Makatiele's hut during his absence.

It appeared that this case was first heard in November, 1898, when applicants applied for an interdict restraining the respondents—Mzimba, Kala, Mabekwa, and Sihawu—from parting with the books and documents in question, as well as a sum of money. The defendants then filed long affidavits, but in them they did not say they had got the books, but set up the case that the applicants had got no *locus standi*. Ultimately in October, 1899, it was alleged that one Makatiele had the books, and thereupon the Court granted a rule calling upon him to show cause why he should not hand them over, while the question of costs was ordered to stand over.

The Chief Justice: There is no notice of motion about costs.

Mr. McGregor, for the respondents, said there was not, but he appeared for Mzimba and the other three original respondents on the question of costs.

Mr. McGregor: On the 12th October, 1899, the Court declined to commit,

Mr. Justice Buchanan: Because the respondents said Makatiele had the books.

Mr. McGregor: There was negligence on the part of the applicants in not proceeding against them.

De Villiers, C.J., said: On October 13 the Court ordered the rule to be discharged, but the question of costs was ordered to stand over. At that time the Court was not in a position to decide whether the respondents, although not technically guilty of contempt of Court, had not been guilty of such conduct as would justify the Court in making them pay the costs. Every fact that has since come to the notice of the Court tends to strengthen the view that those original respondents ought to pay the costs. It is not necessary to repeat what I have said in the course of argument, but their conduct is such that it borders upon contempt of Court, even if technically it does not amount to that. The question of the costs was ordered to stand over. Strictly speaking, there ought to have been a motion; but as it appears that counsel have come prepared to argue this question of costs, no injustice can be done now in ordering that the costs, ordered to stand over from October 13, shall be paid by respondents. Then on October 13 there was a further order that a rule be issued, operating as an interdict, calling upon Makatiele to show cause why he should not be ordered to hand over to the applicants all the documents in his possession relating to the late

congregation at Lovedale. That rule was served upon him on October 21, but he says he left home on October 24, and during his absence the books were burned. *Prima facie* there is evidence now that these books have been destroyed, and it is impossible to order that the books that have been destroyed should be handed over to the applicants. The only other question is the costs of this application against Makatiele, and seeing that no notice has been served as to costs, the Court can hardly order respondent to pay them. Therefore there will be no order as to costs on this point, and the order of the Court will be that the original respondents pay all costs except those of the rule against Makatiele, as to which each party must pay his own costs.

Buchanan, J., concurred, but pointed out that the affidavits with regard to the burning of the books, &c., were not nearly so full and satisfactory as they ought to have been. No explanation was given as to the cause of the fire. If the rule *nisi* had claimed costs against Makatiele he should certainly have given them, and it was only owing to a technical objection that costs could not be claimed.

[Applicants' Attorneys, Messrs. Innes & Hutton; Respondents' Attorneys, Messrs. Walker & Jacobsohn.]

HUNTER V. TRAMWAY COMPANY.

Mr. Graham, Q.C., moved the Court to fix a day for the trial of the above cause by a jury under section 27 of Act 33 of 1891.

The Court fixed February 13 as the day for the trial.

IN THE MATTER OF THE CAPE
OF GOOD HOPE PERMANENT
BUILDING, LAND, AND IN-
VESTMENT SOCIETY, LIMITED, } 1900.
IN LIQUIDATION. } Jan. 23rd.

Mr. Searle, Q.C., moved for the confirmation of the supplementary second report of the liquidators in the above society. (See 9 Sheil, p. 421.)

On behalf of one of the shareholders, Parker's objection was raised to the amount of remuneration (£3,000) proposed to be given to the liquidators, and it was contended among other things that on clerical work £392 had already been expended by the liquidators out of the assets, and further, that a sum of £255 paid to them as special auditors for an investigation they had pre-

viciously made into the affairs of the society ought to be taken into account in assessing the amount of their remuneration.

On behalf of one Bond, a depositor in the society, objection was made to the manner in which it was proposed to distribute the assets among creditors. It was contended that his deposits, to the amount of £3,700, were made in 1894, before Hancock had anything to do with the society; that his money had gone to the benefit of the society, and must be taken as forming part of the assets of the society. He therefore claimed a preference over those depositors whose deposits had not gone to the benefit of the society, but had been misappropriated. It was pointed out that in 1894 the total amount the directors were empowered to borrow was £47,389, while they had actually borrowed £61,000.

Sir H. Juta, Q.C., appeared for Parker; and Mr. Joubert appeared for Bond.

Sir H. Juta, Q.C., was heard for the applicant Parker

Mr. Joubert: If it can be proved that the society got the benefit of all Bond's deposits, he should be placed on a better footing than those who afterwards became depositors.

The Chief Justice: That would be a very good reason for arguing that the others should not receive anything at all, but no reason for giving him a preference.

Mr. Joubert: That is the reason the liquidators give for putting them all on the same footing. From the report itself it would seem that some of the depositors can be traced whose deposits did not go into the society's funds at all. The Court, in its judgment given in October, 1893, referred to the statement for the year 1897. That year must not be taken into consideration in connection with Bond's deposit. The year in which the deposit was made must be considered. If 1894 is taken it will be seen that the over-borrowing was not what it was in 1897.

The Chief Justice: But almost from the commencement of the society it has exceeded its borrowing powers. If it has done so at all the borrowing from Bond is illegal.

Mr. Joubert: It is illegal only in proportion to the extent to which the society has over-borrowed.

Mr. Searle, Q.C., for the liquidators: The only ground on which Bond could claim, if that could be shown, is that the society had not overdrawn at the time of the deposit.

De Villiers, C.J., said: The only questions remaining to be decided upon as to the report of the liquidators are: First, as to

what the remuneration of the liquidators should be, and, secondly, whether Mr. Bond, one of the objectors to the report, is entitled to preference over the other depositors. As regards the liquidators, I think that 5 per cent. of the whole of the assets would be fair remuneration to them. That would amount to about £3,000 on the whole of the assets, but then out of that amount the liquidators would have to pay for clerical expenses, which seem to have already cost the estate an amount of £892, and there would probably be more. However, assuming that there might be something like £500 for such expenses, there would still be owing to the liquidators about £2,500, and we are of opinion that seeing the liquidators have charged the estate with clerical expenses, the Court should now award the liquidators a sum of £2,500. As to Mr. Bond's claim, I do not see that he has shown any cause for giving him preference over other depositors. At the time when he made his deposit there was already an excess. The directors had already exceeded their borrowing powers, and he therefore stands in no better position than any other creditor. It is said that the money he has paid has gone to the benefit of the society, but presumably that is the case with all the other depositors. Then although he deposited in 1894, it is quite probable that some of the funds he deposited were those which were misappropriated, so that at all events there is no ground for giving him a preference over other creditors, although of course if it could have been shown that the deposit of any particular person did not go into the society at all, that might have been an objection against the claim of such person. That has not been shown, and the Court will confirm the report of the liquidators, and award the liquidators a sum of £2,500, the costs of both Parker and Bond to come out of the estate.

Buchanan and Laurence, J.J., concurred.

[Attorneys for the Liquidators, Messrs. Sauer & Standen; Attorneys for Parker, Messrs. W. E. Moore & Son; Attorney for Bond, C. W. Herold.]

IN THE MATTER OF THE PETITION OF JAMES COOK RIMMER.

Mr. Jones moved that the rule nisi granted under the Derelict Lands Act be made absolute.

Granted.

IN THE MATTER OF THE PETITION OF
JOSEPH THOMPSON AND OTHERS.

Mr. Upington moved that a certain award be made a rule of Court.
Granted.

MCDONALD V. LOWIER.

Mr. Close moved that the rule *nisi* granted in this matter be made absolute. The rule was granted on December 12 last, and called upon the respondent to show cause why she should not, as co-executrix of the estate of the late David du Plessis, sign the necessary distribution and liquidation account of the estate, or otherwise to show cause why she should not be removed from the said office of co-executrix.

The rule was made absolute.

FAIRBRIDGE V. SOUTH AFRICAN { 1901.
NEWSPAPER COMPANY. { 23rd Jan.

Winding up — Company — Carrying on business at a loss.

The fact that a Company is carrying on business at a loss is not sufficient to justify its being wound up by the Court, although it is an important ingredient in the decision of the question whether circumstances exist which make it just and equitable that the winding up should take place.

This was an application by W. G. Fairbridge for an order placing the South African Newspaper Company (Limited) in liquidation.

Sir Henry Juta, Q.C., appeared for the applicant.

Mr. McGregor appeared for the South African Newspaper Company, and objected to the petition being heard, on the ground that due notice of the motion had not been served on the respondent company.

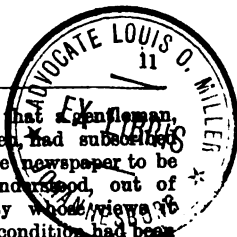
Sir Henry Juta objected to any statements made on instructions, there being no affidavit.

De Villiers, C.J., said: For the present Mr. McGregor has no *locus standi*, but we can proceed to hear the petition, and then if it is found that the case is one in which notice should be given, we can make an order.

Sir Henry Juta said that notice had been given to the secretary of the company, and this objection came as a surprise to the ap-

plicant, because he understood the respondents were going to appear, and no question had ever been raised about the notice.

The Court then proceeded to hear the application. The petition was to the following effect: The petitioner resides at Sea Point, and is one of the original shareholders in the South African Newspaper Company (Limited), which company was registered in the office of the Registrar of Deeds at Cape Town on the 5th day of November, 1898, with a capital of £30,000 divided into 30,000 shares of £1 each, whereof 24,000 shares have been subscribed. Petitioner holds 100 original shares, on which he has paid £100. One of the objects of the company was to publish newspapers, and the company has from about May last published a newspaper styled the "South African News." On the 27th December last a special meeting of the company was held at the offices thereof for the purpose of considering its position. At that meeting a statement of the affairs of the company was laid before the shareholders by the directors, the chairman being Mr. Alexander Mair, showing that the company had been conducted at a loss. Petitioner gathered at the meeting that the assets of the company were valued at £16,783, whilst the liabilities were £23,075, showing a deficiency of £6,292. This had been incurred in eight months. The manager also stated that the monthly loss at that time was £800. It was also stated that the company would be able to continue publication of the "News" for the present, as it had a balance at its bankers of upwards of £5,000. Petitioner applied for an inspection of the report and accounts, and was told that the request would be considered at a meeting on January 9, when an inspection would be too late for the purposes of the application. Petitioner can, however, say of his own knowledge that the operations of the company were not successful, mainly owing to the fact that it had failed to attract advertisements. It was resolved at the December meetings to leave the management of the paper in the hands of the directors, and the result has been that the paper has been reduced from a double sheet of eight pages to a single sheet of four pages, and only about one-third consists of advertisements. It is well known that it is the advertisements alone that enable a daily paper to be conducted otherwise than at a loss, and the petitioner maintains that a company which has lost so large a propor-



tion of its capital in so short a time must be considered as on the verge of insolvency, and that if it be continued longer in all possibility the only result will be the loss of the remainder of its capital. It is clearly in the interests of shareholders that the company should be liquidated, and it would not be just or equitable to allow it to be carried on to the loss of shareholders. If it were now liquidated, and the assets were realised, a considerable dividend might be paid. When at the meeting petitioner expressed his opinion on the financial position of the company, he was met by remarks from some of the other shareholders to the effect that it was a matter of indifference whether the company was successful financially or not; that it represented certain views and a certain party which they professed or supported, and that they, or some of them, were willing to spend more money for the purpose of continuing the "South African News." What those views of that party were was not stated, and the petitioner would prefer not to hazard a guess on the subject. Petitioner has taken up the only ground which appears to him to be a proper one, namely, that of dealing with the financial position of the paper. Inasmuch, however, as the majority of the shareholders represented at the meeting appeared to be of opinion that the company should be continued for the purpose of publishing a newspaper which was stated to be the organ of their party and to express their views, the petitioner was compelled to express his dissent from the position taken up, and to inform the meeting that inasmuch as the "South African News" did not express the views held by him, he desired that the company should be wound up. Petitioner is aware that it might be contended that the political views and opinions of himself or any other shareholder of the company have no concern in the present application, but he desires to put the facts before the Court, because he anticipates that the only real ground of opposition to the application is the allegation that the majority of shareholders are more concerned with carrying on the newspaper than regardful of their pecuniary interests as shareholders. As a fact the greater number of shareholders have no power of carrying their wishes into effect. The meeting of December 27 was convened to alter the articles of association so as to give each shareholder one vote for every share held by him. It was ex-

plained by the Chairman that a gentleman, whose name was not given, had subscribed 12,000 shares to enable the newspaper to be started, as petitioner understood, out of sympathy with the party whose views he was to express, that this condition had been overlooked in drawing up the articles of association, and that it was only just that they should be altered to meet the condition. The resolution was carried. The 12,000 shares are registered in the names of nominal holders who, with the assistance of a single other shareholder, could appear and vote and carry any resolution depending on a majority of votes. Petitioner has set forth the above facts in order to show that the desire of certain shareholders to continue the company was not based on a reasonable belief that it would be advantageous to do so, but, apparently, solely on political motives which they were not entitled to rely on in the case.

An affidavit was produced showing that a copy of the petition had been duly served upon the secretary of the respondent company.

Sir Henry Juta, for the applicant: The fact that the company has been carried on at very great loss is sufficient for the petitioner to ask that it be wound up. The only possible ground on which it can be said that a shareholder has no right to ask that the company be wound up is that there would be no benefit to him, but in this case it is clear that the shareholder will receive considerable benefit, because according to the statement at the meeting there is £5,000 in cash, and it is supposed that the shareholders will carry on till that has all gone and then wind up the company themselves. The deficiency shown is, of course, calculated upon the basis that the amounts paid in by shareholders figured as a liability, and there is nothing to show there were other liabilities. The English cases show that a strong case must be made out for winding up where it is alleged that the company is insolvent. But where the shareholders can get something out of the liquidation there is a good reason for winding up the company. It has been losing heavily for months, and has had to reduce its size from eight pages to four. From a business point of view it is as fair and equitable a case for winding up a company as could be put before a Court.

Laurence, J.: Generally newspaper ventures do not pay at first.

Sir Henry Juta : According to the memorandum of association, the company was started not only to carry on a newspaper but other business, such as printing, lithographing, &c. There are no counter allegations to the effect that the company is recovering its position, and it is a question whether a shareholder is to wait until the whole capital is gone before he moves. Surely he is entitled to come into the court before then. It might be said that the applicant is a single shareholder, and that the others are not with him, but as stated in the petition, the others took up the position that they were willing to lose their money already put in, and more, as it suited their views. If they are willing to lose their capital, or all their money, let them do so, but first let them pay out the shareholders who object.

Mr. McGregor, for the respondents : All newspaper ventures are speculative. There is nothing to show that the paper will not ultimately become profitable. No grounds have been alleged for winding up the Company under the Companies' Act of 1892. The shareholders do not complain of the position of the paper.

De Villiers, C.J. : The grounds on which a company may be wound up by the Court are stated in the 135th section of the Companies Act of 1892. The first is whenever the company has passed a special resolution requiring the company to be wound up. Nothing of the kind has been done in the present case; on the contrary, there appears to be an overwhelming number of shareholders in favour of continuing the business of the company. The second and third grounds also do not apply. The fourth ground is inability on the part of the company to pay its debts, but there is no proof whatever that the company is unable to pay its way as a going concern. The fifth ground, which is the one on which the petitioner mainly relies, is "whenever the Court is of opinion that it is just and equitable that the company should be wound up." It is said that as the company is a losing concern it would not be just and equitable to allow it to be carried on to the loss of shareholders. On the other side, it is contended that the shareholders are the best judges as to what is just and equitable to themselves, and that the fact of a newspaper company not making any profits within the first eight months of its existence is no proof that it will not ultimately become profitable to the shareholders. There is much force in this contention. It certainly was never intended

by the Legislature, in conferring on the Court the wide powers just mentioned, that the Court should arbitrarily interfere with the management of commercial companies. Unfortunately, political considerations have been introduced into the case, which tend to obscure the real issue. If it had been an ordinary mercantile concern, say, a grocery business, it would have been obviously inexpedient for the Court to interfere against the wishes of the great bulk of the shareholders, merely because the business has not become profitable within the first few months. But the inexpediency of interfering is even greater in the case of a newspaper company, which, as remarked by my brother Laurence during the argument, seldom makes a profit within a short time after its formation. Fortunately, the Court has no concern with the political questions raised by the petition, and the case has been fairly argued by counsel on both sides from the commercial and legal points of view only. The mere fact that a company is carrying on its business at a loss is not sufficient to justify its being wound up by the Court, although, of course, it is an important ingredient in the decision of the question whether circumstances exist which make it just and equitable that the winding up should take place. Under all the circumstances of the present case, I am of opinion that the application must be refused.

[Applicant's Attorneys, Messrs. Fairbridge, Arderne & Lawton; Respondent's Attorneys, Messrs. Sauer & Standen].

KOTZE V. CIVIL COMMISSIONER } 1900.
OF NAMAQUALAND. } Jan. 23rd.

Transfer duty — Option — Purchase price.

The applicant sold to O. the option of purchasing a farm, on condition that "if the farm is ultimately bought, the price is to be £11,500, but in the meantime O. is to pay into the hands of a third party a lesser sum as the price of the option; the applicant to transfer the farm to O. who is to retransfer it if the option is not exercised."

Held, that the transfer duty payable upon such transfer to O. must be calculated upon the full purchase price of £11,500.

This was an application, on notice, that the first-named respondent would be required to show cause why he should not be ordered to assess and receive the transfer duty payable upon the transfer of the farm Nigeraamoep, in extent 8,714 morgen 397 square roods, situated in the division of Namaqualand, from the applicant to one Francis Oats, and why he should not be ordered to pay the costs of the application.

The facts were briefly these: Kotzee, the applicant, having discovered indications of a copper mine upon his farm Nigeraamoep, entered into an arrangement with Oats to prospect upon the farm, and gave him the option for one year to purchase it for £11,500.

In consideration of this option, Oats agreed to pay the sum of £2,000 to Kotzee and Dorrington, and deposited £1,900 with an independent party, to be paid over upon transfer being passed to him of the farm.

Kotzee undertook to effect transfer forthwith to Oats of the farm, upon condition that in the event of Oats declining or neglecting to exercise his option to purchase the farm he should be bound and obliged to re-transfer the farm to Kotzee at the expiration of the period for which he held the option.

Declarations setting forth the above arrangement were signed by Kotzee and by the agent for Oats, and these declarations, together with £14, the duty payable on the value of the farm, as assessed by the Divisional Council, viz., £700, were tendered to the first-named respondent, but he declined to receive or assess the transfer duty. Kotzee alleged that he was being put to great inconvenience and loss by being kept out of the £1,900, which would not be paid over until he had passed transfer of the farm to Oats. Copies of the correspondence which had passed between the applicant's attorneys and the Civil Commissioner and the Treasurer-General were put in.

The position taken up by the Acting Registrar of Deeds was that transfer could not be passed until the transfer duty had been paid, but that the time had not yet arrived for the actual payment of the same.

Sir H. Juta, Q.C., appeared for the applicant; Mr. Ward appeared for respondents.

Sir H. Juta, Q.C. (for the applicant): The practice of registering options is not in use in the Deeds Office. The position is this. Here is an agreement to transfer property. The Registrar says he will not pass transfer unless duty is paid. The Civil Commissioner will not assist by assessing transfer duty.

Neither of the officials will do his duty. The applicant cannot say what duty is payable.

The Chief Justice: It should be on the full purchase price.

Sir H. Juta: There is no purchase price. A man can transfer on any terms he pleases. The Transfer Act of 1884, section 7, contemplates a conditional sale. Applicant was entitled to transfer his property. The second and third sections of Act 5, 1884, prescribe no form as to how the declaration under that Act is to be made.

Mr. Ward, for the respondent: The real question is as to the transfer of the options. The question has been raised in more forms than one, but in all of them the object is to secure the purchaser. This is not a conditional sale at all under section 6 of the Act of 1884. If it were so, that could not help the applicant, because full duty should be paid, to be repaid if the conditions fall through. The Registrar of Deeds takes the objection that this is no transfer of property at all, and that what he is asked to do is really to register an option in favour of a person, to protect that person. The Court will not allow immovable property to be transferred into the name of a person who is not the proprietor, and whom it is not intended to make the proprietor, and who has none of the attributes of proprietorship. Section 16 of the Act provides that once a valuation has been made the Government is bound by it.

Sir H. Juta, Q.C., in reply: There is no illegality about such a transfer. The transferee is the owner for the period of the option. If he does not purchase at the end of the period he is no longer owner, and can be compelled to re-transfer. By section 13 of the Act the Government must assess the property.

De Villiers, C.J.: It would be an undesirable innovation in the practice of the Deeds Office to allow the present application. The applicant has sold to Oats what is called an "option" for the purchase of a certain farm. If the farm is ultimately bought the price is to be £11,500, but in the meantime Oats is to pay into the hands of a third party a lesser sum as the price of the option, and the applicant is to transfer the farm to Oats on condition that it will be re-transferred to the applicant if the option is not exercised. The question is what transfer duty is to be paid upon the transfer to Oats. The applicants say it should be the amount of the Divisional Council valuation; the respondents say it should be the price to be

paid if the option is exercised. I cannot agree in the view that an option is capable of formal transfer and registration in the Deeds Office. It is a personal contract, giving the purchaser of the option the right to purchase the farm for a certain price, and until the farm is purchased there is no real right which is capable of registration. If the parties insist upon a transfer and registration before the option is exercised it can only be upon the basis of a purchase at the price agreed upon, viz., £11,500. If they refuse to pay transfer duty upon this sum, they must do without a formal transfer until the property is bought out and out. The application to compel the respondents to assess and receive transfer duty must therefore be refused with costs.

Buchanan, J., and Laurance, J., concurred.

[Applicant's Attorneys, Messrs. Tredgold, McIntyre & Bisset; Respondents' Attorneys, Messrs J. & H. Reid & Nephew.]

SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), the Hon. Mr. Justice BUCHANAN, and the Hon. Mr. Justice LAURENCE (Judge-President of the High Court of Griqualand West.)]

VAN RYN V. VAN RYN. { 1900.
Jan. 24th.

Mr. Molteno said that in this matter the Court had, on October 12, granted leave to sue by edictal citation, the return day being fixed for December 12. Personal service had been effected, and he now asked for leave to serve intendment and notice of trial.

Granted.

IN THE MATTER OF THE PETITION OF MATHYS GERHARDUS HERMAN, IN HIS CAPACITY AS TRUSTEE DATIVE OF THE ESTATE OF THE LATE JURIN JOHANNES HERMAN.

Mr. Burton moved that the rule nisi granted under the Derelict Lands Act be made absolute.

Granted.

IN THE ESTATE OF THE LATE { 1900.
WILHELM HERMANN REMY. { Jan. 24th.

Husband and wife—Marriage in England—Death of husband in the Colony—53 and 54 Vict., c. 29.

R. married in England in 1872, but in 1877 came to the Cape Colony and died here intestate in 1891. The proceeds of his estate having been paid into the Guardians' Fund,

The Court on the application of his widow, who had remained in England, granted a rule nisi calling on all concerned to show cause why the said proceeds should not be paid to her in terms of 53 and 54 Vict., c. 29

The petitioner was Louisa Ann Remy, of Southsea, London, and her petition was to the following effect: That on November 26, 1872, petitioner was married in London to one Hermann Wilhelm Remy, a commercial traveller residing at 59, Doughty-street, London, and they lived together as man and wife in London until the year 1877. In March, 1877, the said H. W. Remy left petitioner without giving any intimation of his intention so to do, and she heard nothing whatever from him until in the month of September following she received a letter from him dated August 26, 1877, and bearing the Cape Town postmark, in which he stated that he had left her owing to family differences. Petitioner did not reply to that letter, and heard nothing more of the said H. W. Remy until the month of May, 1898, when her attention was drawn to a notice which appeared in the "Government Gazette" of the Cape of Good Hope, calling upon all persons having an interest in the estate of the late Hermann Wilhelm Remy to transmit their claims to the Master of the Supreme Court. The petitioner had since ascertained that the said Hermann Wilhelm Remy died intestate at Cape Town on January 1, 1891. She then formally applied to the Master of the Supreme Court to have her share of the proceeds of the estate paid to her, but the Master had informed her that he would not do so without an order of the Supreme Court. There were no children of the marriage between H. W. Remy and petitioner, and to the best of her

knowledge and belief the said H. W. Remy had no surviving relations. Wherefore the petitioner prayed that their lordships would be pleased to grant an order authorising the Master of the Supreme Court to pay to her one-half of the proceeds of the said estate.

Mr. Bisset for the petitioner: Petitioner claims on the ground that under the English law of succession she is entitled to one-half share of the estate, her husband at the time of his death being still domiciled in England, having never lost his domicile there. As a matter of fact, she is really entitled to more than she claims. The estate is worth £689. See *Brett's Commentaries* (Vol. I, p. 341) as to the English Intestate Act of 1890. The petitioner was apparently not sure under which law she would have to claim—English or Colonial. Under the Statute of Distributions of Charles II. she would have been entitled to one-half of the residue as well as the sum claimed.

The Court intimated that it would be necessary to appoint an executor, but the Master of the Supreme Court, on being called, said that an executor had been appointed at the time, although the present application to the Supreme Court was necessary owing to the money having been paid over to the Guardians' Fund.

The Court granted an order calling upon all concerned to show cause by April 12 why the Master should not be authorised to pay the petitioner out of her deceased husband's estate the sum of £595 17s. 2d., with interest, in terms of the provisions of the English Act 53 and 54 Vict., c. 29, the rule to be published twice in a Cape Town newspaper and twice in the London "Daily Telegraph." Leave was given to mention the question of costs when application was made to have the rule made absolute.

DAWSON V. DAWSON.

Mr. Benjamin moved for an extension of the return day in this matter until April 12, on the ground of the irregularity of the mail service to Rhodesia.

The extension of the return day was granted as prayed.

KNUPPEL V. KNUPPEL.

Mr. Benjamin applied in this case for an extension of the return day and for substituted service. Counsel stated that a return had been made by the secretary of the British Consulate at Berlin which stated with regard to the matter of service that

there were two places of the name of Brandenburg in the Prussian Empire, and although inquiries had been instituted in both these places, and diligent search made, they had been unsuccessful in finding the respondent O. W. Knuppel and effecting personal service on him.

The Court granted an extension of the return day until May 1, and authorised substituted service by one publication in a widely-circulating newspaper published in Berlin. Leave was also given to serve intendment and notice of trial at the same time.

IN THE MATTER OF THE PETITION OF HENDRIK JOHANNES LOUW DU TOIT.

This was an application for an order authorising the Registrar of Deeds to pass transfer of certain property.

The petitioner stated that he was the Rev. H. J. L. du Toit, of Lichtenburg, South African Republic, and was the registered owner of certain property situated at Stellenbosch, part of the farm Krom River, and also part of the property transferred to one Daneel in 1887, and also owner of certain lots in the newly-established village of Dutoitsville, and he had borrowed from his father-in-law the sum of £2,250 secured by a mortgage of this property. Certain portions of the land had been sold, and as several of the purchasers were now pressing, it was desired to pass transfer, but before that could be done it was necessary to produce to the Registrar of Deeds the original bond. The mortgagee when last heard of was at Potchefstroom, and had forwarded a power consenting to transfer being passed, but had omitted to forward the said original bond and now it was impossible to communicate with him. A portion of the purchase money for the land sold, and which it was desired to transfer, had already been paid to Du Toit, and if transfer was passed the petitioner was prepared to leave the rest of the purchase money in the hands of the Court until communication was restored, and the bond could be produced. Affidavits were also put in showing that the land remaining was valued at from £8,000 to £10,000.

Mr. Searle, Q.C., appeared for the applicant.

The order was granted as prayed, the balance of the purchase money to be paid into court.

ISAACS AND CO. V. DE MARILL : C.

This was an application for an order (a) restraining the respondent from transferring or otherwise alienating certain mining rights and leases, and (b) for the appointment of a receiver in the matter to take and hold the aforesaid leases, &c., pending an action to be instituted to define the rights of parties.

Mr. McGregor appeared for the applicant.

Mr. Graham, Q.C., appeared for the respondent.

It was stated that only the first portion of the claim was pressed at present, the parties having agreed that the second (b) should stand over until February 1.

Mr. Graham asked that the applicants be bound to go to trial during next term.

The Court granted the first portion of the prayer as desired, and allowed the second, portion to stand over until February 1, the applicants to go to trial by next term, with leave, however, to apply for a postponement if necessary, costs of the application to be costs in the cause.

IN THE MATTER OF THE PETITION OF
HEINRICH BERNARD WILHELM MEYER.
Cancellation—Lost Bond.

Mr. Benjamin moved for the cancellation of a certain bond for the sum of £1,100 passed in favour of the late Ludwig Henry Goldschmidt, which hypothecated certain landed property at Plumstead. It was stated in the petition that this bond had been duly paid off, but Meyer had neglected to have it cancelled. Some years after it had been paid a fire occurred in petitioner's house, during which the papers were removed for safety, and it was believed that during that removal the bond was lost. Application had been made to the Registrar of Deeds for the cancellation of the lost bond, and due notice had been given in the "Cape Argus" and the "Government Gazette." No objection had been raised, and the usual declaration had been made, but the executor of Goldschmidt could not sign the declaration, as he said he knew nothing about the bond. Thereupon the Registrar of Deeds declined to grant the cancellation without an order of Court.

Order granted as prayed.

MAGININDONA V. MAGININDONA. } 1900.
} Jan. 24th.

Edictal Citation—Summons—Service.

Where M had left her husband and resided with her parents at the Paarl, but had since left that district, and had been traced as far as Robertson,

The Court refused leave to sue her for divorce by edictal citation, but ordered service of summons on her father.

Mr. Benjamin moved for leave to sue in this action by edictal citation. The petition showed that the parties were married on June 21, 1892, in the Wesleyan Chapel, Cape Town, and afterwards lived together in Bree street, Cape Town, until September, 1896, when the respondent (the wife) left petitioner, and went to reside with her parents at the Paarl. When leaving, she said she had no intention of returning, but petitioner did not think she was in earnest. The petitioner went on to allege that respondent had since become intimate with one Thomas, and had lived with him as his wife. Afterwards she left the district, and nothing had been heard of her since, although on one occasion her brother had searched for her as far as Robertson.

Mr. Benjamin, for the applicant, said respondent had been traced as far as Robertson.

De Villiers, C.J.: The difficulty is that there is no proof that this woman has left the jurisdiction of the Court, and therefore she cannot be sued by edictal citation. However, there ought to be some means of serving notice upon her, and as the last place where she was known to reside was the house of her parents, the Court will order service to be made upon her father. Service of summons and subsequent process will therefore be left with her father.

IN THE MATTER OF THE MINOR COYNE.

Mr. Gardiner moved for an order authorising the Master to make certain payments towards the minor's education. The petitioner was the tutor dative, and it was desired to pay for the education of the minor, as a boarder at the Grammar School, King William's Town, out of his inheritance of £741 17s. 6d.

The Master's report was favourable, and the Court granted the order as prayed.

IN THE MATTER OF THE PETITION OF RICHARD TILLARD, CIVIL COMMISSIONER OF FORT BEAUFORT, IN HIS CAPACITY AS CHAIRMAN OF THE BOYS AND GIRLS' PUBLIC UNDENOMINATIONAL SCHOOL OF FORT BEAUFORT.

Mr. Buchanan moved for an order for the registration of certain property granted to the former School Association in the name of the trustees of the present Public Undenominational School.

It appeared that application had originally been made under the Derelict Lands Act, but that application was refused, as the Court required further information.

Mr. Buchanan: An additional affidavit has now been filed.

The Chief Justice: On what grounds do you claim the transfer from the name of the one body into that of the other.

Mr. Buchanan: Partly on the *cy prés* doctrine, and also on the ground that this is practically the same school. See *Ex parte Trustees of Wynberg Infant School* (5 Sheil, 11).

The Court granted a rule calling upon all concerned to show cause by February 15 why the order should not be granted as prayed; the rule to be published once in the "Fort Beaufort Advocate" and once in the "Government Gazette," and also served upon William P. Tyler.

QUEEN V. VERMOOTEN. { 1900.
{ Jan. 25th.

Treason—Bail—Trial.

Application of a prisoner, committed for trial on a charge of high treason, refused on the grounds (1) that there was prima facie evidence of his guilt; (2) that the district in which he resided and was alleged to have committed the offence was still in the occupation of the enemy, and (3) that the Attorney-General opposed the application.

This was an application on notice to the Attorney-General that the Court would be moved for an order in terms of the prayer of the petition, and for authority for the petitioner's release upon such bail as the Court should prescribe.

Mr. Burton appeared on behalf of the applicant.

D

Mr. Sheil, Q.C., appeared for the Crown.

The applicant, Octavius Septimus Vermooten, of Dordrecht, an attorney and notary public, at present confined in the gaol at Queen's Town, deposed, *inter alia*, that on the 26th December last he was arrested at Dordrecht on a charge of high treason.

That on the 1st January inst. a preliminary examination was taken against him, and that he was committed for trial.

That he reserved his defence, and after his committal an application for bail was refused by the Assistant Resident Magistrate, who took the preliminary examination, on the ground that applicant was charged with a capital offence.

That unless he were admitted to bail he would be greatly inconvenienced in the preparation of his defence, owing to the fact that persons whom he intended to call as witnesses on his behalf were mostly refugees from Dordrecht at the present time, and their whereabouts unknown to him.

That upon the invasion of Dordrecht all business arrangements came to a standstill, and he had not the means to remove and support himself and his family elsewhere, and was consequently obliged to remain at Dordrecht. That previous to the said invasion, viz., on the 27th November last, he attended a meeting of the inhabitants of Dordrecht and the district of Wodehouse, at which the Hon. J. W. Sauer, Commissioner of Public Works, was also present, and voted in favour of a resolution, which was duly carried, that the Dutch inhabitants of the said district should remain neutral, and that a committee be appointed to convey a message to that effect to the Commandant of the Republican advancing forces. That he was appointed a member of the said committee, and duly proceeded with the other members thereof to Barkly East, where the said resolution was submitted to Commandant Olivier, of the said forces, and they urged upon him not to enter Dordrecht.

That notwithstanding their efforts, Commandant Olivier did subsequently, on or about the 2nd December, enter Dordrecht and proclaim the district as annexed to the Orange Free State Republic, without any opposition on the part of Her Majesty's Government.

That it was his intention at the trial to prove that Her Majesty's subjects residing at Dordrecht received no protection from her Government, and that he, being of Dutch blood and proficient in the language, was commandeered and forced under

threats of fine and imprisonment to perform some of the alleged treasonable acts sworn to by the witnesses called for the prosecution.

That he had no intention of departing from the Colony but was desirous of being admitted to bail in order to properly prepare his defence and prove his innocence upon his trial, and that he was prepared to find bail in a sum not exceeding £2,000.

Mr. Sheil, Q.C., said he opposed the granting of bail.

Mr. Burton: The granting of bail is a matter which is purely in the discretion of the Court. The question of a presumption as to the prisoner's innocence or guilt does not exist. High treason is not entirely on the same footing as murder. High treason, though a capital offence, is punishable with death only when the crime is extremely gross. It is not necessarily punishable with death. The important point in such cases is the question whether the accused will answer to his bail.

The Chief Justice: Is there not another consideration—namely, that while these troubles, in the disturbed district where the prisoner resides, are going on, there is a danger of his joining the enemy?

Mr. Burton: It is a very strong answer that he remained in Dordrecht after it was evacuated by the enemy.

Mr. Sheil, Q.C., for the Crown: The power of the Court to admit to bail in all cases under section 51 of the Ordinance 40 is not disputed. The Court has absolute discretion in the matter, but it is a discretion which the Court seldom exercises in capital cases, and there is no case in our reports in which a man charged with high treason has been admitted to bail.

In the present case it is clear from the evidence taken at the preliminary examination that the applicant threw in his lot with the Queen's enemies after they had occupied Dordrecht, that he acted as Assistant Landdrost in issuing passes and doing work of a similar nature, and that on the 14th December he was seen under arms coming into Dordrecht with Her Majesty's enemies.

These treasonable acts are not denied by the applicant, but he alleges in defence that he intends to prove at the trial that Her Majesty's subjects residing at Dordrecht received no protection from her Government. This is a defence which no Court will listen to, and as to his second defence, it is clear from the passes issued to the witnesses for the prosecution that the applicant, if he had claimed to be a British subject, might also

have obtained a pass and left Dordrecht. As to the test applied by the Court in considering applications for bail in capital crimes see *Regina v. Steyn Bros.* (2 Juta, 297) and *Regina v. Barronet and Allen* (Dearnly's Reports, 51). As to the English practice in cases of high treason, see *Stephen's History of the Criminal Law*, Vol. I., ch VII., p. 239.

Mr. Burton replied.

De Villiers, C.J.: At this stage I desire to say as little as possible that might prejudice the petitioner's defence, but the matter cannot be disposed of without this remark, that the affidavits disclose *prima facie* evidence of his guilt. The facts disclosed at the preparatory examination are not really denied, but his defence is that he was forced into committing the treasonable acts charged against him. The difficulty is to understand how a person can be forced into doing such things as fulfilling an official position and signing official documents. These and other matters will require explanation at the trial, but in the meantime the question arises whether the petitioner, if let out on bail, is likely to appear for the purpose of undergoing his trial. We cannot lose sight of the fact that the district in which the offence is alleged to have been committed is again in the occupation of the enemy, and that, if the petitioner were released on bail, he might again place himself in the position of being forced into doing illegal acts. Another consideration not to be lost sight of, is that the Attorney-General opposes this application. He has presumably satisfied himself that under the circumstances in which the country is placed there is great risk in allowing the application, and the Court, although, of course, not bound by his opinion, must attach considerable weight to it. The application must be refused.

(Applicant's Attorneys, Messrs. Van Zyl and Buissinné.)

SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), the Hon. Mr. Justice BUCHANAN, and the Hon. Mr. Justice LAURENCE (Judge-President of the High Court of Griqualand West.)]

QUEEN V. MFENGE. { 1900.
Act 37, 1884—Government Notice { Jan 25th.
No. 642, 1899—Native location.

Where an inhabitant of a native location was convicted by a Resident Magistrate on a charge of having cultivated certain ground without having obtained the permission of his headman, and without the approval of the Inspector of Native Locations, by reason whereof he contravened section 2 of Government Notice No. 642, 1899, and it was shown that the accused had cultivated the land since 1880, and was cultivating the land at the time of publication of the regulations, and that the land had been allotted to him by his headman, with the concurrence of his Chief, the Court, on appeal, quashed the conviction.

This was an appeal from the conviction of and sentence passed upon the appellant, Joseph Mfenge, by the Assistant Resident Magistrate of King William's Town at a Court held at Middledrift on the 25th October, 1899.

The appellant was charged with contravening section 2 of the regulations framed under the 29th section of Act 37 of 1884, "in that upon or about the 15th October, 1899, and at or near Penline, in the district of King William's Town, the said Joseph Mfenge did wrongfully and unlawfully, and in a location on Crown land at Penline in the said district, cultivate land not allotted to him by the headman, Joseph Tele, and without the approval of the Inspector of Native Locations."

The regulations were published under Government Notice No. 642 of 1899 on the 5th August last.

Regulation 2, which the appellant was charged with contravening, provides as follows: "It shall be the duty of the headman of each location, subject to the approval of the Inspector, to allot to each inhabitant of such location, whose name appears on the hut-tax register, arable land sufficient for the requirements of the household of such inhabitant, if available, and any person who shall cultivate land not so allotted to him, or who shall enlarge the area or limits of his allotment, without the permission of the Inspector first had and obtained, shall be deemed to have committed a breach of these regulations: Provided that it shall be lawful for any person with the consent of the Inspector, to allow any relative or friend to cultivate his allotment."

Regulation 3 was as follows: "All land which, at the time of the publication of these Regulations, shall have been brought under cultivation, shall be taken and deemed to have been allotted to the person cultivating the same, unless proof to the contrary be adduced, and any person enlarging the limits of such allotment without the permission of the Inspector, first had and obtained shall be deemed to have committed a breach of these Regulations."

Regulation 9 provided that any person committing a breach of the regulations would be liable to a month's imprisonment, with or without hard labour, or to a fine not exceeding £5.

It appeared from the evidence that the Penline location was surveyed into garden and building lots and the commonage defined, and that the appellant has a building and garden lot. That the appellant had not received permission to plough the commonage land from the Inspector of Locations, nor had the headman allotted any land on the commonage to him.

The ploughing on the commonage by the appellant was not denied, but the position which he took up was that the land in question had been cultivated by him for twenty years (since 1878) under permission from Wm. Shaw Kama, his chief.

The Assistant Resident Magistrate found the appellant guilty, and sentenced him to pay a fine of 2s. 6d., or three days' imprisonment with hard labour.

The following were the Magistrate's reasons: In addressing the Court in this case Mr. Attorney Murray contended that the regulations did not apply to an area like Penline, because, as he said, the Inspector

of Locations could at any time turn a man off the building lots. I am of opinion that the object of the regulations is to prevent the natives from building huts off the lots and ploughing outside the garden lots.

There appears to have been some mistake with regard to the exact date when Rebe saw accused ploughing on the commonage, but as the accused admits cultivating at the spot objected to, the date does not appear to be of the essence of the offence.

The Court is satisfied that the Penline Commonage has been defined by survey. The Supreme Court ruled in *Kama v. The Government* that Penline is a native location on Crown land. The real defence seems to be that Kama gave accused and others permission to plough the commonage, but it is difficult to understand by what authority the chief could remove tenants from his own farm and place them upon the Penline commonage, or on any other location on Crown land without the permission of the Government. It appears that the Government for years back has taken up this position, namely: (1) That it is unlawful to cultivate the commonage; (2) that if any person wished to acquire unsurveyed land the proper course is to apply for survey of the extent required. I am of opinion that the allotment by the late Chief Kama was unlawful, and the occupation of the land is contrary to the regulations, but as this appears to be a test case, a fine of 2s. 6d. will be imposed.

Mfenge now appealed. The grounds of the appeal were as follows: (a) That inasmuch as the land upon which the alleged offences were committed is situate within the Penline Mission-station, and inasmuch as the Penline Mission-station is surveyed ground, forming portion of the territory granted for the use and occupation of the late Chief Kama and his tribe on or about the 7th February, 1861, by Sir George Grey, clauses 1 to 3 of the regulations in Schedule A of Government Notice, No. 612 of 1899, do not apply to this land, and therefore the appellant has not committed the crime with which he was charged and convicted. (b) That if the regulations referred to do apply to the land of the Penline Mission, then the appellant has complied with clause 2 of the said regulations in that the land which he was accused of cultivating was land which had been allotted to him in or about the year 1880 by Wm. Shaw Kama, Chief of the Amagumkwebe tribe, and by Thomas Seya, at that time acting

headman at Penline, both of whom had full power and authority to allot the said land, the appellant being an inhabitant of the location at Penline and a member of the Amagumkwebe tribe. (c) That, furthermore, at the date of the publication of the regulations referred to the lands in question were, and had been, under the cultivation of the appellant, and no proof was adduced at the trial of the appellant to show that the said lands had not been allotted to him as required by clause 3 thereof. (d) That on the merits of the case the appellant should have been found not guilty of the crime with which he had been charged.

Mr. Benjamin appeared for the appellant.

Mr. Ward appeared for the Crown.

Mr. Benjamin, for appellant: There are two grounds of appeal. The first is, that the ground was cultivated at the time of the publication of the regulations, and that no proof to the contrary has been adduced. As a matter of fact, the evidence confirms the appellant's contention. According to the witness Sinxo, the prisoner got the land from the acting headman, Thomas Seya, about the year 1880. There was a meeting of the Chief Kama, his councillors, and the headman, when it was decided to grant the land. This evidence was corroborated. The second ground of appeal is that the regulations do not apply to locations like Penline, which is surveyed. It is a location on Crown land. See *Kama v. Colonial Government* (15 S.C.R. 65). Inasmuch as Penline was surveyed with gardens and building lots, the regulations do not apply. See regulation 2 (above).

Mr. Ward, for the Crown: The Chief had no authority to remove tenants from his own farm, and place them on the Penline commonage. The ground cultivated by the appellant is situated on that commonage. Kama's act in allotting this ground to the appellant was unlawful, for commonages cannot be cultivated. The proper course for anyone who wishes to acquire unsurveyed ground is to apply for the survey of the extent required.

De Villiers, C.J., said: It is sought to subject the appellant to criminal liability for contravening the regulations under consideration. Clearly it lay upon the Crown to prove that the appellant has been contravening these regulations. The second regulation provides that "it shall be the duty of the headman of each location, subject to the approval of the Inspector, to allot to each inhabitant of such location whose name appears on the hut-tax register arable land sufficient

for the requirements of the household of such inhabitant, if available, and any person who shall cultivate land not so allotted to him, or who shall enlarge the area or limits of his allotment, without the permission of the Inspector first had and obtained, shall be deemed to have committed a breach of these regulations." Now if the rules had stopped here, clearly the appellant would have been guilty of contravention of this regulation, but the third rule or regulation proceeds to state that "all land which at the time of the publication of this regulation shall have been brought under cultivation shall be deemed and taken to have been allotted to the person cultivating the same, unless proof to the contrary be adduced." Now it is proved in the evidence that at the time of the publication of the regulations the appellant was cultivating this land; that he had been doing so ever since 1880; that the land had been allotted to him by Thomas Seya, who was the headman appointed by and with the concurrence of the Government, and that this allotment took place with the consent also of the then Chief Kama. That has been proved. Well, in the face of that proof I am of opinion that the fact that the present headman did not give his consent does not assist the prosecution. In my opinion the appellant is protected by the third regulation. In point of fact, the land had been brought under cultivation; the appellant was the person cultivating the same, and had done so since 1880 with the consent of the chief, and whatever civil liability he may have incurred, I am of opinion that he has incurred no criminal liability under the regulations. For these reasons I am of opinion that the appeal must be allowed, and the sentence quashed.

Buchanan, J., I concur: We have only got to do with the regulations, and the third regulation protects the appellant, although it might well be that better regulations should be framed, and so secure the rights of the commonage.

Laurence, J., also concurred.

[Appellant's Attorney, D. Godlonton.]

REGINA V. PLANK AND { 1900.
OTHERS. { Jan. 25th.

Master and Servant—Act 18, 1873,
section 2, sub-section 6—Wages.

Where certain labourers were engaged for a period of six months at the rate of £3 per month,

and worked from November 1 to November 30, on which date, as they were not paid their wages, they refused to continue working, and the Magistrate convicted them under section 2, sub-section 6 of the Masters and Servants Act of 1873:

Held, on appeal, that the conviction was wrong, as the labourers were entitled to be paid on November 30, and were justified in refusing to continue working upon failure to obtain payment.

This was an appeal from the conviction of the appellants, Plank and forty-three other Kafir labourers, who were charged before the Resident Magistrate of Caledon with contravening Act 18 of 1873, section 2, sub-section 6, in that upon or about the 2nd December, 1899, the said Plank and others did wrongfully and unlawfully refuse to obey the command of their master, or of any person lawfully placed by their master in authority over them, which command it was their duty to obey.

The prisoners pleaded not guilty.

The evidence for the prosecution showed that the complainant, Stuart Basil Pattison, a contractor on the Caledon railway, engaged the accused at Port Elizabeth, between the 18th and 25th October last. Each man was to be paid £3 per month of thirty working days. They were to be fed on mealie meal and to be allowed 6d. a week extra for meat.

The complainant deposed that each man had a card, and that every day he worked was marked on the card, and as soon as the card showed that he had worked for thirty days he was paid. That none of the men had yet worked the full thirty days, some had still to work four, five, or six days before their month was up, and that on December 2 they refused to work, and demanded their month's wages, which the complainant refused to pay.

For the defence two of the prisoners were called, and they swore that they had been engaged at 3s. a day from the day they left Port Elizabeth, that their month was up, and that if they had been paid their wages they would have continued their work.

The Magistrate found the prisoners guilty. He reprimanded and discharged them, and ordered them to return to their

master's service. He gave the following reasons for his judgment: "In this case Pattison, a contractor for the construction of the Caledon railway, complained against Plank and others for contravening section 2, sub-section 6, of Act 18 of 1873, in refusing to obey his command, &c. It appears from the evidence that Pattison engaged these men at Port Elizabeth on a verbal contract at £3 per month and their food for six months, to commence from the day of their commencing work on the Caledon railway. For the defence, Mr. Kleyn called two of the defendants, Whisky and Jacob, who held that they were engaged at 3s. a day from the day they left Port Elizabeth. Mr. Kleyn then applied that some other of his witnesses (sixteen) should be heard, which I thought was unnecessary as he had called his principal spokesmen, and every other witness would imply follow what the spokesmen had stated. I therefore reprimanded the prisoners and ordered them to go back to their master. It has since turned out that these men have struck for more wages, having heard that other contractors pay their men 3s. a day, and thirty-two of these men have deserted and gone to work for another sub-contractor." The defendants now appealed.

Mr. Searle, Q.C., appeared for the appellants.

Mr. Ward appeared for the Crown.

After argument on the facts, the appeal was allowed, with costs.

De Villiers, C.J.: There is a conflict of evidence in this case. The prosecutor states that he engaged the appellants at £3 per month, the month to consist of thirty working days, but the appellants say that they were each engaged at three shillings per day, that it was a monthly engagement, that they had to be paid at the end of the month, and that they began their work on the 1st November. The Magistrate finds that Pattison engaged these men at Port Elizabeth upon a verbal contract at £3 per month and their food, to commence from the date of their commencing work on the Caledon railway. Well, they commenced work on the 1st November, and according to the Magistrate's own finding, therefore, they were entitled to be paid their wages at the end of November. When they went for their wages Pattison said, "You have not worked your full thirty days," but he could not demand that. If the Magistrate was right in finding that, the master was bound to pay at the end of the

month, and if he refused to pay, he could not expect servants to continue working, because the master might refuse to pay next month, and a servant is quite justified in refusing to work unless his wages are paid when due. I think therefore the Magistrate was wrong, after finding the contract was for £3 per month, in finding that the appellants were guilty of a contravention of the Act. For these reasons I think the sentence ought to be quashed. There is another technical objection, but which, as it has not been taken by the Crown, does not need to be considered, and that is that the second section, under which the appellants are charged, does not apply. It only applies to agricultural labourers, and it is the seventh section which really applies to persons other than agricultural labourers, but inasmuch as there is a sub-section of the seventh section which would clearly apply to the appellants, we do not make that the ground of our decision. The appeal must be allowed, with costs.

[Appellants' Attorney, Paul de Villiers.]

SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., (Chief Justice), the Hon. Mr. Justice BUCHANAN, and the Hon. Mr. Justice LAURENCE.]

ADMISSION.

{ 1900.
Feb. 1st.

Mr. Buchanan moved for the admission of Charl Samuel Auret as a sworn translator.

The application was granted, and the oath administered.

PROVISIONAL ROLL.

ESTATE OF MILLER V. J. W. BOYCE AND GRONEAU.

Mr. Benjamin moved for provisional sentence for £190 on certain conditions of sale of property, the first-named defendant being the purchaser and the second the surety.

Granted.

WHITE BROS. V. RAPP AND LENK.

Mr. Benjamin moved for provisional sentence for £30, being rent for two months on a lease of certain property.

The defendants appeared in person, and Lenk said that he had sold all his share in the business to Rapp.

Rapp's defence was that he had a counter-claim against the landlord for non-fulfilment of a certain promise with regard to water and sanitary arrangements.

Provisional judgment was granted, but with stay of execution for a month, so that the defendants might come to some arrangement with the plaintiff, or failing that, employ an attorney to bring an action if they desired to do so.

BEANDES V. WORRE.

Mr. P. Jones moved for provisional sentence on a mortgage bond for £350, with interest from July 1, 1899. The bond had become due on notice given.

Granted.

DE LORME V. MURISON.

Mr. Innes, Q.C., moved that the provisional order for the compulsory sequestration of defendant's estate be confirmed.

Mr. Searle, Q.C., appeared for the defendant.

From the petition it appeared that the defendant sold plaintiff a property in Long-market-street, the purchase price being £450, of which £100 was paid at the time of sale, £250 was to be paid in ten monthly instalments of £25 and the balance of £100 on January 1, 1900, when transfer was to be given. Defendant had bonded this property along with another for two sums of £950 and £600, and plaintiff becoming alarmed at this, demanded immediate transfer after she had paid six of the monthly instalments. Letters then passed in which it was stated by the defendant that his estate was insolvent, and a sum of 3s. in the £ was offered, and plaintiff's consent to that asked. This she refused, and an application was made for the cancellation of the agreement or transfer of the property and subsequently an application for the sequestration of the estate.

Mr. Searle stated that an arrangement with defendant's creditors had been made, and on January 10 last transfer of the property was offered on the balance of the purchase money being paid.

Mr. Innes, Q.C., for plaintiff: Large costs have been incurred. The plaintiff cannot recover costs in these proceedings. She wishes to be placed in such a position that she can claim cancellation.

Mr. Searle, Q.C., for defendant: The whole thing seems to be a question of costs. The petition is not based on the Act of 1884. The plaintiff says that an act of insolvency has been committed, not that defendant's estate is insolvent, or that it would be for the benefit of creditors that the estate should be sequestrated. The only act of insolvency which can be meant must be the passing of the bonds.

The Chief Justice: The concluding portion of the petition indirectly says it is for the benefit of creditors.

Mr. Searle: The ground must be clearly stated.

The Chief Justice: It seems to be a question of costs now. Had not the plaintiff good grounds for her action?

Mr. Searle: I will not say that there were not good grounds for demanding transfer, but the costs of the last application have been paid.

De Villiers, C.J., said: It is clear there was *prima facie* proof that the defendant was insolvent at the time the provisional order was granted, but since then the defendant has expressed his willingness to give transfer. The Court will therefore now direct that the order of sequestration be discharged; defendant to give transfer of the property to the plaintiff on payment of the balance of the purchase price. Defendant to pay costs of the proceedings.

ESTATE OF KOTZE V. KRAEHMEL.

Mr. Buchanan moved for provisional sentence for £2,000 on a mortgage bond, with interest at the rate of 6 per cent. from July 1, 1899, the bond having become due by reason of the non-payment of interest. It was also prayed that the property specially hypothecated be declared executable.

Defendant appeared in person, and admitted the debt, but said he wanted to sell the property and pay it.

Provisional sentence was granted as prayed.

KAISER V. R. A. FALCONER.

Mr. Molteno, for the plaintiff, moved that the provisional order for the sequestration of the defendant's estate be discharged.

The order was accordingly discharged.

ILLIQUID ROLL.

FORREST V. LUCAS AND ANOTHER.

Mr. Benjamin moved for judgment, under Rule 32nd, for £90, rent due.
Granted.

HAYES V. HAYES.

This was an action for restitution of conjugal rights.

Mr. Buchanan appeared for the plaintiff.

The defendant was in default.

The declaration and the evidence of the plaintiff, taken on commission in England, showed that the parties were married at Cape Town on September 16, 1892, but after living together for several years, defendant left his wife, and she had heard nothing of him since 1898.

Leo Heath said he was manager of Reuter's Agency in Johannesburg until the war broke out. Defendant had been employed in the office there for twelve months, when he embezzled some funds of the company and absconded. Witness did not know where he now was.

A decree of restitution of conjugal rights was granted, defendant to return to plaintiff on or before April 15, failing which defendant to show cause by May 1 why a decree of divorce should not be granted; personal service to be effected.

[Plaintiff's Attorneys, Messrs. Fairbridge, Arderne & Lawton.]

LEWIS V. LEWIS.

This was an action for decree of restitution of conjugal rights, failing which for divorce.

Mr. Benjamin appeared for the plaintiff; defendant in default.

Helen Lewis, the plaintiff, stated that she was married to the defendant, James Garfield Lewis, at Cape Town, on March 15 1898. On May 25 last he left her, and had not returned since then. She subsequently learned that he had gone to England, and then to America. During the time he lived with her he contributed nothing towards her support. There were no children of the marriage.

The Chief Justice said a letter had been sent to him by defendant, in which he said he had heard that he was required to return to his wife at once, but he had no intention of doing so.

A decree of restitution of conjugal rights was granted, defendant to return to his wife by April 15, failing which, to show cause by May 1 why a decree of divorce should not be granted; personal service to be effected.

[Applicant's Attorneys, Messrs. Fairbridge, Arderne & Lawton.]

GENERAL MOTIONS.

MINORS BRISLEY V. DAVIS.

Mr. Close moved that a certain award of arbitrators be made a rule of Court.

Mr. Seale, Q.C., said he appeared for the respondent, but did not oppose.

It appeared that of the two tutors testamentary of the minor children who signed the deed of submission one had since died, while the other was the defendant in the case.

The Chief Justice said it would be in the interests of the minors to have somebody representing them, and the matter would stand over until another tutor had been appointed, which the Master would provide for.

IN THE MATTER OF THE PETITION OF WILLIAM ERSKINE GILL.

Articled clerk—Clerk to Judge—Service.

Where a clerk to a Judge asked that his term of service should be allowed to count as service for the purpose of his admission as an attorney, and the Judge had been away on leave for six months during which time applicant had served in the Cape Civil Service, the Court refused to allow the term of the Judge's absence to count.

This was an application by an articled clerk for leave to count as service the period during which he was employed as clerk to the Hon. Mr. Justice Hopley, and in the Civil Service of the Colony.

The petition set forth that the applicant had served as an articled clerk in the Isle of Man from February 10, 1894, until September, 1895, when he came out to this colony. From January 1, 1898, he had been employed as clerk to Mr. Justice Hopley at Kimberley.

On June 14, 1899, Mr. Justice Hopley went on leave to England, and applicant was informed by the Law Department that if he wished to continue to draw his pay he would have to do work as Resident Magistrate's clerk. He had afterwards been employed as such in various places. He had, however, intended to resume his position as clerk to Mr. Justice Hopley, but on the latter's return from England it was impossible for him to return to Kimberley owing to the siege there. Applicant had now entered into articles with Mr. A. G. Syfret, an attorney of the Court. He asked that the period of Mr. Justice Hopley's absence being from June 14, 1899, to January 12, 1900, should be allowed to count as service.

Mr. McGregor, appeared for the petitioner.

Mr. Searle, Q.C., appeared on behalf of the Law Society.

Mr. McGregor, for applicant: Act 12, 1858, section 3, provides for service under articles to a solicitor or advocate. Rule of Court No. 152 allows a term of at most four years' service with a judge to count, provided one year is spent in an attorney's office. In *Ex parte Coetzee* (7 Juta, p. 66), the Court allowed two years' service with a judge to count instead of four years.

The Chief Justice: The only question is whether the six months during which Mr. Justice Hopley was away can be counted as part of the applicant's term of service.

Mr. McGregor: As to that, I rely on *Ex parte Smith* (4 Juta, 170), and *Ex parte Van Zyl* (6 Juta, 316). In both those cases there was a break owing to absence for the purposes of study. If one address to the letter of the law, then applicant is entitled to count the six months, for he drew pay all the time as judge's clerk. But the Court will not take the strict view unless it is also equitable that it should. It is equitable because the applicant was doing work all the time in a Magistrate's office, and there he would be doing the same kind of work.

Mr. Searle: The society cannot accede to applicant's request. This case goes further than any application the Court has yet granted. The proper course for the applicant to adopt, when the judge left, was to article himself to an attorney, or take some similar service with another judge.

Laurence, J.: If, after service of eighteen months with a judge, the judge had gone on leave for six months, and the applicant had completed his two years' ser-

vice afterwards with the judge, would the Law Society object to the two years counting?

Mr. Searle: It would not object to that break in continuity where the six months had been spent in study. That was the case in *Ex parte Smith* (4 Juta, 170), and *Ex parte Van Zyl* (6 Juta, 316). See also *Re E. N. Badenhorst* (8 Juta, 1).

De Villiers, C.J., said: I am of opinion that the Court cannot allow the applicant to count as part of his service the period of the absence of Mr. Justice Hopley from the Colony, for during that time he received no instruction from the judge and performed no services for the judge. It is true he acted as magistrate's clerk, but the Legislature has not provided that such service shall count for the purpose of becoming an attorney of the Court. But another question arises, viz., whether that period should be treated as a break in the continuity or not. I am of opinion it should not, especially as he intended to return to the service of Mr. Justice Hopley on his return from England, and it could not be expected that he would be article'd for the time Mr. Justice Hopley was in England. Under these special circumstances, the Court will direct that this will not be treated as a break in the continuity of service, and the Court will allow the service with Mr. Justice Hopley from January 1, 1898, until June 14, 1899.

Their lordships concurred.

[Applicant's Attorneys, Messrs. Scanlen & Syfret.]

QUEEN'S TOWN MUNICIPALITY V. COLONIAL GOVERNMENT,

Mr. Graham, Q.C., moved for removal of trial to ensuing Circuit Court at Queen's Town.

Mr. Sheil, Q.C., appeared on behalf of respondents to consent.

The application was granted.

KORLER V. KORLER.

Mr. Glose moved that the rule *nisi* for a decree of divorce be made absolute, the defendant being in default.

Granted.

IN THE INSOLVENT ESTATE OF HENDRICK LODEWYK MULLER.

Mr. Innes, Q.C., moved for a commission to take the evidence of a number of wit-

nesses with regard to alleged false claims, false schedules, undue preference, &c., in the above insolvent estate.

Granted, the Resident Magistrate of the Paarl being appointed commissioner.

MEYER V. MEYER—NOW SWINTON.

This was an application by the defendant in the above suit (which was an action for divorce on the ground of adultery, in which a decree of divorce was given, the plaintiff to have the custody of the children of the marriage). The applicant sought an order fixing the times and places of meeting with her children, and restraining the plaintiff and his servant from being present at such meetings.

Mr. Benjamin appeared for the applicant.

Sir Henry Juta, Q.C. (with whom was Mr. Currey), appeared for the respondent in the application (plaintiff in the action).

After argument on the facts of the case,

The Court ordered that applicant be allowed to see her children at Mrs. Casey's house once a month for an hour in the absence of the respondent. No order was made as to costs.

[Applicant's Attorneys, Messrs. Fairbridge, Arderne & Lawton; Respondent's Attorneys, Messrs. Van Zyl & Buissinné.]

CHRISTIE V. TRAMWAY COMPANY.

Mr. Graham, Q.C., moved on behalf of the plaintiff that the Court fix a day for the hearing of this case by a jury.

The Court set the action down for February 23.

VAN NIEKERK V. THE GRAND JUNCTION RAILWAY, LIMITED.

Mr. Nightingale moved that a certain award be made a rule of Court.

Granted.

DIXIE V. THE GRAND JUNCTION RAILWAY, LIMITED.

Mr. Nightingale moved that a certain award be made a rule of Court.

Granted.

IN THE ESTATE OF THE LATE THOMAS WILKINSON WHITE.

Mr. Close moved for leave to mortgage certain property in the above estate, which the deceased had himself intended to mortgage prior to his decease.

Granted.

IN THE ESTATES OF HENDRINA MARGARETHA CONRADIE AND OTHERS.

This was an application by one Conradie, as executor under the joint will of himself and deceased wife. Under that will he had a life-interest in certain property which upon his death would devolve upon his children and two minor grandchildren. This property he, as executor, together with a co-owner, had sold for £1,500, his share being the half, viz., £775. The petitioner Conradie was also the absolute owner of another property valued at £1,500, but mortgaged at present for £484 in favour of certain minors Van Zyl, of whom the petitioner was himself the tutor. He applied for the confirmation of the Court of the sale of the first property mentioned and authority to retain the proceeds and to transfer to his children and grandchildren the second property, subject to his life-interest and on condition that they took over the mortgage bond. The children consented, and the father and guardian of the grandchildren, Burger, joined in the petition. The Master, however, reported that the interests of the minors were not sufficiently protected unless the amount of the mortgage was paid into the Guardians' Fund.

Mr. Howel Jones appeared for the applicants.

The Court granted the application subject to the condition recommended by the Master.

TRIAL CAUSE.

| | |
|---------------------|-----------|
| TABORSKI AND CO. V. | } 1900. |
| HENCKELS AND CO. | |
| | Feb. 1st. |
| | " 2nd. |

This was an action for damages owing to the non-delivery of certain goods ordered by plaintiffs from defendants, who carried on business at Hamburg and also had a branch business in Cape Town. The amount of damages claimed was £378 18s.

Sir Henry Juta, Q.C., appeared for the plaintiffs.

The defendants were in default.

Jacob Taborski, the plaintiff, stated that in November, 1898, and January and March, 1899, he bought goods from the defendants, to arrive in four months. The defendants knew what the goods were required for. In May, 1899, the goods had not arrived, and witness commenced an action against them. Defendants then agreed to give plaintiff, as compensation, two pianos, of the value of £16 10s. each, which were to arrive within four months,

and also agreed that the mouldings overdue would be here in three weeks, otherwise they could be purchased here, and the defendants were to pay the difference in cost. The goods did not arrive, and on August 1, 1899, witness first heard of their arrival when the bank presented to witness a draft drawn against certain goods. Witness refused to accept the draft, as he had already ordered the goods by cable from another firm. The goods from defendants should have been here in the first week in June. In consequence of the delay, witness had suffered considerably in his business, which he could not carry on in his usual style at all. Some of the goods he could not obtain in Cape Town at all, and for these he had to cable to Europe. The goods which should have arrived in three weeks would have been about £100 foreign cost, and it would have cost him about £250 if he had had to buy them here. Witness only bought a small quantity here, because he could not get any more. Witness went on to detail the damage he had suffered owing to the delay in the delivery of portion of the goods and the non-delivery of a large portion. During the year 1898 his profits from his business amounted to £132, while for the first six months of 1899 his profits amounted to £85 lbs. only. That difference was due to these goods not having been delivered, as there was plenty of business if witness could have undertaken it.

By Mr. Justice Laurence : He lost £322 in profits through not having those goods.

Sir H. Juta, Q.C., for plaintiffs : Some goods arrived in August, 1899. Plaintiffs refused to accept them, as they came two months too late, and had the goods attached. No others were sent at all. The plaintiffs' business had suffered considerably. The November and January orders (which had to be delivered in three weeks) amounted to £100. Plaintiffs could not buy in this market, and could not execute orders. They cabled to Europe for mouldings, and got them at the same price. If they had to buy in Cape Town the mouldings would have cost £200 to £250.

The Chief Justice: If the purchaser, on failure to deliver, does not go into the market to buy, can he claim damages?

Sir H. Juta: He is not bound to buy. In this case the kind of goods ordered was not in the market. In the case of shares the Court grants the difference, and does not compel the purchaser to buy.

The Chief Justice: Such a rule might lead to great injustice. There might be a very small stock in the local market, and the owner might charge 1,000 per cent. Is that price to be said to be the local price?

Sir H. Juta: Supposing that a security is of such a kind that people will not part with it, or will only part at a high price, that is the measure of damages. The measure of damages is what it would cost to replace the article on the day it should have been delivered. The price which he had to pay in Cape Town was not a fictitious price. It was the ordinary price which the plaintiff himself sold his goods at.

C.A.V.

Postea (2nd February).

De Villiers, C.J., said : This case must be decided upon the terms of the special contract executed between the parties. On the 12th May there had admittedly been a breach of contract on the part of the defendants with regard to which there had been some correspondence. In the course of this correspondence the defendants wrote saying that they would guarantee to execute the orders, and as compensation for plaintiff's claim against them promised to send him two pianos, of the value of £16 10s. each, free of charge. Then came the answer of the plaintiff, in which he agreed to that course provided the pianos were delivered here in the four months, and the mouldings which were due here in three weeks, and further that if the order was not delivered in time or wrongly executed the plaintiff should have the right to have the order executed here, making defendants responsible for the difference in price. There is no question as to the pianos, and the only question is that of damages for the non-execution of the order for mouldings. Well, the parties themselves have agreed upon the measure of damages to be applied, and it is therefore unnecessary to enter into the general law on the subject. The plaintiff would be entitled to replace the mouldings here, and the plaintiff would be responsible for the difference in price. The plaintiff sought to find these articles here, but succeeded in buying only a part of them, and the evidence tends to show that the prices here are largely in excess of the prices in the same market elsewhere. The plaintiff has made out an account which shows £278 damages, but included in that account is an amount of £6 for cable expenses, which we are of opinion ought not

to be allowed, and the Court is of opinion that judgment should be for the £378, less the £6 mentioned.

Buchanan, J., and Laurence, J., concurred.

[Plaintiff's Attorneys, Messrs. Silberbauer, Wahl & Fuller; Defendant's Attorneys, Messrs. Van Zyl & Buissinné.]

SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), the Hon. Mr. Justice BUCHANAN, and the Hon. Mr. Justice LAURENCE.]

STANLEY V. BOTHA'S } 1900.
EXECUTOR. } Feb. 2nd.

Will—Power of appointment—*Fidei-commissum*.

A testator by his will bequeathed a farm to L. on condition that during his lifetime he should have no power of alienation, and that after his death the farm should pass to his (L.'s) eldest son, with power, however, to L., in case he should consider another son to be better qualified to manage the farm, to bequeath it to such other son, upon such conditions as he should deem reasonable. After the testator's death L. enjoyed the life interest and, before his death, he nominated his son J. in lieu of the eldest on condition that J. should pay into his (L.'s) estate the sum of £2,800 for the use of certain beneficiaries. Upon L.'s death the plaintiff claimed that, as one of L.'s creditors, he was entitled to be paid his debt out of the £2,800, there being no other funds available.

Held that L.'s interest in the property ceased with his death and that the plaintiff had no claim in respect of the said sum of £2,800 in preference to the beneficiaries.

This was an action for debt.

The declaration was as follows:

1. The plaintiff is a produce dealer carrying on business in the division of Somerset East. The defendant is the secretary of the Graaff-Reinet Board of Executors, which Board has been duly appointed the executor dative of the estate of the late Louis Jesias Jacobus Botha and predeceased spouse.

2. The said executor dative is indebted to the plaintiff in the sum of £82 5s. 9d., being the balance of an account, with interest, for cash advanced to the said estate, all of which will more fully appear from a copy of the account annexed.

3. The defendant has filed a liquidation and distribution account, copy of which is annexed, from which it appears that there are ample funds belonging to the said estate to pay the plaintiff, but the said defendant has only paid the sum of £44 19s. 6d. to the plaintiff, and has awarded the bulk of the estate to the heirs of the late Louis J. J. Botha and his wife, and contends that the said heirs are entitled to be paid before and in preference to the creditors of the said estate, including the plaintiff.

4. All things have happened, &c., to entitle the plaintiff to claim the sum of £82 5s. 9d., &c.

The prayer was for: (a) £82 5s. 9d., with interest; (b) an order declaring that the plaintiff is entitled to be paid the said sum before any amount is distributed among the heirs, and that the said account be amended accordingly.

For a plea to the declaration the defendant said as follows:

1. He admits the allegations in the first and second paragraphs of the declaration.

2. The late Philip Rudolph Botha and the late Elizabeth Johanna Susanna Coetzee, who were in their lifetime married in community of property, and were parents of the late Louis Jesias Jacobus Botha, executed on the 1st June, 1861, a mutual will. In terms of this will they bequeathed to their son, the said Louis Jesias Jacobus Botha, the farm Buffel's Hoek, in the district of Somerset East, upon the express condition that he should not have the right to sell, lease, mortgage, or in any way alienate the said farm during his lifetime, but that after his death it should pass to his eldest son then living, on the understanding that if he had more sons living, and if he considered one of his other sons more fit to carry on the farming, he should be at liberty to direct by his will that the said farm should devolve

upon such other son on such conditions as he might deem fair and proper, in which case the provision aforesaid as to the passing to the eldest son should be considered void.

3. The said Elizabeth Johanna Susanna Cootzee died on the 24th May, 1863, and the said Philip Rudolph Botha died on the 18th September, 1869, leaving the said will unrevoled, and thereafter the said Louis Jesias Jacobus Botha throughout his lifetime occupied the farm Buffel's Hoek in terms of the said will and subject to its provisions.

4. On the 31st July, 1896, the said Louis Jesias Jacobus Botha and his wife Martha Christina Slabbert, to whom he was married in community of property, executed a mutual will, in which after reciting the provisions hereinbefore set forth of the will of his parents the said Louis Jesias Jacobus Botha declared that he considered his son named Louis Jesias Jacobus Botha more fit and capable of carrying on farming operations than his eldest son, the said will then directed that the farm Buffel's Hoek should go to the said Louis Jesias Jacobus Botha after the death of the testator and subject to certain conditions.

5. One of the said conditions was that the said Louis Jesias Jacobus Botha should pay unto the joint estate of his parents the sum of £2,800, which sum the testators directed should be by their executor invested upon first mortgage, the interest to be paid to the testatrix (if she was the survivor) during her lifetime, and after her death the capital sum to be divided in a certain specified manner among certain of the children and grandchildren of the testators.

6. The last-named testatrix died on the 15th May, 1897, and the last-named testator on the 12th April, 1898, leaving the said will of full force and effect; and the said defendant in his said capacity is the executor dative of each of them.

7. The said Louis Jesias Jacobus Botha has paid to the defendant the sum of £2,800. According to the true extent and meaning of the said will, the said sum has to be received by him in trust for the various persons among whom it was directed to be distributed. It forms in law no part of the estate of the testators, the said farm never having formed part of such estate, nor is it any more than the said farm liable to satisfy the debts of the said testators.

8. The defendant has passed a legacy account distributing the said sum of £2,800, less the expenses of distribution, among the

said beneficiaries, and he has passed a liquidation and distribution account dealing with the assets proper of the testators, and satisfying their debts as far as they can be satisfied out of the funds available. This is the account referred to in the third paragraph of the declaration.

9. Subject to the above, and save that he says that there are not sufficient funds available in the said estate to pay all the creditors the eof, he admits the said third paragraph, but denies the fourth paragraph, save the allegation of his refusal to pay the claim of the plaintiff. He does not deny the liability of the estate for the sum of £22 5s. 9d., but he denies that the plaintiff is entitled to be satisfied out of the said sum of £2,800.

Wherefore he prays that the plaintiff's claim may be dismissed with costs.

For a claim in reconvention, the plaintiff in reconvention says:

1. He asks leave to refer this Honourable Court to the matters set out in his plea in convention

2. By reason of the said matters he is entitled to a declaration of rights as to the liability or otherwise of the said sum of £2,800 for the debts of the late Louis Jesias Jacobus Botha and predeceased spouse.

The plaintiff in reconvention claims: (a) An order declaring that the sum of £2,800 aforesaid forms no part of the estate of which he is executor as aforesaid, and that the plaintiff is not entitled to have his claim paid thereout; (b) alternative relief; (c) costs of suit.

The replication was general.

The will of Philip Rudolph Botha and spouse contained the following clauses: "We prelegate and bequeath to our son, Jacobus Lodevicius Botha, the half share of our farm Groot Riet Vallei, &c., upon this express condition and stipulation, that he during his life shall not have the right to sell, let, mortgage, or otherwise alienate the said share, but that the same after his death shall pass to his eldest son then living, upon this understanding, that in case he should have more sons living, and he should be of opinion that one of his other sons would be better qualified to carry on the farm, he shall be free to bequeath the said half-share by testamentary dispositions to such son, upon such conditions as he shall deem good and reasonable, in which case the stipulation in this bequest devolving upon the eldest son shall be regarded as null." "We prelegate and bequeath upon the same conditions,

stipulations, and provisions to our son, Louis Jesias Jacobus Botha, the farm Buffelshoek." The will of Louis Jesias Jacobus Botha and spouse, after referring to the will aforesaid, proceeded: "And whereas the testator herein is of opinion that his son, Louis Jesias, Jacobus Botha, is better qualified for farming than his eldest son, Philip Rudolph Botha, and he is desirous of availing himself of the rights of disposition with regard to the said property, which are granted him by the testament aforesaid, now, therefore, we hereby declare to give and bequeath to our son, Lou's Jesias Jacobus Botha, the farm Buffelshoek and the adjoining land, subject to the following conditions and stipulations: Firstly, that our said son, Louis Jesias Jacobus Botha, shall receive transfer of the said farm and adjoining land immediately after the death of the testator; secondly, that he shall immediately afterwards pay the sum of £2,800 into our joint estate. . . . We wish and declare that the sum of £2,800, to be paid into the joint estate by our son, Louis Jesias Jacobus Botha, as aforesaid, shall be invested by the executrix hereinafter mentioned in mortgage on landed property, and the amount of interest proceeding therefrom shall go to the testatrix for her benefit, and that of our minor children and unmarried daughters, and after the death of the testatrix we give and bequeath the amount of the capital aforesaid as follows:" (Here followed a distribution of the money among the testator's children and their descendants in case of predecease.)

Sir H. Juta, Q.C., and Mr. Joubert appeared for the plaintiff.

Mr. Innes, Q.C., and Mr. Howel Jones for the defendant:

Sir H. Juta, Q.C., stated the plaintiff's case.

The Chief Justice: Louis Botha never had the right to the property. He had only a power of appointment.

Sir H. Juta: The testator was a fiduciary heir. The original will of Philip Rudolph Botha left the property in favour of his son as a *fidei commissum*. If he left it in any other way, the *fidei commissum* is gone. We have here no power of appointment or trusts. There is only a *fidei commissum*, and the *fidei commissum* was such that it lapsed if the property were not left to the son.

The Chief Justice: Those conditions cannot be conditions for his own benefit.

Sir H. Juta: What would stop him?

The Chief Justice: Because it would be an absurd reading of the will, as he had only a life interest.

Sir H. Juta: If there has been no testament by L. Botha, then plaintiffs can claim under the grandfather's will. But, L. Botha having made a will, plaintiffs claim under his will. It is the land which is the subject of the *fidei commissum*. This money is not the subject of the *fidei commissum*.

The Chief Justice: I think you will find that the power of selecting may be left to the fiduciary heir.

Sir H. Juta: Plaintiffs do not dispute that; but we say that the grandfather's will does not deal with money.

The Chief Justice: That power of selection is a power of appointment.

Sir H. Juta: The English power of appointment might deal with the money, but not our power of appointment.

The Chief Justice: Voet says this is a good *fidei commissum*.

Sir H. Juta: My point is that the *fidei commissum* is at an end where the land has been disposed of.

The Chief Justice: I am reminded that there was a case where the fiduciary had benefited himself under power of appointment, and the Court held that there was no *fidei commissum* at all. I think it was a case from Germany, tried at Port Elizabeth.

Sir H. Juta: Suppose one of the legatees predeceased the testators, to whom will the money go? There cannot be a *jus accrescendi* unless it is a legacy. If it is a *fidei commissum*, it comes back to us. It cannot go back to the grandfather's estate, because it never formed part of the grandfather's estate.

Mr. Innes, Q.C., for defendant: The right given under the grandfather's will is a right which the law recognises. See Voet (36,1, 29; McGregor's translation, p. 76). The conditions were not allowed to benefit himself, but they might reasonably be allowed to benefit the other children.

Buchanan, J.: Could he benefit himself at all?

Mr. Innes: No.

Buchanan, J.: He benefited his wife.

Mr. Innes: I think he could not do that; but fortunately that provision fell to the ground, because she died before him. We must look at the intention of the will. The second will was based on the assumption that the testators should be benefited, and that she should predecease the testator. The one thing was illegal, and the other did not happen. All the clauses of the will must be read

together. It was in effect a direction that the second son should step into his brother's shoes, and pay out his brothers and sisters. If any of their sons had predeceased, the owner of the farm would have to pay less, just as if there had been a direction to him to pay direct to the children.

Sir H. Juta, in reply: Two things are unanswerable. One is the question why the wife cannot be benefited, and the children can. The second question is, what becomes of the property in case of predecease? One knows of no trust under a will. Our law knows administration, which is practically the same thing under another name. The power of appointment referred to by Voet is a power of appointment of an heir among a certain class pointed out.

De Villiers, C.J.: The case seems to me to be a clear one. The plaintiff is one of the creditors of the estate of the late Louis Botha, to whom his parents had by mutual will bequeathed a farm subject to certain conditions. The terms of the bequest are as follow: "We prelegate and bequeath to our son Louis the farm Buffelshoek upon this express condition and stipulation, that during his life he shall not have the right to sell, let, mortgage, or otherwise alienate the said farm, but that the same after his death shall pass to his eldest son then living, upon this understanding, that in case he should have more sons living, and he should be of opinion that one of his other sons would be better qualified to carry on the farm, he shall be free to bequeath the said farm by will to such son, upon such conditions as he shall deem good and reasonable, in which case the stipulation as to the bequest devolving upon the eldest son shall be null and void." Before his death Louis Botha made the following disposition in his will: "Whereas the testator herein is of opinion that his son Louis Jesias is better qualified for farming than his eldest son, and he is desirous of availing himself of the rights of disposition granted to him by his parents' will, he hereby bequeaths to his son Louis Jesias the farm Buffelshoek," subject to the following among other conditions: That he shall pay into the joint estate of his father and mother the sum of £2,800 to be invested on mortgage, the interest accruing on which to go to the mother for life, and after her death to certain of her children. The executor of Louis Botha's estate has framed an account by which he awards the sum thus paid to the joint estate as directed by Louis Botha's will. To this the plaintiff objects,

claiming by his declaration to be paid the debt owing by Louis Botha out of the sum of £2,800. If the plaintiff had obtained judgment on his debt before the death of Louis Botha, he would clearly have been entitled to obtain an order for the realisation of Louis Botha's life estate in payment of the debt. But Louis Botha's death put an end to his interest in the farm. The fact that he had the right to nominate another son as fidei-commissary legatee in case he considered the eldest son not well qualified to manage the farm did not confer on him an estate enduring beyond his own life. As was decided in *In re Myburgh* (13 S.C.R., 218), "where a testator has conferred on a person to whom he has given a limited interest in property, the power of selecting the person on whom such property should devolve at the expiration of such limited interest, the due exercise of such power has the same effect as if the testator had himself made the selection." The effect of Louis Jesias being selected as the fidei-commissary is the same as if the original testator, Philip Botha, had appointed him as the remainder-man. It was not left to the discretion of Louis Botha whether he should restore the property or not. He was bound to restore the property, and the only discretion left to him was whether he should allow the eldest son to take it or appoint another son instead of the eldest. If he had not exercised his power of appointment the eldest son would have taken the property on his death. According to Voet (36, 1, 29)—I quote from Mr. McGregor's excellent translation—"it cannot be considered a *fidei commissum* when it is left to the discretion of the person whom the testator thinks of binding (to a trust) whether he is willing to give or restore, but that it is a good *fidei commissum* when it does not rest in the discretion of the person to whom the request is made to decide whether or not he shall make the restriction at all, but when, this necessity of making restitution being once imposed, he can merely exercise his discretion as to the distribution and the election of the person to whom restitution is to be made." In fact, it is not denied on behalf of the plaintiff that a valid *fidei commissum* was created, but if there was such a *fidei commissum* the fiduciary's interest did not extend beyond the period of his own life. He could only exercise his power of appointment by will. The fact that by his will he imposed a condition that the fidei commissary should pay £2,800 into his estate for the use of certain beneficiaries does not give his creditors any right

to claim portion of that money. While giving judgment for the plaintiff for the amount claimed, the Court must refuse the further claim of the declaration, and the plaintiff must pay the costs.

[Plaintiffs' Attorney, C. W. Herold; Defendant's Attorneys, Messrs. Scanlen & Syfret.]

COOMER V. SMITH. } 1900.
} Feb. 2nd.

Account—Stock—Verbal agreement.

This was an action on an account instituted by Frederick Charles Coomer, a landed proprietor, formerly carrying on business as proprietor of the Masonic Hotel, Stellenbosch. The declaration alleged that on October 13 last the plaintiff sold to the defendant certain stock in the hotel at cost price for the sum of £32 9s. 6d., which he now claimed with interest *a tempore morae* and costs of suit. Defendant in his plea denied that he bought the whole of the stock in question, but said that he only bought a part thereof, and that for that part he had repeatedly offered plaintiff the sum due, £21 9s. 6d., less £1 12s. 9d., being half of the surplus expense of a certain entertainment in connection with which the plaintiff and another had agreed to share the cost equally.

Mr. Buchanan appeared for the plaintiff.

Mr. Close for the defendant.

For the plaintiff was called

Frederick Charles Coomer, the plaintiff, who stated that he now resided in Cape Town but in October last was the proprietor of the Masonic Hotel, Stellenbosch. About that time he sold the business to the South African Breweries Company through Mr. Fowler. On October 13 witness met the manager of the Brewery Company and Mr. Fowler, and accompanied them to the hotel. Among others then present were the defendant (who had taken over the hotel from the Brewery Company) and Mr. Jones. The liquor stock and stores had been taken over by the Brewery, and after they had taken an inventory of that stock Mr. Fowler said, "What about the pantry stock?" That was the stock now in dispute. Defendant then said in the presence of Mr. Fowler and Mr. Hatblock, "The pantry stock has all been weighed, and I am taking it all over." When they came to tally up the amounts defendant said he would take the pantry stock over, and Mr. Hatblock said in his presence that defendant would have to pay for that. Witness received a list of

the pantry stock either from Mr. Hatblock or Mr. Jones. On the list produced the pencil items as to the fowls, &c., were added on the morning after the stock-taking in the presence of defendant. Witness fixed the prices according to the list, and sent in an account to defendant in a letter. The account showed a claim of £35 9s. 6d., but that had been reduced by certain contra charges allowed. As to the concert expenses, Mr. Hatblock thought it would be a very good thing to have a farewell and welcoming concert, and witness then said he would contribute £5 towards the concert, and Mr. Hatblock said he would, and the expense over £10 defendant was to be liable for. Witness never agreed that he would share the surplus expense. Witness paid his £5 the next morning to Mr. Fowler, who made the arrangements. In answer to the account he sent witness received a letter on October 24, with a list of the stock defendant was prepared to take over, and in which defendant said that certain articles being useless to him, he would pack them up and forward them where desired. After correspondence, witness's account was amended to the present claim—£32 9s. 6d. Afterwards Mr. Krige, a clerk to Mr. Kenealy, said to witness that he had been authorised to settle the full amount of the claim, provided witness paid his own expenses. It was then that witness heard for the first time about the claim for the half of the surplus expense of the concert.

Cross-examined: Defendant actually purchased the stock on the night of October 13. Witness could not remember any conversation a few days afterwards in which defendant said to him that some of the pantry stock he would not take over at any price. Witness was not aware that Mr. Hatblock had paid both the £5 and his share of the surplus expense.

Albert Samuel Fowler, a broker, practising in Cape Town, gave evidence generally corroborating that of the last witness as to the defendant saying he had taken over the pantry stock. He also corroborated as to the agreement that plaintiff and Mr. Hatblock should each pay £5 towards the expenses of the artists for the concert, and reference having been made to the expense of bed, supper, &c., for the artists, it was understood that that would be borne by defendant, who was then present, and did not object. Witness had no doubt but that it was meant that the whole of the stores should be taken over.

Herbert Charles Hatblock, the manager in Cape Town of the South African Breweries (Limited), said he had agreed with defendant that he should take the catering part of the business of the hotel on his own responsibility, and that he should take over the pantry stores. Witness corroborated the evidence of Mr. Fowler. It was agreed that the whole of the pantry stock be at cost price. He also corroborated as to the arrangements for the concert. Witness had said to defendant that he should provide the accommodation, as he would benefit by the entertainment, and defendant did not object.

This closed the case for the plaintiff.

For the defence,

Egbert George W. Smith, the defendant, said that when the Masonic Hotel was taken over witness was appointed manager of the hotel so far as regarded the bar and sale of liquor, and had sole control of the catering. The hotel was taken over on October 13, and witness took possession the same evening after stock had been taken. On October 12 witness settled with plaintiff to go over the pantry stock, but on October 13 plaintiff had to go to Cape Town, and it was settled that witness should go over that stock with Jones, plaintiff's bookkeeper. The list he now produced was the one witness had taken. It was a correct one, and the articles with the crosses against them were those witness had told the bookkeeper he would not take over. On the following day he told plaintiff that there were certain articles he would not take over, especially green peas, which he said, "Have caused the death of my father and nearly of my mother." One Davis was present in the bar at the time. Witness had never authorised Krige to make the offer which plaintiff alleged he had done. As to the arrangement for the concert, it was reckoned between plaintiff and Mr. Hatblock that they should pay £5 each, and that any expense over and above that should also be paid by them. Mr. Hatblock had paid his half of the additional expenses, witness having put it in a bill with the items set out. Plaintiff had also admitted to witness his liability for his half, and said he would pay it when they settled the stock business. Witness never said on the night of October 13 that he had taken over the pantry stock. Witness's words were: "I have gone through that stock already." That was when they were about to take stock of the articles in the pantry.

f

Cross-examined: Witness had not previously made any arrangement with Hatblock as to the pantry stock. Witness never agreed to pay any portion of the expense of the concert, because it would not benefit him, he being only the manager for the Brewery Company. He received as such a salary and no commission.

William D. Davids stated that three or four days after the hotel had been taken over he overheard a conversation in the bar. He heard defendant saying that certain articles of the stock he would not take over at any price. In answer to that Coomer did not say anything.

Cross-examination: That conversation could not have taken place on October 11.

E. W. Krige, an article clerk to Mr. Kenealy, said he had never had any conversation with plaintiff in which he said he was authorised to settle for the full amount of the claim. That story was a fabrication. Witness saw plaintiff on the farm one day, and the latter said to him: "Here, you, why don't you make your man simply climb down." Witness was in a hurry at the time, and replied, "I have nothing to do with that." That must have been towards the end of November. Witness could never have offered to settle the account, because he had no instructions from anybody to do so. Witness was at the entertainment on October 19, and he heard plaintiff say that defendant had nothing to do with it, and that he (plaintiff) was to share the expense with the company.

This concluded the evidence.

After argument on the facts,

De Villiers, C.J., said: The defendant does not deny that he bought stock from the plaintiff, but he says that he bought part of the stock only, and not the whole. Upon this there has been a conflict of evidence, and from the plaintiff's evidence it is clear that the whole of the stock was sold at cost price, and the sale took place on the 13th of the month. In this conflict of evidence, that of two apparently impartial witnesses must weigh with the Court, and both Mr. Fowler and Mr. Hatblock said it was clearly understood that the whole of the stock was taken over. It seems to me so extremely improbable that the plaintiff would have sold the whole of the liquor at cost price to the brewery, and sold part of the pantry stock to the tenant of that hotel. The amount itself is very trifling, very small, and it seems to me extremely improbable that if an arrangement was made, there would be an

understanding that a part only of the stock should be taken over. Certainly the plaintiff did not understand that, nor did Mr. Hatblock or Mr. Fowler. It may be said that the defendant was mistaken, but I think it was somewhat of an afterthought, and on the 14th, when it was said that he objected to the sale of the peas, he did not then seem to object to anything else; at all events, that is all the clerk Davis heard any objection to. But what took place on the 14th could not affect a contract made on the 13th. As to Krige's evidence, that does not carry the case very much further. Here were two conversations in which there might have been a misunderstanding on either side, but they could not really affect the contract originally made, nor does either conversation carry the question further with regard to paying for the entertainment. Here also, the plaintiff having paid his £5 as his contribution, it does seem extremely improbable that he agreed to pay more. The whole weight of the evidence favours the plaintiff in this case, and judgment will be given for the plaintiff, with costs.

Buchanan, J. and Laurence, J., concurred.
[Plaintiff's Attorneys, Messrs. Fairbridge, Arderne & Lawton; Defendant's Attorney, A. P. Kenealy].

IN THE MATTER OF THE MINOR LUCK.

Mr. Nathan moved for an order authorising the Master to make certain payments towards the minor's education from the estate in which she was heir.

Granted.

WHITE BROS. V. JACOBS.

Pleading—Amendment.

This was an application by the defendant for leave to amend his plea. It appeared that the defendant was sued by plaintiffs for the amount of a certain account. This debt was denied, the defence set up in the pleadings being that the money had been paid by defendant's clerk Davis to one Kelly on behalf of the plaintiffs; the plaintiffs, however, stated that they did not know Kelly in the matter, while the latter denied having received payment of the account in question. The said Davis was in the South African Light Horse, and it had been impossible to obtain further particulars from him until recently, when he returned to town.

He then gave a description of the man to whom he paid the money, from which it was seen that the person was one Higgins, formerly a clerk or partner in Kelly's office. Leave was therefore asked to amend the plea by inserting the words "one Higgins, at the time a partner or clerk in the employ of the said Kelly."

Mr. Currey appeared for the applicant (defendant in the main action).

Mr. Benjamin for respondent (plaintiff in the action): The proposed amendment of the plea raises an entirely new issue, and should not be allowed. If it had been made in the first instance that the money was paid to Higgins, and not to Kelly, this action would never have been pressed. Unfortunately the plaintiffs knew Higgins, who has now absconded, to their cost. It now becomes a question of costs. If the amendment is allowed, the case cannot go on, and the question will be, who is to pay costs?

The Chief Justice: Was not Higgins your agent?

Mr. Benjamin: I must admit that he was. Under the English Rules of Court (A.P., p. 482), in an ancient lights case, an amendment was refused because a new issue was raised. (See under Order 28, R. 1, the case of *Wedgwood v. Wedgwood*, W.N. 1883, 8, p. 27.)

Laurence, J.: In that case there was an appeal, and it appears that the Court of Appeal thought the amendment ought to be allowed.

Mr. Benjamin: There was no decision to that effect. If the amendment is allowed, I submit that we ought to have our costs up to date.

Mr. Currey was not heard in reply.

De Villiers, C.J., said: The plaintiffs cannot possibly be prejudiced by a statement of fact. The clerk alleges now that he paid the money to Higgins, and the plaintiffs apparently admit that Higgins was entitled to receive the money on their behalf. It is plaintiffs' misfortune that their agent had received the money and not informed them of it, but the defendant must not suffer for that. The amendment of the plea will be allowed with the cost of opposition, as I do not think that opposition should have been raised.

Buchanan and Laurence, J.J., concurred.

SEARIGHT AND CO. V. THE TOWN } 190.
COUNCIL OF CAPE TOWN. } Feb. 2nd.

Mr. Searle, Q.C., on behalf of the plaintiffs in this action, applied to the Court to fix a

day for the hearing of this case before a judge and jury. He suggested February 26 as a suitable day.

Mr. Innes, Q.C. (with whom was Mr. MacGregor), appeared for the defendants, and consented to the application.

The application was accordingly granted, February 26 being fixed as the day for hearing the case; costs to be costs in the cause.

SEA POINT MUNICIPALITY V. PEDERSEN.

Mr. Benjamin, for the Municipality, applied for the postponement of the hearing of this case until February 15.

Mr. Buchanan, for the respondent, agreed, subject to the payment of the costs occasioned to respondent by that application.

Postponement granted accordingly.

IN THE MATTER OF THE PETITION OF HOWEL JONES.

Lost debentures — Cancellation of covering bond—Issue of duplicate—Act 43 of 1895.

This was an application for an order upon the Registrar of Deeds.

The petitioner was the registered owner of four debentures of £100 each in Stuttford & Co. (Limited), which had been destroyed by fire to the best of his knowledge, and had at no time been ceded or pledged by him. The debentures had been registered under section 4 of Act 43 of 1895, and were therefore executed singly, and the only record in the office of the Registrar of Deeds was a covering bond describing and enumerating all the debentures. Upon an indemnity being given by the petitioner, the company had issued duplicate originals to him subject to the condition that he should have them stamped by the Registrar of Deeds and issued by him as in the case of originals. The Registrar of Deeds however, upon application being made to him said that as no provision was made in the Act for such a course, he could not undertake the responsibility of confirming the action of the directors. The petitioner now prayed for an order authorising the Registrar of Deeds to cancel such part of the registration of the original covering bond as referred to the original four debentures, and thereupon to register, stamp with his official stamp, and issue the duplicate debentures in lieu of the originals. Stuttford & Co. and the trustee for the debenture-holders consented.

Mr. Searle, Q.C. appeared for the petitioner.

The order was granted as prayed.

SUPREME COURT

[Before the Hon. Mr. Justice BUCHANAN
and the Hon. Mr. Justice LAURENCE.]

TRUTER V. KRYNAUW. { 1900.
{ Feb. 5th.

Lease—Sheep—Delivery.

This was an action for the delivery of certain sheep, and for the recovery of certain moneys for hire of sheep, &c.

The plaintiff's declaration was as follows. The plaintiff is Jan Louis Truter, of Nietgedacht, in the division of Britstown, and the defendant is Stephan Johannes Krynauw jun., a farmer, of Honiglaagte, in the said division. (2) On or about January 12, 1897, the plaintiff and the defendant entered into an agreement whereunder the plaintiff let to the defendant, who hired from him, 299 merino sheep, the property of the plaintiff, and then having wool of three months' growth upon them at a hire or rental of 1s. per head per annum, the defendant undertaking to return to the plaintiff sheep of the same class with three months' growth of wool upon them at the expiration of one year. (3) On or about January 25, 1899, the plaintiff and the defendant entered into a further agreement, whereunder the plaintiff let and the defendant hired twenty-five more merino sheep, the property of the plaintiff, upon like conditions. (4) All the said sheep were delivered to the defendant, who retained possession of all of them until March 28, at which date he delivered back to the plaintiff 299 sheep similar in class to those he had hired, but newly shorn, with no wool upon them, and he also paid to the plaintiff the sum of £7 on account of the hire of the said sheep. (5) The defendant has failed and neglected, since the said date, to deliver back to the plaintiff the remaining twenty-five sheep hired as aforesaid, or to pay the balance of the hire or rental due in respect of the said 299 sheep, or any portion of the

hire due in respect of the said twenty-five sheep, and the plaintiff has thereby sustained damage. (6) All things have happened, all times have elapsed, and all conditions have been fulfilled necessary to entitle the plaintiff to demand from the defendant delivery of the said twenty-five sheep or their value, and the amount of their hire or rental, together with damages for their non-delivery as agreed upon, and also the balance of the hire or rental of the said 299 sheep, together with damages for failure to deliver the same within the time agreed upon, and with three months' growth of wool upon them, but the defendant has failed and neglected to deliver the said sheep, or to pay the said sums as damages.

The plaintiff therefore claimed: (a) Delivery of the said twenty-five sheep, or similar sheep or their value, viz., £25; (b) the hire or rental of the said twenty-five sheep, for one year, being £1 6s.; (c) the sum of £1 6s., being damages for failure to deliver the said twenty-five sheep; (d) the sum of £17 19s., being balance of hire or rental for the said 299 sheep; (e) the sum of £2 9s. 10d., being damages for failure to deliver the said 299 sheep at the due date; (f) the sum of £4 19s. 8d., being damages sustained through defendant delivering sheep just shorn and without wool, being the value of three months' wool at 4d. each sheep; (g) alternative relief; (h) costs of suit.

The defendant's plea was that on or about January 26, 1897, he hired 298 merino sheep from plaintiff at 1s. per head per annum, it being a condition of the said contract of lease that the defendant should return to the plaintiff sheep of a similar class upon receiving from plaintiff one month's notice at the expiration of any successive period of twelve months, reckoned from January 25 1897. There was no stipulation as to the growth of the wool upon the sheep so to be delivered. (2) No contract was entered into between the parties on January 12, 1897. Subject to the above, the defendant denies all the allegations in the second and third paragraphs. (3) The said 298 sheep were thereafter delivered to the defendant, and among them was one lamb not included in the terms of the said contract. On or about January 20, 1898, he received a notice from the plaintiff demanding back the said sheep, and although the said notice was informal he agreed to return, and did duly return, to the plaintiff in the month of March 298 sheep under the said contract, and an addi-

tional sheep in return for the lamb aforesaid. (4) The rent due under the said lease was the sum of £14 18s. At the same time the plaintiff was indebted to the defendant in the sum of £1 6s., for goods sold and delivered, and £6, being the value of a certain bull for which the defendant was responsible. The said total amount of £7 6s. was by the parties agreed to be set off against the rent of the said sheep, and the defendant paid the balance, being the sum of £7 12s., to the plaintiff in cash. (5) Subject to the above, the defendant denied all the allegations in the 4th, 5th, and 6th paragraphs. Wherefore he prayed that the plaintiff's claim be dismissed with costs.

All the evidence in the case had been taken on commission before Mr. Aitchison, the Resident Magistrate at Britstown, on August 3, 1899, and formed a voluminous record. Plaintiff's evidence was to the effect that after agreeing about the hire of the 299 sheep he mentioned that he had some other sheep which had strayed, and defendant agreed to hire those on the same terms. Other witnesses deposed that twenty-five of these sheep were recovered and handed over to defendant. Plaintiff also stated that there was nothing in the agreement about one month's notice, the period for which the sheep were hired being one year. As to defendant's contention that plaintiff was responsible for a certain bull which had died, plaintiff said that he never took over the said bull from plaintiff.

Mr. Buchanan appeared for the plaintiff.

Mr. Benjamin appeared for the defendant.

After the evidence had been read over, Mr. Benjamin was heard in argument on the facts.

Mr. Buchanan was not called upon.

Buchanan, J., said: This action has arisen out of a lease of certain sheep to defendant by plaintiff. It appears that in January, 1887—the exact date has not been proven by the evidence, but it is immaterial to this case—the plaintiff and defendant agreed together that the defendant should hire the merino sheep belonging to the plaintiff. It was said by the plaintiff that they were hired for one year certain, but the defendant said they were hired for one year, subject to one month's notice of the termination of the agreement. The plaintiff had certain goats and bastard sheep among his flock, but the defendant agreed to take only the merino sheep. When the sheep came to be delivered, 299 merino sheep were counted out and accepted by the defendant. At this time

the plaintiff had certain other sheep, which had been lost and were not forthcoming at the time, but the defendant agreed to take those sheep should they be found. Some time after certain sheep belonging to the defendant were found, and on the evidence taken as a whole, we are convinced that these sheep were taken to defendant's kraal. These sheep numbered twenty-seven in all, but two of them were claimed by plaintiff's brother, and consequently only twenty-five sheep were handed over to the defendant. On this point we have the evidence of the man April and the plaintiff's brother, and in conjunction with this we have the evidence of Hattinck, who said that after correspondence the defendant admitted to him distinctly that he had received those twenty-five sheep. The defendant denies having received these twenty-five sheep, and one witness says they could not have been taken to the kraal otherwise he would have seen them, which he never did; but the weight of evidence is entirely in favour of the plaintiff, and that the defendant received these sheep. These never having been returned the plaintiff claims redelivery of them or their value, £25. This seems to be a fair valuation according to the prices at which sheep were sold at this time. The defendant must therefore restore these twenty-five sheep, or better still, pay their value, £25, along with their hire for two years. £2 10s., making together £27 10s. As to the 299 sheep, about which there is no dispute, these were received by the defendant and not restored until between fourteen and fifteen months afterwards. A demand was made for these sheep in January, 1898, but they were not redelivered until March. Whether the plaintiff's account or the defendant's account of the contract be taken it is immaterial, as both the parties agreed in March that these sheep were to be received back. The only question now is the payment of the hire for these sheep. Defendant admits responsibility for at least twelve months, and under the circumstances, seeing that these sheep had three months' wool on them when they were delivered by plaintiff to defendant, and that they had been newly shorn when returned, I think it only fair that the defendant should pay hire for fourteen months, the period the sheep were in his possession. This amounts to the sum of £17 8s. 10d., according to the declaration. Against this the defendant has paid a certain amount in cash to the plaintiff

through Philip Truter. The plaintiff alleges that he received £7 through Philip Truter, while defendant says the sum was £7 16s., but taking the evidence I think only £7 was paid. Therefore only £7 will be allowed. The defendant, however, has a contra account against plaintiff for £1 5s. 6d., goods sold and delivered. This account is admitted by the plaintiff, and must therefore be deducted. Then defendant claims £6 for a bull which, he says, was lent to plaintiff's father to use on condition that he trained the bull for draught, and which had died. This bull was not the property of the defendant, but belonged to his sister and was in his custody. No cession of action has been made by the sister to defendant, but allowing that he has, and that seeing he had custody, he is entitled to recover, the question arises whether he could recover from the plaintiff the loss of the bull. In the first place it is suggested that the plaintiff is liable on the ground that he was in partnership with his father, but the evidence goes to prove that there was no such partnership. Even if he did lend plaintiff the bull, it is now dead, and in our opinion, in the absence of any negligence on the part of plaintiff, he could not be held responsible. Even if he had hired the bull to plaintiff, the latter could only be held responsible in case of negligence on his part. There was no negligence in this case; in fact, the death of the bull was due to a regrettable accident, for which the plaintiff was in no way responsible. Under the circumstances the judgment must be for plaintiff for £17 8s. 10d. for the hire of the sheep. From this there has to be deducted the £8 5s. 6d., leaving £9 3s. 4d., to which must be added the £27 10s. Judgment will therefore be for the plaintiff for £36 13s. 4d., and costs of suit. I must say with reference to the commission that a great deal of unnecessary evidence was given, but this is a matter for the taxing officer.

Laurence, J., concurred.

[Plaintiff's Attorney, Paul de Villiers; Defendant's Attorneys, Messrs. J. & H. Reid & Nephew].

IN THE ESTATE OF THE LATE WILLIAM FLEMING AND OTHERS.

Mr. H. Jones applied for an order authorising the Registrar of Deeds to pass transfer of certain property situated in Wynberg.

The Court granted a rule *nisi* calling upon all persons interested to show cause why the order prayed for should not be granted, the rule to be published once in the "Government Gazette" and once in the "Cape Times."

IN THE MATTER OF THE PETITION OF
ELIAS KEYS.

Mr. Nightingale moved for an order authorising the Registrar of Deeds to issue a certified copy of certain two mortgage bonds, which had been lost.

Granted.

IN THE MATTER OF THE PETITION OF MARIA
ELIZABETH ANN CHICK.

Husband and wife Transfer of property.

Mr. Uppington moved for leave to the petitioner to transfer certain property without the assistance of her husband, from whom she now lived apart. The petition stated that the ante-nuptial contract under which the parties were married had not been deposited in the Deeds Office, having been drawn up prior to 1875. The petitioner's copy had been lost, and the husband had refused to sign the power to enable the petitioner to pass transfer of certain property coming to her from her mother's estate.

The Court granted the order as prayed.

HAYES V. HAYES.

Mr. Buchanan asked for an extension of the return day in this case until February 17.
Granted.

SUPREME COURT

[Before the Hon. Mr. Justice BUCHANAN
and the Hon. Mr. Justice LAURENCE.]

FACHIDIEN V. CITY TRAMWAYS { 1900.
COMPANY.—MUSZLAK V. { Feb. 6th.
CITY TRAMWAYS COMPANY.

Tramcar—Running powers—Negligence.

A Tramway Company which has statutory running powers, and the right to run cars along streets, has no greater powers than the drivers

of any other vehicle. If, therefore, a motorman on a tramcar, going along a street, sees a carriage in front of him at such a distance that he can pull up and avoid an accident, and does not do so, he will be guilty of negligence.

Where a Tramway Company was not wholly absolved of negligence, but it was not satisfactorily proved that an accident resulted from the negligence of its motorman driving a tramcar,

Held, that the plaintiff claiming damages by reason of such accident had not discharged the burden of proof imposed on him.

These were two actions for damages, and as the evidence was similar in each case they were taken together.

The actions were for damages, due to a collision between a carriage belonging to Muszlak and a tram in Plein-street, at the corner of Spin-street. Muszlak claimed £21 10s., and Fachidien an occupant of the carriage claimed £17. It was alleged that the collision took place on July 20 last year, and was due to the carelessness of the company's servants.

The defendant company, on the contrary, alleged that the collision was due to the want of skill and negligence of the plaintiff Muszlak's driver.

Mr. Benjamin appeared for the plaintiffs.

Mr. Graham, Q.C., and Mr. Innes, Q.C., appeared for the defendant company.

Felix Muszlak, stated that he was in business in Cape Town as a carrier and livery-stable keeper. On July 20 last year a man named Charles Champ was in witness's employ. Champ had been driving for witness for ten or twelve months. He was a sober, good, steady driver, and had never met with any accident. On the day of the accident Champ was plying for hire with a four-wheeled Victoria to which two horses were harnessed. Witness did not see the collision. Champ went out on the morning of July 20, and was brought home insensible in the evening, while the Victoria was smashed. The mud guards and the lamp were damaged, the axle required repairing, and there was something the matter with

the splash-board. The charge for repairing the carriage was £7 10s. Witness made on an average £2 per day from the carriage, and it was a week under repair. Witness did not use the horses during that time, as he had not another Victoria. If he had he could have used the horses. Had he hired a Victoria he would have had to pay 30s. a day for the hire. Witness paid Champ 5s. per day for that week. He also had a doctor attending him, and was responsible for the bill. Witness estimated his total loss at £20 odd. At the spot of the accident Plein-street was 28 feet wide between the kerbs, while Spin-street was 37 feet wide. The collision occurred in front of Cleghorn & Harria's shop. Scott Bros.'s premises were 128 feet distant.

Cross-examined: Witness had had the Victoria about eighteen months before the accident. He bought it new from Cooper's, and it had not been under repair at the factory between that date and the accident. Witness had sold the Victoria to one Mr. Bunn for £90 before the accident, but he was still using it, as he had not to give delivery for a month. Consequently witness had to pay the bill for repairs, so that the carriage should be accepted by Mr. Bunn. Witness did not notice a smell of drink about Champ on the day of the accident.

Dr. Abdurahman deposed that he examined the plaintiff Fachidien and her daughter on July 20. The plaintiff had an abrasion over the right eye, which made a mark which would last for some time. There was also a contusion on her right side on the ribs. Witness attended her daily for a month. She was confined to bed for the first fortnight. Witness saw her about the end of the year, when she again complained about a pain in the side. Witness could not say whether she was still suffering. He did not think it was a permanent injury. Witness's bill for attending plaintiff and her daughter came to £6 15s.

Charles Champ deposed that on July 20 he was in the employ of Mr. Muszlak driving a Victoria with two horses. He had had twenty-two years' experience as a driver. On July 20 witness had driven the two women (Fachidien and her daughter) from Boom-street to Bree-street, and then brought them back again at five o'clock in the afternoon. They were returning *via* Wale-street, Adderley-street, Bureau-street, and Spin-street. The daughter was sitting with her back to witness, while the mother

had her face towards him. Witness was on the left side of Spin-street at the time, and the horses were going between five and six miles an hour. Witness did not see the tram-car when he came to the corner because it was impossible to see very well until he got into the street. The horses were nearly across the tramline when witness first saw the tram, which was then between twenty and thirty yards away. The tram was coming down Plein-street towards Darling-street. There was no bell ringing at the time. The tram was going faster than usual. Witness could not have stopped the horses when he saw the tram. If he had tried to do so there would have been a bigger accident. Witness did not whip the horses up. He tried to cross before the tram, but failed to do so, and the tram struck the carriage sideways. It first struck the front wheel and then the hind wheel, turning the carriage right round. These horses were always quiet, and witness had driven them for ten months previous to the accident. Witness became unconscious after the collision.

Cross-examined: A man named Douglas, who also was in Mr. Muszlak's employ, took witness home. Witness had made no claim for damages himself, and never asked anybody to claim damages for him.

Mr. Graham read a letter the Tramway Company had received from Mr. Brady, attorney, stating that he had been consulted by Mr. Charles Champ, a cab-driver, with reference to the damage caused to him personally by the collision, and stating that his client held the company responsible for any loss or damage that might ensue.

Witness then admitted that about four or five days after the accident he saw Mr. Brady at his office. Witness went there himself, and he told Mr. Brady to make a demand. He asked Mr. Brady to write a letter, but he did not see what was in the letter. Witness was now employed by Mr. Ebdon as an engine-driver. Witness had been three years in the employ of Mr. Stacey, of the Eastern Telegraph Company, and he then did gardening and also drove a one-horse polo cart. On the day of the accident witness had had other fares besides the two women, having driven a lady and gentleman from Mount Nelson Hotel to a hotel in Wynberg and back again. Witness had had nothing to drink the whole of that day. He did not tell anybody that he had had a couple of glasses of liquor that day. It was not a fact that before the accident he

was driving rather nearer to the right side of Spin-street. There were no other vehicles about the place at the time.

Mr. Justice Laurence: But surely if there were no other vehicles about there would be no difficulty in avoiding the tram?

Witness: It was going too quick. Continuing, witness said he could have stopped the Victoria in three or four yards; he was going quite easy.

Charles William Douglass, formerly a cab-driver in the employ of Mr. Musztrak, said that he was on his cab in front of the Royal Hotel at the time of the accident, and saw both the tram coming down and the Victoria turning in from Spin-street. Witness heard no bell, and the tram was coming down very much faster than usual.

Cross-examined: Champ drove round the corner at a speed of from five to six miles an hour. That was a decent speed, and he could have stopped the horses within seven yards.

Re-examined: After the collision the tram was pulled up at the second pillar past Scott Brothers' corner.

James Meyer, a wagon-driver, deposed that he saw the accident from where he was standing at the left-hand corner of Spin and Plein Streets. The tram was coming down at full speed; going faster than trams usually do. When he first saw it, the tram was about fifty yards away.

Cross-examined: Champ was driving at the rate of five or six miles an hour. Witness was now working at the Docks as a coolie. If the driver of the Victoria had looked up the street he would have seen the tram. He would have had plenty of time to pass it if the tram had not been coming so fast.

Jessie Abrahams Fachidien, the plaintiff in the second case, said that she kept a fruit and fish shop in Boom-street. On the day of the accident Champ drove witness and her daughter to a gathering at the Malay priest's house in Bree-street. Champ came for them again in the afternoon. He had nothing to drink there. There were no strong drinks at the priest's house. Witness saw the tram coming down fast just before the accident, but no bell was ringing. They were crossing the tram line when the car struck the carriage, and witness was thrown out. She could not say where she fell. Witness was ill for a month afterwards, and still suffered from a pain in her side. The dresses of witness and her daughter were spoilt. They were new

dresses put on for the first time that day. Her dress cost £3 and the daughter's £7. Witness claimed £46 15s., made up as follows: Doctor's bill, £6 15s.; dresses, £10; general damages, £30.

Cross-examined: Witness was talking to her daughter at the time of the accident.

Marian Abrahams Fachidien corroborated the evidence of her mother.

This closed the case for the plaintiff.

For the defence,

Walter Frederick Howse stated that he was employed by Messrs. A. R. McKenzie & Co., and resided in Upper Orange-street. On the evening of July 20 he was standing outside Messrs. Cleghorn & Harris's in Plein-street, waiting for a tram. He saw a carriage coming along Spin-street with a white driver on the box and two Malay women inside. A tram was coming down Plein-street at the rate of 5½ or 6 miles an hour. His attention was directed to the tram by the gong sounding. The carriage was coming round the corner at full speed. It was quite light at the time, and there was no traffic to impede witness's view. The carriage was coming down the centre of Spin-street, more to the right. It was driven straight across the street, and the horses were facing witness when the collision occurred. The driver was speaking to the people round about after he fell. If he said that he was insensible, that was false. From what witness saw, the motorman was not in the least to blame. Witness had no interest in the case. Witness heard the bell ring seven or eight times before the collision. The car was about fifty or sixty yards away when he first heard the bell ring. After the collision, the car drew up about eight or ten yards from Spin-street.

Cross-examined: The Victoria was turned over on its side by the collision.

By the Court: From Stal Plein down to the place where the accident happened there was a decline.

Albert Ansell said that he had had about eighteen years' experience of horses, and was considered a pretty good judge of pace. He was turning into Plein-street from Spin-street at the time of the accident. The tram was coming down the street at the rate of five or six miles an hour. The landau was in the middle of the road, inclining more to the right than anything else. It was going at a fair speed. From the left-hand corner of Spin-street it was possible to see about fifty or sixty yards up Plein-street. The carriage drove straight ahead

over the tram-line. Then the collision occurred and the carriage was overturned, falling on its side, but the horses remained standing. It was not true that the driver was rendered insensible by the fall from his box. He could speak, and witness remarked to him that he had had a lucky escape from being killed. Witness also asked him if he had had anything to drink, and he said he had had a couple of glasses. Witness was standing close to Champ, and smelt the drink on him. If the landau had been skilfully driven the accident would not have occurred. From what witness saw, neither the motorman nor the Tram Company was in any way to blame. Witness had no enmity against Mr. Muslak, and had come forward as an impartial, voluntary witness.

Maurice Cohen, a private inquiry agent, also detailed the manner in which the accident occurred. He corroborated the last witness as to the landau being driven in the middle of the road in Spin-street, and as to the gong being sounded while the car was coming down Plein-street. Witness thought the driver of the carriage had been drinking. He smelt liquor on him.

Cross-examined: Witness had never been employed in connection with this or any other case by the Tramway Company.

Alexander McDonald stated that he had been two years and nine months in the employ of the Tramway Company. He did not drink intoxicating liquors. There was an incline down Plein-street. With regard to the accident, witness first saw the landau coming across Plein-street from Spin-street. Witness put on his brake, and did his best to stop the car, but failed. Before he reached Spin-street, and before he saw the landau, he was sounding his gong. He had instructions to sound the gong when approaching cross-roads. The car struck the landau and turned it over on its side. There were four or five people on the car at the time. Witness thought the driver had drunk from the appearance of his eyes, and on going over to him he smelt the drink. He told the driver he was the worse for drink, and the latter made no reply.

Cross-examined: When witness first saw the landau it was about fifteen yards away. It was then coming out of Spin-street. After the collision the car went about nine yards. The car was going at the rate of five or six miles an hour. He would swear it was not running at the rate of ten or twelve miles an hour. Witness was ringing his gong

nearly all the way from the top of Plein-street. Witness's car was stopped before it reached the corner of Mostert-street.

James Grant said he was guard of the car in question. It would be between half-past five and a quarter to six when the accident occurred. The gong was sounded all the way down Plein-street. It was the gong sounding more than usual that directed witness's attention to the front of the car, which he saw was then close upon the landau. They were going about five miles an hour at the time. Witness felt the current being reversed and the brakes being put on. They were then about four yards away, and after the collision they went on about seven yards. Witness took the names of the two gentleman passengers in the car. One was the French Vice-Consul, M. Feer. Witness believed M. Feer had now left. His assistant, who was with him at the time, had also left. After the collision witness saw the driver of the landau. He was not insensible, but he was the worse for liquor.

Cross-examined: It would take longer to stop a car on an incline like Plein-street than it would on a level road. Witness would not say the driver was quite incapable of driving, but he had had drink.

Walter Reid, an architect practising in Cape Town, said he had measured the distance from the centre of Spin-street to the front door of the Royal Hotel, and found it to be 100 yards. Standing in Spin-street, six feet behind the line of buildings in Plein-street, it was possible to see 350 feet up Plein-street. Six or eight yards from the corner it was possible to see about twenty yards up Plein-street.

Clarence de Jaeger, a clerk in the employ of Messrs. Scanlen & Syfret, said he knew they had got a statement from the French Vice-Consul, M. Feer. On going to the Vice-Consul's house in November to serve the subpoena, he found that M. Feer had gone to Johannesburg.

This concluded the evidence.

After argument on the facts.

Buchanan, J., in giving judgment, reviewed the facts of the case and then said: The bases of these actions are the negligence of the Tramway Company and its servants, and in such a case some evidence must be given by the plaintiffs of negligence before they can succeed. There is no doubt whatever that the Tramway Company has running powers and the right to run cars down Plein-street, but at

the same time it must be clearly laid down that they have no greater powers than any other vehicle, and if the motorman coming down this street saw this carriage in front of him at such a distance that he could have pulled up but did not do so, then he would have been guilty of negligence, and the Tramway Company would be liable in damages. But the evidence raises considerable doubt as to whether there was any negligence on the part of the motorman, and, at any rate, the evidence shows that if there was any negligence on the part of the motorman, there was also negligence on the part of the driver of the carriage, and that with reasonable diligence on the part of the latter he might have avoided the accident. This being the case, the action must fail. I must say that the evidence for the defence in this case goes too far, for I am not convinced that the driver of the carriage was intoxicated at the time, and I can quite understand the dazed condition of the man after he was thrown off his box. I do not believe there was any drunkenness whatever on the part of the driver. With the doubt in this case as to whether there was negligence on the part of the motorman, and with my opinion that there was some negligence on the part of the driver, the judgment must be absolute from the instance. I cannot discharge the Tramway Company altogether from negligence in this case, but I do not think it has been satisfactorily proved that the accident resulted from the negligence of the motorman. With regard to the damages, even if the plaintiffs had succeeded in their actions the amount of damage was so small that the actions should certainly have been brought in the Magistrate's Court.

Laurence, J., concurred.

[Plaintiffs' Attorney, C. Brady; Defendant's Attorneys, Messrs. Scanlen & Syfret.]

SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), the Hon. Mr. Justice BUCHANAN and the Hon. Mr. Justice LAURENCE (Judge-President of the High Court of Griqualand West).]

PROVISIONAL ROLL.

WILEY AND CO. V. CAROLUS } 1900
AMSTERDAM. } Feb. 8th.

Mr. Bisset applied for provisional sentence for £300 on a mortgage bond passed by defendant in favour of Wiley & Co., with interest at the rate of 7 per cent. from January 1, 1899. The bond had become due by reason of the non-payment of interest. It was also asked that the property be declared executable.

Order granted.

ROBERTSON V. HUGO RIEVE.

Mr Benjamin applied for provisional sentence for £13 3s. 3d., being interest on a mortgage bond from July 7, 1899, to December 3, 1899.

Granted.

WOODHEAD, PLANT AND CO. V. CONRAD COHEN.

Mr. Gardiner applied for the final adjudication of defendant's estate, the provisional order having been granted on January 31.

Granted.

SAVAGE AND SON V. MARCUS MARAISE AND OTHERS.

Mr. Buchanan applied for the final adjudication of defendants' estate, the provisional order having been granted by the Chief Justice on January 21.

Mr. Gardiner appeared for the defendants, and asked for a postponement of the matter. He read an affidavit from one of the partners of the defendant firm, trading at Hope Town, who stated that after receiving the summons in the matter, he applied to the Major in command at Hope Town for a pass to proceed to Cape Town, when he was informed that passenger traffic between Hope Town and Cape Town was stopped for the present. He went on to state that the defendant firm carried on

business both in Hope Town and Douglas, and the latter place was at present in the hands of the enemy.

The Chief Justice: Could he not send an affidavit?

Mr. Gardiner: I have no affidavit on the merits of the case.

The Chief Justice: His personal attendance was not necessary.

Mr. Gardiner: I suppose it was impossible to go into the merits of the case because some of the books would be at Douglas.

The case was postponed until the last day of term, the provisional order remaining in the meantime.

WHITE, RYAN AND CO. V. SCHLENZKA.

Mr. Buchanan applied for provisional sentence for £50 on a promissory note, and also for judgment, under Rule 329D, for the sum of £25 for goods sold and delivered as per detailed accounts rendered, with interest *a tempore morae*, and costs of suit.

Granted.

WEBER V. JAN DU PLESSIS.

Mr. Benjamin applied for provisional sentence for £179 17s. due on a promissory note, with interest *a tempore morae*, and costs of suit.

Granted.

ILLIQUID ROLL.

MACKIE, YOUNG AND CO. V. C. AMSTERDAM.

Mr. Benjamin applied for judgment, under Rule 329D, for the sum of £26 13s., being balance of account for goods so delivered, with interest *a tempore morae*, and costs of suit.

Granted.

VAN DER BYL V. JAMES H. CARSTENS.

Mr. Buchanan applied for judgment, under Rule 329D, for the sum of £260, being the purchase amount of certain sixteen horses sold and delivered by plaintiff to defendant, with interest *a tempore morae*, and costs of suit.

Granted.

TOWN COUNCIL OF CAPE TOWN V. J. A. VIXSEBOXSE.

Mr. Jones applied for judgment, under Rule 329D, for the sum of £21, water rates due, with costs of suit.

Granted.

GENERAL MOTIONS.

COLONIAL GOVERNMENT V. MILLS.

Mr. Sheil, Q.C. (with whom was Mr. Ward), appeared for the plaintiffs, and moved for judgment in terms of the consent paper which had been filed.

Granted.

IN THE MATTER OF THE PETITION OF NICHOLAAS SALMON LOUW.

Mr. Buchanan moved for an order authorising the Registrar of Deeds to issue a certified copy of a certain mortgage bond. It appeared that the petitioner was a farmer residing in the division of Calvinia, and on January 20, 1886, a certain mortgage bond for £244 2s. 5d. was passed in his favour. In April, 1893, a son of the mortgagor paid the full amount of the mortgage, and requested cession. It was said that the bond was handed to the son, but appeared to have gone astray, and the certified copy was now asked for so that cession might be given.

Mr. Buchanan: Petitioner is the legal holder of the bond, which is not pledged. *Ex parte Stone* (4 Sheil, p. 138) is a case in point.

The Court granted a rule *nisi*, calling upon all interested to show cause why the order should not be granted as prayed; the rule to be published once in the "Government Gazette" and once in a Dutch newspaper circulating in the district.

| | |
|------------------------------------|---|
| VOS V. GEORGE AND HENDRINA FARMER. | { 1899. Nov. 16th Dec. 12th. Feb. 8th. |
| | |
| | |

Life-interest--Attachment.

V. obtained a judgment against F. for payment of a certain sum of money, and a return of nulla bona was made to the writ of execution against the movables. Application was thereupon made for the attachment and sale of the life interest owned by F. in a certain farm. F. alleged that she had sold the life interest to M., but in the absence of any proof of delivery or transfer, The Court granted the application.

This was the return day of a rule *nisi* granted on the 16th November. On that date a petition was presented to the Court praying that the second-named respondent's life interest in a certain piece of land situate in the field-cornetcy of North Onder Bokkeveld, in the division of Calvinia, being the farm called De Brak, might be attached and sold in satisfaction of a judgment of the Supreme Court, dated 12th October, 1899, for the sums of £85, £16 2s. 6d., and £9 16s., with interest on the first amount, the costs of the motion, and the expenses of the attachment and sale.

After considering the petition, the Court granted a rule *nisi* calling upon the defendants to show cause on the 12th December why the property should not be attached as prayed.

It appeared from the original petition that the second-named respondent's husband died on the 24th December, 1894, leaving a mutual will, which had been executed in 1874 by the deceased and by the second-named respondent.

By a codicil to this will the survivor of the spouses was entitled to a life interest in the farm De Brak.

In reply to this the respondent said that in 1895 she required £12), and borrowed that amount from her stepdaughter on loan for one year, and signed a document in which she promised to repay the same after one year from that date (December, 1895) with interest at the rate of 5 per cent., and upon failure of such payment it was to be understood that her life interest in the farm De Brak was sold to the said stepdaughter. Respondent failed to pay at the end of the year, and accordingly her life interest passed to the stepdaughter, who immediately thereupon took over the farm and still occupied it. Therefore neither of the respondents had any interest in the farm De Brak.

There was an affidavit by the stepdaughter corroborating the above.

In an answering affidavit it was pointed out that in 1895, 1896, and 1897 the road rates on the farm were paid by the respondent personally. In further affidavits it was said that she still resided at De Brak. The life interest in question was worth from £50 to £75 a year. The attention of the Court was also directed to the writing and signatures on the document, by which it was alleged the life interest was sold.

Mr. Buchanan moved that the rule be made absolute.

The Chief Justice said that if the life interest amounted to between £50 and £75 a year it would be worth more than £120. The matter might be allowed to stand over so that the parties could come to some arrangement, for it seemed to be very much to the advantage of these parties to pay the applicant's judgment, with costs, and remain in possession of the farm. On the face of the case, it seemed a very weak one. Another suggestion would be to make the rule absolute and stay execution to enable Miss Farmer to set up her claim.

Mr. Buchanan: It is quite clear that this case is the same as that of a fidei-commisary inheritance, where registration is necessary.

Mr. Justice Buchanan: Has there been any delivery at all?

Mr. Buchanan: This is an intangible thing, and it is difficult to say how there could be a delivery of it.

The Chief Justice: There is no delivery without transfer.

Mr. Buchanan: I do not think that the Court has ever held that in the case of interests there cannot be delivery without transfer.

De Villiers, C.J., said: The Court will make the rule absolute, but in order to enable the stepdaughter, Miss Farmer, to set up any claim she might have in respect of this interest, the Court will stay execution for one month.

The rule was accordingly made absolute, with costs, but with a stay of execution for one month.

IN THE INSOLVENT ESTATE OF GANIFFA HARRIS.

Mr. Buchanan moved for the appointment of a commission to examine certain witnesses with regard to the above insolvent estate.

The order was granted, the Resident Magistrate of Wynberg being appointed commissioner.

IN THE ESTATE OF THE LATE HELENA CHRISTINA STRYDOM.

Mr. Cloos moved for an order authorising the resignation of the superintending guardian and surety under a certain kinderbewys, and the appointment of one Johannes Stephanus Nel in his place.

The Magistrate of the district (Willowmore) from which the application came certified that the proposed superintending guardian and surety was a substantial man.

The order was granted, but the Chief Justice pointed out that it did not prejudice any claim the minors might have against the surety before his resignation, or against the survivor in the estate.

SUPREME COURT

[before the Chief Justice (Sir J. H. DE VILLIERS, &c.), Mr. Justice BUCHANAN, and Mr. Justice LAURENCE.]

QUEEN V. MICHAU. { 1900.
Feb 8th.
" 15th.

Bail—High Treason—Preliminary examination—Residence.

Where a preliminary examination had been taken on a charge of high treason, and a postponement of such examination was made for a considerable time without any further evidence being forthcoming, the Court, on the Attorney-General consenting, released the accused person on bail, with certain conditions as to residence.

This was an application for the release of J. J. Michau, at present in confinement on a charge of high treason and rebellion, on bail. It appeared that the applicant, J. J. Michau, was arrested on November 29, 1899, by the military authorities, and kept until January 26, when he was handed over to the civil authorities. On that date he was apprehended on a warrant charging him with high treason and rebellion. A preparatory examination was taken at Modder River, and he was remanded until January 29, on which date he was taken to Orange River, Hope Town district. At Orange River some evidence was taken, and the petitioner was then remanded by the Magistrate until March 1, and bail was refused. Applicant alleged that he was a British subject, and

that his domicile was Kimberley. He was a member of the Kimberley Borough, and a justice of the peace, also an attorney of the Supreme Court. He was arrested at Modder River, and no inquiry was made in his case until January 26. He was now in the common gaol at Hope Town, usually occupied by native prisoners.

Mr. McGregor appeared for the applicant, and Mr. Ward appeared for the Crown.

Mr. Ward said it would save the time of the Court if he stated that he objected to the application as being premature at this stage, on the ground that the prisoner had not been committed for trial. He had been remanded.

In answer to the Chief Justice, Mr. Ward further said that further evidence was to be taken. The remand was ordered in order that inquiries might be made. There were certain allegations against the applicant, the evidence respecting which was in Kimberley,* and the Attorney-General wished to make inquiries as to the nature of the evidence in support of that charge. He would not say that he wished to remand him until they got the witnesses out of Kimberley, because it might be that this evidence was worthless.

The Chief Justice asked whether there was not enough evidence against the prisoner to justify a committal.

Mr. Ward said the evidence at present was with regard to acts at Modder River, but there were also charges as to acts alleged to have been done in Kimberley, and the Crown wanted to make the record as complete as possible, but it was not intended to keep him in prison until they got the witnesses out of Kimberley. The examination would be concluded as soon as possible, but communication with Kimberley was not quite perfect. Of course, if he was committed for trial that application would be in order then.

In answer to Mr. Justice Laurence,

Mr. Ward said he did not think there was at present sufficient evidence to commit for trial, but the Kimberley charge was a serious one.

Postea (February 15th).

In reply to the Chief Justice,

Mr. Ward said that since the matter was last before the Court inquiries had been made as to the nature of the evidence from Kimberley, and from the information received the Attorney-General did not think

[* NOTE.—Kimberley was at this date besieged by the Queen's enemies.—REF.]

he could oppose the application in case the Court held it had jurisdiction. Michau had not yet been committed for trial.

The Chief Justice: Do you still press that objection?

Mr. Ward said he did not, and the Attorney-General, on the merits of the case, was willing to consent to bail, but thought some condition should be imposed as to the place of residence of the accused. He should not be allowed to go into a disturbed district.

The Chief Justice suggested Cape Town.

Mr. Ward said that would do, and if he afterwards wished to remove from there he might go to some other place with the Attorney-General's consent.

Mr. Justice Buchanan: Do I understand that you do not oppose the bail?

Mr. Ward: No, my lord.

But some conditions as to residence?— Yes, my lord.

Mr. McGregor said he was instructed to give an undertaking as to residence. He suggested Cradock as the place at which the accused should reside, seeing that he had a brother, an attorney of that Court, there, but the accused was prepared to come to Cape Town if thought desirable.

The Chief Justice asked why the Magistrate did not commit in this case.

Mr. Ward pointed out that accused was brought before the Magistrate on the 26th of last month, and there was a remand then for a day or two. Then it was stated that there was further evidence available in Kimberley, and the Magistrate granted a rather long adjournment, until March 1. If the Court were now to express an opinion the examination might be closed.

The Chief Justice asked Mr. Ward how much he would suggest as bail.

Mr. Ward said that was for the other side to propose.

It was pointed out that £1,500 was suggested in the correspondence, and Mr. McGregor said that probably the accused could manage £2,000.

The Chief Justice said: It appears that in this case a preliminary examination has been taken, and the Attorney-General is not prepared to state that any further evidence will be forthcoming to justify a committal. Under these circumstances the Attorney-General does not object to this Court now exercising jurisdiction in admitting the applicant to bail. The case will therefore be remitted to the Magistrate to admit the applicant to bail of £2,000 personally, and two sureties of £1,000 each, and there will

be a further condition that the applicant is not to reside elsewhere than in the district of Cradock.

[Applicant's Attorney, C. W. Herold.]

UYS AND OTHERS V. THE QUEEN } 1900.
Feb. 8th.

Habeas Corpus—Prisoner of war—
Service of writ—Military commandant.

The petitioners having been arrested by British troops, and detained as prisoners of war at Simon's Town for upwards of two months, applied for a writ of habeas corpus on the grounds that they were British subjects, that they had never taken up arms against the British Government, and that at the time of their arrest they were peaceably employed in the cultivation of their farms. After service on the military custodian at Simon's Town of a notice of application for the writ, the petitioners' attorney was informed by the attorneys of the military authorities that the prisoners had been removed to the district in which they had been arrested.

Held, that the writ must issue and be served on the person into whose custody the prisoners had been removed, as well as on the attorneys for the military authorities.

Postea: The General in charge of communications accepted service of the writ, and before the return day of the writ the prisoners were released.

This was an application by Hercules du Preez, Johannes du Preez, and Hendrik Johannes Uys, who prayed for an order to inquire by what authority they were detained in custody by the military authorities.

Notice of the application had been served on Captain J. Proctor, at Simon's Town, in whose custody the applicants then were. The applicants Du Preez claimed to be British subjects, and stated that they were arrested at Honeynest Kloof on November 27 by British troops. They declared that

they had never taken up arms against the Government, and when arrested were in the pursuit of their farming operations. They had been detained as prisoners of war, and were present at Simon's Town under arrest. They had not been brought before a magistrate or any judicial tribunal, or charged with any crime. They held that they were unlawfully detained in custody. In Uys's case it appeared that he was arrested on the 28th of November, nine miles from Belmont. It appeared that a letter had been received from Messrs. Van Zyl and Buissinné on behalf of the military authorities stating that all the applicants had been sent to the district in which they were arrested, where they would be tried, and if found not guilty, would be released. Under these circumstances they (the attorneys) hoped that the present motion would not be pressed. The applicants, through their attorney, replied that Captain Proctor was served with the notice in their presence, and that they were shortly afterwards removed.

Mr. Burton appeared for the applicants.

There was no appearance on behalf of the respondents.

Mr. Burton, for the petitioners: The petitioners are British subjects. They have never taken up arms, but have been detained as prisoners of war. They are not prisoners of war, and they have not been charged before any proper judicial officer. The applicants are entitled to a writ calling upon the officer in charge to show cause why they should not be set at liberty. Notice was served on Proctor while he was in charge of them. It does not appear who is now in charge of them.

The Chief Justice: I gather from the letters that they have been handed over to the civil authorities.

Mr. Burton: In the district of Herbert, where they have been sent to there is no civil court at present.

Mr. Justice Laurence: They are probably in the hands of the military authorities in a district where martial law is proclaimed.

Mr. Burton: That does not interfere with the jurisdiction of the Supreme Court.

Mr. Justice Buchanan: It may prevent the Court's writ from running.

The Chief Justice: I assume that the same course will be taken in this case as was taken in Michau's case—that a preliminary examination will be taken.

Mr. Burton: I do not know that that will be so. This is a stronger case than that of Michau. No charge has been made

against them. They have been in custody since November 24. The only explanation of Proctor's action is that it is an attempt to deprive the applicants of their legal rights. The best thing is to effect service on the Field Marshal Commanding-in-Chief. Service on any subordinate officer will not be of any use.

De Villiers, C.J.: At the present stage of the proceedings it is sufficient to say that the writ must issue and must be served upon the military custodian of the petitioners as well as upon the attorneys, Van Zyl and Buissinné. They appear to be the attorneys for the military authorities who have imprisoned the petitioners, and as such attorneys they have written to the petitioner's attorney informing him that the petitioners had been removed from Simon's Town to the district in which they were arrested. The petitioners, as British subjects, claim the protection of the Court, and that protection the Court is bound to give. They have not been brought to trial before any Court, nor was any preparatory examination held to investigate their case. They allege, and the allegation is uncontradicted, that they have never taken up arms against the Government, and that at the time of their arrest they were busy carrying on their usual farming operations. The fact that they are detained as prisoners of war should not prevent the Court from calling upon their custodians to produce them before the Court and state when they were apprehended, and the cause of their detention.

[Applicants' Attorney, V. A. van der Byl.]

IN THE MATTER OF THE MINOR MANUEL.

Mr. McKenzie moved for leave to the petitioner, Frederick Manuel, to mortgage certain property registered in the name of his minor child. The petition stated that the petitioner now resided in Cape Town, but previous to the outbreak of hostilities between Great Britain and the Transvaal he resided in Johannesburg, but being a British subject, he left with his wife and six children. He brought with him a certain sum of money which up to the present had been sufficient, but which was now exhausted. He had a sum of £240 to his credit in the African Banking Corporation at Johannesburg, but owing to the recent proclamation he could not draw upon that at present. There were certain two lots of ground at Wynberg

which he had purchased in 1895 for £100, and had transferred to his children. The value of that property was now considerably enhanced, and it was worth about £400. He desired leave to raise a mortgage of £100 upon it for the maintenance of himself and family until such time as he could return to Johannesburg. With that sum he would be able to maintain them for nine or ten months, and he would undertake to repay the amount of such loan out of the funds to his credit in the bank as soon as the funds were available.

The Master recommended the granting of the application, provided that as security for the repayment of the loan the bank ceded a sum not exceeding £110.

The order was granted in the terms of the Master's report.

IN THE MATTER OF THE PETITION OF
BRIDGET MORRIS.

Mr. Benjamin moved for leave to the petitioner to institute an action, *in forma pauperis*, to have the estate of one Anne Blair declared intestate.

The usual order was granted, Mr. Benjamin being appointed to take the reference.

IN THE INSOLVENT ESTATE OF THE LATE
MARY FALCONER.

Mr. Close moved for an order authorising the Registrar of Deeds to transfer certain property, at present registered in the name of John Kelly, to the above insolvent estate on payment to the Master of the value thereof. The petition showed that the land in question was a small strip situated between certain lots belonging to the insolvent estate. R. A. Falconer, the husband of the deceased, had acted as her agent during her lifetime, and being under the impression that all the land belonged to deceased had erected certain houses thereon. The said John Kelly had left for Australia fourteen or fifteen years ago, and had not been heard of since.

Mr. Close: Such a mistake is easily made. The trustee, acting as an officer of the Court, comes to it for assistance. He offers to buy at what is said to be the true value. The offer is quite *bona fide*. This is not the case of a person who has no rights at all to the property. See the case of *De Beers Consolidated Mines v. London and South African Exploration Co.* (10 J., 359).

The Chief Justice: He has only the right of detention.

Mr. Close: He would have the right to sue for compensation for improvements. The Court might allow applicant to sue by edictal citation. *Bellingham v. Blommetje* (Buch., 1874, p. 38).

De Villiers, C.J., said: There is not at present enough information before the Court to justify such an order as prayed being made. It will be necessary first to sue by edictal citation, while the property will have to be attached *ad fundandum jurisdictionem*. Information will also be required as to whether the man Kelly had any family.

The application was accordingly refused.

COLONIAL GOVERNMENT V. HARTUNG.

This was an application by the defendant for removal of bar and leave to plead.

Mr. Ward appeared for the petitioner.

Mr. McGregor appeared for the respondents.

After argument, the application was granted, costs of the application to be costs in the cause.

IN THE INSOLVENT ESTATE OF MARTIN
JULIUS RAMPF.

Mr. Buchanan moved for the appointment of a commissioner to examine a certain witness in the above insolvent estate.

The application was granted, the Resident Magistrate of Tarkastad being appointed commissioner.

IN THE MATTER OF THE PETITION OF
CHARLES BENEDICTUS ZIERVOGEL AND
WIFE.

Mr. McGregor moved for the registration of a certain ante-nuptial contract. It appeared that the contract was duly executed before the marriage of the petitioners, but owing to the ill-health of the notary public before whom it was made its registration was omitted.

The usual order was granted.

SCHOEMAN V. MEYER.

Mr. Currey, for the applicant (the defendant in the action), moved that the trial be removed to the Circuit Court at Oudtshoorn. Counsel stated that the plaintiff had consented to this through his attorney.

The application was granted.

BUIRSKI AND SON V. REID.

This was an application to have a rule *nisi* restraining the respondent from selling a certain farm made absolute.

The applicants stated that on January 26 a rule *nisi* was granted restraining respondent from selling a certain farm called Kent, situated in the division of Swellendam, sold to him on December 13, by one Russouw, whose estate had since been sequestrated as insolvent. It was contended that the sum paid, £1,500, was not the fair value of the farm, and that the sale was an undue preference. The applicants were creditors in the estate having obtained a judgment against it in the Magistrate's Court at Montagu on November 27, and intended to bring an action to have the sale upset.

The respondent filed an affidavit alleging that the sale of the farm took place on November 27, that the farm was not sold at less than its value, the respondent having paid altogether £1,726 for it, and that he knew nothing of the seller's insolvent state.

Mr. Innes, Q.C., for the applicants: The applicants allege that when the respondent bought the property he knew of the impending insolvency of Russouw. The respondent says the sale took place on November 27, and the declaration of seller says that it took place on November 24.

The Chief Justice: On what ground do you say it is an undue preference?

Mr. Innes: Respondent was a creditor.

The Chief Justice: He was a preferent creditor for £200 on a bond. If he has a due preference, how can there be an undue preference?

Mr. Innes: The £200 may not be the whole of his claim.

The Chief Justice: We cannot grant an interdict unless there is some ground for it, and you must show the ground.

Mr. Innes: I am not fully instructed as to the facts, but Buirski says he is going to bring an action for undue preference.

Mr. McGregor, for respondent, was not heard.

De Villiers, C.J., said: When I granted the rule it was on two grounds stated, viz., that the sale had taken place after the judgment, and, secondly, that the amount paid was a gross undervalue of the farm. The first falls to the ground altogether, because it now appears that the sale really took place before the judgment. As to the second ground, that appears to be now extremely doubtful, the respondent deny-

ing the under-valuation. Under the circumstances, the rule must be discharged with costs.

[Applicant's Attorneys, Messrs. Van Zyl & Buissinné; Respondent's Attorney, C. W. Herold.]

TRIAL CAUSE.

PROCTOR V. LONG. { 1890.
Feb. 8th.
" 9th.
" 12th.

Account—Partnership—Entries.

This was an action for the recovery of money lent.

The plaintiff's declaration was in the following terms:

1. The plaintiff is a builder and contractor, resident in Cape Town; the defendant resides at No. 8, St. George's Villas, Green Point.

2. In or about the month of April, 1898, the plaintiff agreed to advance certain moneys to the defendant, and on his behalf, in connection with the erection of certain houses by the defendant on land owned by him at Observatory-road, he also agreed to superintend the erection of the said buildings.

3. At divers times between the beginning of the month of April, 1898, and the end of September, 1899, the plaintiff did advance to and pay on behalf and at the request of the defendant, various large sums of money in connection with the building of the said houses and otherwise. The sums so advanced and paid, together with interest thereon, amounted to £1,816 2s. 5d.

4. During this period the plaintiff received from and on account of the defendant, certain sums of money and certain rents amounting in all to £999 15s. 1d., leaving a balance due to the plaintiff of £816 7s. 4d. A memorandum of account is annexed showing the particulars of the said amount.

5. All things have happened, all conditions have been fulfilled, and all times elapsed to entitle the plaintiff to receive the said sum of £816 7s. 4d., yet the defendant refuses to pay any part thereof.

The plaintiff claims: (a) Payment of the sum of £816 7s. 4d. as aforesaid; (b) alternative relief; (c) costs of suit.

For a plea to the plaintiff's declaration the defendant says as follows:

1. He admits the allegations contained in paragraphs 1 and 2. He denies the allegations in paragraph 5.

2. With reference to the allegations in paragraphs 3 and 4, he admits that at divers times between April, 1898, and September, that the plaintiffs advanced certain sums of money in connection with the building of the houses therein referred to, but he denies that the amount so advanced was the sum of £1,816 2s. 5d., as alleged. He admits that during the said period the plaintiff received certain sums of money and certain rents from the defendant, amounting to the sum of £999 15s. 1d., but denies that the balance due to the plaintiff is the sum of £816 7s. 4d.

3. In or about the year 1896 the plaintiff and defendant entered into a partnership in connection with certain contracts for the erection of certain wire fencing for and on the behalf of the Colonial Government, in the district of Victoria West. In terms of the said agreement of partnership it was agreed between the plaintiff and defendant that the profits arising out of the said contracts should be divided in the proportion of three-fifths to the said plaintiff, and two-fifths to the defendant. The plaintiff undertook to keep the books and accounts of the said partnership. The said contract had been completed and carried out, and large profits been made thereunder, and the defendant has received on account the sum of £600 as part profit on the said contract, but the defendant says there is due to him a further sum as his share of the said profits under the said partnership, and the defendant further says that upon a true and correct account being furnished him, duly supported by vouchers, of the dealings and transactions of the said partnership, it will be found that there is a large sum of money due by the plaintiff to the defendant. The plaintiff has wrongfully refused to furnish the defendant with the said accounts, duly supported by vouchers as aforesaid.

5. In or about the year 1898 the defendant handed to the plaintiff the sum of £350 for the purpose of a certain share in the Cape Quarries Company (Limited), and a certain life policy insuring the life of the defendant for the sum of £500, and certain Building Society shares. The plaintiff wrongfully refuses to deliver the said shares or the said policy to the defendant.

6. The defendant says that by reason of the matters hereinbefore pleaded he is not in a position to ascertain the true and correct

state of the account between himself and the plaintiff, but he is ready, and hereby tenders, to pay to the plaintiff any sum which may be found due to him upon the plaintiff's accounts to the defendant for the profits under the said partnership hereinbefore referred to. Save as above, the defendant prays that the plaintiff's claim may be dismissed with costs.

And for a claim in reconvention the defendant says:

1. He craves leave to refer to the matters hereinbefore pleaded, and prays that they may be considered as inserted herein.

2. It became and was the duty of the defendant in reconvention to furnish the plaintiff in reconvention with a true and just account, supported by all proper and necessary vouchers of all dealings and profits in connection with the said partnership referred to in paragraph 3 of the plea, but the defendant in reconvention wrongfully neglects and refuses to furnish the said account.

3. The plaintiff in reconvention has demanded from the defendant in reconvention the delivery of the said shares, and the said policy referred to in paragraph 5 of the plea, but the defendant in reconvention wrongfully refuses to return the same.

The plaintiff in reconvention prays: (a) That the defendant in reconvention may be condemned by judgment of this Honourable Court to render to the plaintiff in reconvention a just and true account, supported by all necessary vouchers of all dealings and profits in connection with the said partnership as aforesaid, and that he may debate the said account with the said plaintiff in reconvention, and pay to the said plaintiff in reconvention whatever sum or sums of money may be found to be due to the said plaintiff in reconvention; (b) delivery of the said shares and life policy referred to in paragraph 5 of the plea; (c) alternative relief; (d) costs of suit.

Mr. Innes, Q.C. (with whom was Mr. Close), for the plaintiff.

Mr. Graham, Q.C. (with whom was Mr. Benjamin), for the defendants.

Richard Proctor, a builder and contractor, said he had known defendant for a good many years. In the beginning of the year they were both in the employ of Mr. Mills on certain work on the Post-office. Towards September or October, 1896, witness made up his mind to leave Mr. Mills, as the work was approaching completion, and he ultimately entered into a contract with the

Government for the erection of certain fences in connection with the rinderpest. (Contract put in.) Mr. Mills was to finance witness when necessary, and practically act as his agent in Cape Town, in return for which he was to receive 20 per cent. of the profits. Defendant knew nothing about witness tendering until the day after. There was no agreement of partnership between witness and defendant in this matter. They had been partners on other work (railway construction) years before. When they went up witness engaged defendant at £1 per day. Witness's contract was for fencing from Hope Town to Colesberg Bridge. Defendant did his work very well. The work was finished in March, 1897, but the accounts were not finally made up until 1899. When the work was going on witness always promised defendant a good bonus, but no amount was fixed. With regard to Mr. Mills's share of the profit witness afterwards, at his suggestion, increased it to 30 per cent. The profits on the contract amounted to something like £3,578, of which Mills got 30 per cent. Witness fenced over 100 miles on the first contract from Hope Town to Colesberg, and on the second contract 38½ miles. The second contract took about two months, and defendant was there only about three weeks of that time. After March, 1897, witness had various other contracts from the Government for the erection of certain public buildings. He employed defendant on several of these works as foreman, at £1 a day. Witness gave defendant a bonus of £500. While defendant was working on one of witness's contracts, witness undertook to advance certain money for the erection of houses on a piece of ground belonging to defendant at Observatory-road, and also to superintend the building while defendant was away working on his (witness's) contracts. Afterwards witness discharged defendant, owing to his not attending to his work. With regard to the Quarry Company's share, witness obtained that for defendant and debited him with it in the accounts. In July, defendant ceded the quarry shares to witness. Witness first heard of an alleged partnership between himself and defendant after he sued the latter. He was quite positive no such contract existed.

Mrs. Proctor, the plaintiff's wife, deposed that she kept his accounts, and often wrote letters for him. She gave evidence as to the accounts made out and letters written,

For the defence,

George Long, the defendant, said he and plaintiff had known each other for a considerable time, having come out from England together. Out here they had certain contracts together, in which they shared half the profits. Afterwards they both worked for Mr. Mills, who had a contract on the New Post-office. When the work there was nearing completion, plaintiff came to witness and said that there were some rinderpest fences to be made, and asked him, "Are you on?" Witness said he was on for anything. Plaintiff then said, "Very well, I think this will come our way." Next day the contract was signed, and when the plaintiff came back after that he said, "It is all right, George; I have signed the contract." They afterwards went to the office, and plaintiff said to witness, "You will take £20 to my £30 out of it." There was nothing said about witness getting £1 per day. Witness had never received £1 per day. He had received certain moneys from time to time, for which he had accounted in the business. He had received the £600 mentioned at Observatory-road, not at Victor's West. Nothing was then said about a bonus. When plaintiff gave the £600, he said, "This will square us up about the rinderpest contract." Witness never asked anything about the partnership account before, because he was not very well educated, and left all matters connected with the keeping of the books to plaintiff. After the fencing contracts plaintiff said to witness that there was now no longer any partnership between them, but that he should have a job, as long as he (plaintiff) could get jobs, at £1 per day.

Cross-examined: Witness was certain that the cheque for £600, although bearing the stamp of the Victoria West branch, was cashed in Cape Town, because before he went up to Hope Town on plaintiff's instructions he gave plaintiff £20 to buy a bicycle, and that he could not have done unless he had cashed the cheque. When plaintiff gave witness the cheque he said that would settle them about the rinderpest, all except the profits. Later on plaintiff said to witness, "George, your corner in the profits is about £850." By "corner" witness understood him to mean "share." That was before the account was rendered by plaintiff to witness. When witness received that account he did not say anything about the £600 accredited him, because he was not a good writer, and decided

to wait until he came down. Witness knew he had that £850 to get when he was dismissed. Witness did know that the document produced, and which he had signed, contained an acknowledgment of his indebtedness to the amount of £700 odd. He thought it was simply to give plaintiff leave to deposit the quarry share to draw against.

Samuel B. Mills said he had been a contractor for several large buildings in Cape Town—the Post-office and others. The plaintiff and defendant were in witness's employment for some years—the one as senior foreman, and the other as junior foreman. When the rinderpest contract was advertised plaintiff was about to leave witness's employment, the Post-office being nearly completed. Witness arranged to finance plaintiff in the rinderpest contract, and made out the tender. Plaintiff came to witness's house, and the tender was signed and sent in. There was not an absolute acceptance of the tender until seven days later. Up to that time defendant had nothing to do with it. He came into it when he and plaintiff went up together. Before they went up plaintiff said in a general way that as he was getting £30 and defendant £0, they would share on the same terms.

By the Chief Justice : Did you understand from that that they were partners ?

Witness : Oh, yes, my lord.

Examination continued : He told plaintiff on one occasion that he thought £600 was a great deal too much for defendant, because he thought he was not carrying out the work as he ought to have done. Plaintiff had complained about defendant's conduct of the work, and was not satisfied with it. Plaintiff was speaking about the proportion of their shares of the profits. Witness said that defendant's proportion was too much. There was no mention of £600. If he had stated there was that was a mistake.

Cross-examined : The tender was framed on a Sunday and posted in the evening. At that time witness understood that defendant was a part tenderer ; that was to say he knew defendant was working with plaintiff and he tendered for them both. He understood when the surety was written out that he was standing surety for them both. They had been friends so long that he thought he was dealing with them both. He had no reason for so thinking except his knowledge of the two men's friendship. It was after the contract

had been partially completed that plaintiff said he supposed they would share. The word "partner" had often been mentioned. Defendant's name did not appear on the contract because it was not necessary. When he suggested he (witness) should get 10 per cent. more he did not inform defendant. In addition to the financing, witness had to look after the sending up of wires, poles, and such other tools as were necessary for carrying on the work.

The Chief Justice : If there had been a loss you would have been responsible ?

Witness : Yes, undoubtedly.

And then to whom would you have looked to recoup yourself ?—I should not have looked to anybody. I should have had to bear it.

Re-examined : Before plaintiff and defendant went up to carry out this contract, the impression they gave witness was that they were going up on the same terms as their wages, viz., two-fifths to defendant and three fifths to plaintiff.

By the Court : Witness said he thought defendant was getting more than he ought to because he was misconducting himself, not because there was no partnership.

After argument on the facts,

C.A. V.

Postea (February 12th).

De Villiers, C.J., said : The real question in dispute between the parties is whether there was a partnership between them in regard to the contract for fencing—what is called the rinderpest contract. The evidence upon this point is rather weak, but after carefully considering the evidence, and consultation with my brethren, I have come to the conclusion that judgment should be for the defendant. The point which most weighs with me is the circumstance that in the account rendered by the plaintiff to the defendant the plaintiff credits defendant with the sum of £600, as he now says as a bonus. This payment of £600 to a man who, according to plaintiff's evidence, was to receive only £1 per day seems to me incredible, unless there was some kind of an agreement between them that they were to share the profits. In the very account which was rendered by plaintiff there is an entry in connection with this item, "part profits of rinderpest contract." No doubt this entry would be consistent with the view that the plaintiff, seeing he had made a very large profit, thought fit out of that profit to pay defendant a large sum, but that would not be the ordinary construction,

and certainly the amount is so large that it appears to me really improbable that the plaintiff would have paid it unless there was a contract of partnership. There are no doubt some circumstances which somewhat weigh in favour of the plaintiff, but upon the whole, looking at these and the correspondence itself, I think that judgment should be for the defendant. The point which weighed most against the defendant was the fact that in the subsequent correspondence there was no distinct allegation on the part of the defendant that there was anything due to him by plaintiff, or that there was anything in the nature of a partnership between them, but my brother Laurence has called my attention to one passage in the defendant's letter which would seem to show that there was passing in the mind of the defendant the idea that there was some sort of a partnership. In that letter defendant says, "To refer back to the rinderpest contract and the manner in which I have worked for seven months, and the way I scrimped and worried to make the job come out so that we should both get a bit, but it looks to be one-sided now to me." Well, if he was to receive only £1 per day, why should he make this reference to both of them getting a bit. The absence of reference to the debt owing, or the counter claim that defendant had against the plaintiff would be explained by the fact that there was a further arrangement between the parties, the plaintiff assisting defendant in regard to certain buildings at Observatory-road, and as there was undoubtedly a large balance owing to plaintiff, the defendant may well have thought it advisable to wait until that business was concluded before he insisted upon getting the balance due to him under the rinderpest contract. It is clear also that there was no final settlement by the plaintiff with the Government until the middle of 1899, and the defendant may well have waited until the settlement was made with Government before claiming the full amount. Under all the circumstances, therefore, I am of opinion that the Court should hold that there was a partnership. It is admitted now that the additional amount which the defendant would be entitled to claim would be £401 18s. 11d. Then I understand that the defendant does not now dispute the items in the plaintiff's account, and the result will be that there will be judgment for the plaintiff for the amount claimed,

les: £401 18s. 11d. Then as to the question of costs. I think that seeing that the real question upon which the Court had to decide was the partnership, the plaintiff should pay the costs. I am satisfied that if the plaintiff in rendering his account had given defendant full credit for this £401 18s. 11d. the case would have gone no further, and that being so, it would only be right that plaintiff should pay the costs.

Mr. Close: As to the question of costs, the plaintiff's claim was disputed up to the last minute.

Buchanan, J.: If the accounts had been referred to an arbitrator the defendant might have had to pay the costs, but all the evidence has been as to the partnership.

De Villiers, C.J.: To put it broadly, supposing the plaintiff had claimed only this amount, would the case ever have come before the Court?

Mr. Close: I submit that it would, the defendant having disputed the account.

De Villiers, C.J.: But you had not all the vouchers yourself when you first came into court.

Mr. Close: We had the great bulk of them, but defendant had declined to admit items for which we had vouchers.

De Villiers, C.J.: It was the duty of the plaintiff to keep proper accounts, and until he rendered such the defendant could not pay. These accounts were not proper because plaintiff refused to credit defendant with this balance. Plaintiff will therefore have to pay the costs.

Buchanan, J.: I concur.

Laurence, J.: I also concur, and dealing with the question of the contract. I must say that it does not seem likely that a capable workman, earning £20 a month here, as defendant was, would have gone into the wilderness, so to speak, where there was little comfort to be had, for £1 per working day. Even as to the cheque for £96, which it was said was sent to defendant in payment of his wages of £1 per day, there is nothing to show that that was not disbursed in connection with the work. The defendant's story that they were to share in the profits in the proportion of two-fifths and three-fifths is not only not unreasonable, but the witness Mills confirms the agreement. He says plaintiff told him about it at the time. Mills was not in all respects a satisfactory witness, but so far as the Court can see, he was an impartial witness. With regard to the £600 given to defendant, whoever heard of a case of a

bonus on wages to the extent of 100 per cent., on the wages the person was to receive. Not only is this amount fantastical, but the plaintiff was utterly unable to give any account as to how the amount was arrived at. Then a further significant fact is that this £600 was credited in the accounts not as a bonus but as part profits. There were two other points argued which were rather against the defendant. The first was as to the signing of that document in which defendant acknowledged an indebtedness to plaintiff of £700, but that document merely authorised the plaintiff to raise the sum of £150 on the quarry share. Then a point was raised as to why defendant did not raise the question earlier, but it is clear that the accounts with the Government were not adjusted much earlier, and it is also clear that the defendant did not know exactly where they were, and in any case he did raise the point in the letter quoted by the Chief Justice.

[Plaintiff's Attorneys, Messrs. Van Zyl & Buissinné; Defendant's Attorney, A. W. Steer.]

1900.
DYKMAN V. CITY. } Feb. 12th.

Lease—Renewal—Agreement.

Although in a contract affecting a piece of land, or the sale of a piece of land, there is no rule that there must be a written document, still the proof must be conclusive, and, where there is any reasonable doubt as to the existence of the contract, the person against whom it is sought to enforce such a contract must have the benefit of that doubt.

This was an action for declaration of rights, or in the alternative £50 for work done, &c. There was a claim in reconvention for £100 damages.

The plaintiff's declaration alleged that in August, 1898, plaintiff and defendant entered into an agreement by which defendant agreed to hire to plaintiff certain premises, situated at Newlands, for a period of five years, commencing from September 15, 1898, with the right of renewal for another five years at the expiration of that period, at a rental of £3 per month for the first two years, and £3 10s. for the remainder of the lease. In consideration of this lease the

plaintiff agreed to make certain alterations and improvements in connection with the premises to the value of £50. He took possession and made those alterations, but defendant repudiated the lease and sought to eject plaintiff, who now claimed an order declaring that he was entitled to the benefits of this lease, or in the alternative judgment for the sum of £50, the amount disbursed in alterations and improvements made in the building.

Defendant, in his plea, denied this agreement, and said there was only a tenancy from month to month at £3 per month. He denied that there was any agreement about the alterations or improvements, and denied that any were ever made by plaintiff. In reconvention the defendant said that plaintiff had damaged the property in certain ways, and he claimed for this £100 damages.

Sir Henry Juta, Q.C. (with whom was Mr. Upington), for the plaintiff.

Mr. Buchanan for the defendant.

The first witness called was the plaintiff,

John Frederick Dykman, who said he was a carriage painter, trimmer, and sign writer. In August, 1898, he hired the premises in question from the defendant on a monthly tenancy. At that time there was simply a dwelling-house, and it was generally in bad condition. Witness spoke to the defendant about the necessity for alterations and improvements, the putting in of a shop door and window, &c. Witness told defendant it would cost between £70 and £75, and it was agreed that witness should put in labour and material to the value of £50, and in return he was to receive a lease for five years, with the option of renewal for another five years, the lease to commence from October 1, 1898, at a rental of £3 per month for the first two years, and £3 10s. per month for the remainder of the lease. Witness agreed to that, and had a plan of the alterations and improvements made by Mr. Hall, an architect practising in Claremont, paying three guineas for the plan. Witness then detailed the work done, which took between two and three months to finish. During that time he did not occupy the premises, but in December he let a portion of the premises to Johnson, a carpenter, for £2 per month. About the middle of January the shop was completed, and he then let it to a man named Isaacs for £3 per month, Johnson occupying the remainder at £2 per month. After Johnson left witness lived in that portion himself.

The Chief Justice : Why did you not have this agreement in writing, so as to have no dispute afterwards ?

Witness : I could have done so : but we were friends at the time, and he agreed to supply me with certain things. It was not as if I wanted the £50 of him ; it was the lease I wanted of him.

Examination continued : Witness had let the shop to Isaacs for two years, receiving six months' rent in advance.

By the Chief Justice : Witness had made out a written document, but defendant refused to sign it.

Examination continued : After the alterations were made witness had gone with two men, one of whom was named Freeder, to defendant's house and the document produced was then read over to him. The defendant understood English, and when Freeder came to the part that said the lease should be for five years defendant said : "No, not five years ; two years." He then refused to sign the document, and when witness gave him the account for the repairs to the premises he refused to pay it.

By the Chief Justice : If he had paid the account witness would not have insisted upon the lease.

In cross-examination, witness stated that it was understood before the alterations were commenced that a lease would be drawn out by him, but witness, instead of doing so, took his word for it and went on with the work.

Watson Hall, an architect, practising at Claremont, deposed that he knew the parties to this suit and the premises in question. Before the alterations were made the floors of the building were in a dilapidated state, and the whole place was in a filthy and dirty condition. Witness framed the plan produced, plaintiff paying him for it. The plan was passed by the Municipality, and the work gone on with, witness inspecting it when completed. He valued the improvement to the property at £60.

L. Johnson, carpenter, gave evidence as to work he had done for plaintiff on the property.

Adolph Birkenberg said that in February last he spoke to defendant and wanted to hire the premises, which had been altered into a shop. He wanted to hire the shop for a couple of months or longer. He said perhaps over twelve months. Defendant said he could not hire it, and that he (witness) must ask Dykman, because he had got a lease. Witness did ask Dykman, but could not come to terms.

Mark Freeder corroborated plaintiff's evidence as to going to defendant's house and reading over the draft lease to him, when defendant said, "Oh, no, not for five years ; for two years."

Thomas Jones stated that he occupied the premises for two months before Dykman became tenant. He paid £2 5s. the first month and £3 the second month, defendant having raised the rent, upon which he left.

Peter Newman gave evidence as to work he had done on the premises for plaintiff.

This concluded the case for the plaintiff.

For the defence,

William City, the defendant, stated that he only hired the house to plaintiff from month to month, at a rental of £3 per month. Several people were present at the time the agreement was made. He never leased the place to plaintiff for five years, as alleged. With regard to the repairs, he had the wood for that before the plaintiff hired the place. He put in the account from Arderne & Co. for the wood. After detailing the work done on the premises, and also the damages he alleged were caused by plaintiff, witness said he estimated his total damage at £100.

In cross-examination witness denied the statements made by the witness Birkenberg.

Several witnesses gave evidence as to their presence when plaintiff hired the premises, and said that it was to be a monthly tenancy only. Evidence was also led in support of the defendant's claim in reconvention.

After argument by Sir Henry Juta on the facts of the case.

Mr. Buchanan said he would not press the claim in reconvention.

De Villiers, C.J., said : It lies upon the plaintiff clearly to establish the contract upon which he relies. It is alleged that there was to be a lease for five years with the option of renewal for a further period of five years, and that the defendant should compensate plaintiff to the extent of £50 for any improvements made by him. Now it has been continually laid down by the Court that although in a contract affecting a piece of land, or the sale of a piece of land, there is no rule that there must be a written document, still, the proof must be conclusive, and that where there is any reasonable doubt as to the existence of the contract, the defendant must have the benefit of that doubt. In the present case, so far

as any doubt is concerned, I think the balance of the evidence is in favour of the defendant. The plaintiff, no doubt, alleges that there was an agreement, but the defendant says there was no agreement, and calls witnesses who were present when an arrangement was made, and these witnesses say that nothing was said about a lease. No doubt there is much force in the argument of Sir Henry Juta that the mere fact that the plaintiff made these improvements shows that he believed that he would have a long period in which to enjoy the use of this property, but it is not the plaintiff's belief alone that can decide this case, and if the defendant did not understand that also, the Court cannot enforce this agreement. Then what the plaintiff had expended on the property was mostly his own work and labour, because, so far as material was concerned, he could not have put much value into the premises, the wood having been supplied by the defendant. Then the plaintiff has no really corroborative statement as to the lease. There is one witness who said that he asked defendant to hire him the property, and the latter replied that he could not do so because it was held by the plaintiff on lease, but that is quite consistent with plaintiff having a monthly tenancy, defendant having understood that as a lease. The only other evidence upon this point is the plaintiff's statement that he went to the defendant for the purpose of having the written lease executed, and that the defendant said it should be for two years. But that does not show that there was an original agreement for five years. It merely shows that if there was to be a lease at all executed at that time he would require that it should be for two years, and not for five years, so that that was really no corroboration of the plaintiff's statement that there was to be a lease for five years, and as that statement is contradicted by the defendant, and that contradiction is supported by other witnesses whom the defendant has called, I am of opinion that the plaintiff's case falls to the ground, and with that also falls to the ground the claim for enhanced value of the property. The rights of lessees were fully laid down in the case *De Beers Consolidated Mines v. The London and South African Exploration Company* (10 J., 359) and from this it would appear that while this tenancy existed the plaintiff could remove materials if he could do so without injury to the land, but that at the expiration of his ten-

ancy he had no longer this right, but could claim the bare value of the material. In the present case the plaintiff's case rests entirely upon an agreement and not upon the common law, and therefore without expressing an opinion as to the plaintiff's rights, although apparently the defendant does not object to his removing the materials, I think the plaintiff's case falls to the ground, and there must be absolution from the instance with costs. Defendant having given up the claim in reconvention, there must also be absolution from the instance on that.

Buchanan, J., concurred, and said that an agreement could be easily established by an instrument in writing, and in the absence of that it might be established by *viva voce* statement, but such must be clear and irresistible and satisfactory to the minds of the Court. Instead of having such a strong case here, they had one of the weakest cases ever brought before the Court.

Laurence, J., also concurred.

[Plaintiff's Attorney, C. Brady; Defendant's Attorneys, Messrs. Dempers & Van Ryneveld.]

VAN DER HORST V. CHABAUD.

Mr. Graham applied in this case on behalf of the plaintiff for a removal of bar, and also for the removal of the case from the Supreme Court to the Circuit Court at Port Elizabeth, or in the alternative for leave to take the evidence of a number of witnesses on commission at Port Elizabeth and for the postponement of the day of trial.

Mr. Currey appeared for the respondent, and said there was no objection to the commission if the case were heard this term in the Supreme Court.

The Court granted the application for the removal of bar, and also for the removal of the case to the Circuit Court at Port Elizabeth.

[Applicant's Attorney, V. A. van der Byl; Respondent's Attorneys, Messrs. Van Zyl and Buissinné.]

[Before Mr. Justice LAURENCE and a jury.]

HUNTER V. CAPE ELECTRIC } 1900.
TRAMWAYS COMPANY. } Feb. 13th.

Damages—Negligence—Tramway.

The plaintiff's case was that in the month of October, 1896, the plaintiff was in a cart, driven by a friend, Mr. Hill. They were coming from the direction of Wynberg to Cape Town, when about nine o'clock at night at

a certain place in the road called Rochester House, the cart in which they were seated collided with a tramcar, belonging to the defendant company, coming from the opposite direction, with the result that plaintiff was thrown out and sustained serious injuries. It was owing to the injuries plaintiff then sustained that the delay was so great in bringing the action, as the plaintiff had since been incapacitated from doing any work, his mind having been affected. The plaintiff claimed £5,0 0 as damages owing to the injuries he had sustained, and which he alleged were due to the great negligence of the persons employed by the defendant company.

The plea of the defendant company was to the effect that there was no negligence on the part of its servants, and that the collision was unavoidable owing to the negligence and carelessness of the plaintiff and the driver of the cart.

Mr. Graham, Q.C., and Mr. Close, appeared for the plaintiff; S r H. Juta, Q.C., and Mr. Upton appeared for the defendant company.

For the plaintiff was called

Samuel Patton Impey, a medical practitioner, practising in Cape Town, who said he had been plaintiff's medical attendant since June, 1896. On the morning of October 25, 1896, he was summoned to the Woodstock Police-station, and there found plaintiff lying unconscious in one of the rooms with injuries to the brain and several cuts about the face. As far as witness knew before that plaintiff was in good bodily and mental health. Proceeding, witness detailed the injuries he found plaintiff suffering from when he saw him at the Police-station. In consequence of these injuries plaintiff was suffering from concussion of the brain. Witness met in consultation with Dr. Herd, then district surgeon, on the case. Witness regarded plaintiff's injuries as serious, and advised his removal to the Somerset Hospital. Witness did not at that time think plaintiff would recover. Witness next saw plaintiff at his home in Woodstock, after he had come out of the hospital. He was then weak-minded, and had never completely recovered. Witness would say he was not fit for business, although before the accident he was a very smart man. Witness had attended him since. He suffered from inability to exercise his brain, and if he went out into the sun he was attacked by a nervous fever. He had periodic attacks of this fever, but the intervals between them

were longer now than when he first came out of the hospital. He might recover in two or three years if he had a complete rest. Witness's fees for attending him were £50. He had not yet been paid.

By the Court: Plaintiff would now be able to stand an examination, but witness would not say his memory would be accurate.

Cross-examined: A man might give very good evidence although not in his proper senses, but he would not say that evidence could be depended upon. Witness was not aware that plaintiff had given evidence in December, 1896, in the case of the first collision with the cart. After the accident witness did not attend plaintiff professionally for eighteen months, although witness had seen him occasionally during that time. In March, 1898, witness again attended him for the nervous fever.

Re-examined: Witness had after consultation ordered him to the country for rest and change, that being the proper treatment for such cases.

By the Court: Since March, 1898, witness had been attending plaintiff regularly, almost every month.

Henry James Hunter, the plaintiff in the case, said he was formerly a military foreman of works for the Royal Engineers. He left the army in 1893, and was the possessor of a good-conduct medal. After leaving the army he resided in Woodstock, and entered into partnership with one Murray as a builder and contractor. At a moderate estimate his share of the profits came to £100 a year. On October 24, 1896, he went to Claremont, Mr. Hill, who had a cart and horse, driving him there. At the sale, witness bought some of the lots provisionally. After the sale they had a drink at Coomer's Hotel, on the Lansdowne-road, and started on their homeward journey at six o'clock. While passing through Mowbray they had a collision, the cart with which they collided being driven by a deaf and dumb Malay man. The man came right across in front of them. The road was all broken up at the time, as they were making the tramway. Witness knew they were not to blame for the collision, and went to the Police-station to get the Malay man arrested. They were at the Police-station more than an hour, leaving there about a quarter past eight. They got lights for both lamps from Mr. Hyland, of the Mowbray Hotel. They had one drink there. That and the one at Coomer's were

all the drinks they had. They resumed their journey, and when near Rochester House Mr. Hill was still driving. They crossed the tramline because there were some boulders on the road, which were always a danger. These boulders were now removed. Witness had on previous occasions seen carts and wagons taking exactly the same direction they did to avoid those boulders. There were eight feet between the tram-rail and the boulders, so that after allowing for the overhang of the tram-car, there was not room for a cart to pass with safety. While they were crossing, they saw a tram coming at express speed. The construction engineer had told witness that cars could run at thirty-five miles an hour. He did not then believe it, but he did now. Since then he had seen a car timed at that spot, and it went 114 feet in 2 3-5 seconds, that was as near as possible thirty miles an hour. Proceeding, witness said the tram struck their cart at the angle shown on the plan put in. At that spot it was a straight line for 100 yards each way. Since then a siding had been put in there, the boulders removed by the Divisional Council, and the road widened. After the accident, witness became insensible. He was twenty-four days in the Somerset Hospital, and only had a dim recollection of coming away from there. After that witness went to Koeberg, and resided there for over a year, coming into town once a week or once a fortnight. Witness was still suffering from his head and could not go out into the sun. While witness was ill his partner collared everything and absconded, and his business was ruined. Witness had had no quarrel with his partner, but he left. Witness had had an interview with the motorman in November, 1898. The man was not then in the employ of the Tram Company, having been discharged. The motorman's name was Avery. He made a statement to witness.

Sir Henry Juta objected to this statement being given, as according to the evidence the man had been dismissed at the time he made the statement.

Mr. Graham said the man had made a statement as to what occurred at the time of the accident when he was in the employ of the company.

Mr. Justice Laurence said that at the time the man made the statement he was not in the employ of the Tramway Company, and he believed there were authorities on the

point that such evidence should be excluded. In *De Waal v. Sivewright* a statement made by a man who had been one of Sir James Sivewright's agents was not allowed as evidence because it had been made when the man had ceased to be an agent of Sir James Sivewright.

Mr. Graham was proceeding to examine witness with regard to a letter he had written to the Tramway Company as to the statement made by Avery, but Sir Henry Juta again objected.

Mr. Justice Laurence (after perusing the letter) said he did not think it could be admitted as evidence, containing as it did the statement made by Avery after he had left the Tramway Company's employ.

Examination continued: Witness was in touch with Avery up to the beginning of the war. He had gone to Johannesburg last year. Witness claimed £5,000 damages. He had no money to enable him to go home to take a change and rest. His business was now broken up. Witness drew £3 per month rent from a house he owned, and his son was at work. He also had a small pension. He had lost his business and lost his health.

Cross-examined: Witness was a great friend of Mr. Hill, the proprietor of the New Brighton Hotel. He used to go there three or four times a week and play billiards. He was not in the habit of taking more liquor than was good for him. He had not had too much at the time of the accident.

Mr. Justice Laurence: How would his condition affect the case? He was not the driver.

Sir Henry Juta said their case was that both were drunk at the time.

Cross-examination continued: Before they went to the sale they had a drink at Claremont. That was all they had. There were no refreshments at the sale. They only had three drinks all the time they were out. Neither witness nor Hill were bad when they left Mowbray. It was a windy night, and they were on the proper side of the road until they approached the place where the boulders were, and then, seeing the tram coming, they crossed over to the other side of the road. They did not remain on the side where they were, because they thought they had lots of time. Witness thought they had one wheel in the tram-line when they saw the car. Witness was not in financial trouble before the accident. He was a contractor for

a nitrate factory at Oudekraal, but did not get into financial difficulties over it. He did not lose over it. Witness's partner left about December 31, 1898. His business was fairly good at the time of the accident.

There is some arrangement between you and your creditors to pay them all with this compensation?—No.

But if you do not get enough?—I am sure I will get enough.

By the Court: His debts on the partnership were something about £1,000, and his private debts were also about £1,000.

Mr. Justice Laurence: Unless you get more than £2,000 practically all your damages will go to your creditors?

Witness: I must pay my creditors.

Cross-examination continued: Witness had not been employed in a hotel since the accident. He had not been of intemperate habits of late.

Re-examined: Witness was contractor for the nitrate factory. The estimated cost was about £2,700. He got £400 and an order for 1,000 shares in a nitrate company at Prieska, but he did not get the shares. The £400 he got practically covered the work he had done.

Albert Wheeler Hyland, the proprietor of the Mowbray Hotel, deposed that on the day of the accident plaintiff and Mr. Hill were in the billiard-room of his hotel between eight and nine o'clock. They asked witness to put two lights in their cart. They remained at the hotel for ten minutes, and had one drink. They were both sober. Witness had known Hill for some time, but did not know plaintiff. He heard of the accident about a week afterwards.

Edward Hill, the proprietor of the New Brighton Hotel, corroborated plaintiff's evidence as to their proceeding together in witness's cart to the sale at Claremont, where five plots were knocked down provisionally to plaintiff. They had no refreshments at the sale, but after that they went to Coomer's Hotel, where they had one drink. They then left for home, but did not stop on the road at Rondebosch. If he said before the Magistrate in December, 1896, that plaintiff had two drinks at Rondebosch, that might be correct. His memory would be clearer then. Witness corroborated as to the collision with the cart driven by a deaf and dumb Malay. They were not drunk, and were not to blame for that accident. The Magistrate decided against them in a civil action in connection with that collision.

By the Court: The Magistrate in giving judgment said he believed they must both have been drunk.

Examination continued: Witness had never been in trouble about drink before. Proceeding, witness corroborated as to their stay at Mowbray Police-station, procuring candles for their lamps at Hyland's Hotel, and as to the accident. If the tram had been going at a reasonable speed they would have had time to cross over. After the accident the tram did not stop but went right on. Other people came up and assisted them. When the first tram came from Mowbray witness held up his hand and signalled it to stop, but it did not do so. By the time the next tram came up an artilleryman was present, and on their signalling the tram it stopped, and plaintiff was taken to the Woodstock Police-station. Witness got a shock, as he thought plaintiff was killed.

Cross-examined: If they did stop at Rondebosch it must have been at Randall's. If plaintiff had two drinks witness must also have had two.

Cross-examination continued: If witness had stopped his horse on the side of the road where the boulders were until the tram passed it would have been dangerous, as his horse would not remain quiet. The horse would not shy if it was moving, but it would if it was pulled up to allow the tram to pass. Witness went in the car along with plaintiff after the accident, and a cow-keeper near the spot took charge of his horse and cart.

Re-examined: Witness had still got the cart in the same condition it was after the accident. He had it outside the court now. The cart was struck on the left side.

By the Court: Witness had written to the Tramway Company claiming damages, but no notice had been taken of the letter, and he had not pressed the matter further.

By a Jurymen: Plaintiff was sitting on the off-side of the cart, and consequently nearest to the part struck by the tram.

William Lindsay, a sergeant of police, said that in 1896 he was stationed at Mowbray. In October of that year plaintiff and Hill came to the station about seven p.m., and left about 8.10 p.m. They were there all the time, and witness was making an investigation into the accident between the two carts. The driver of the other cart was not present. When Hill

left he was quite sober. Hunter had been drinking, but was sober enough to make a coherent statement.

Cross-examined: Plaintiff had been drinking. Witness should say he had had a couple of drinks. Witness would call that drinking. Witness would not say he was able to take care of the cart and horse, but he was not bad. A man might be able to take care of himself and not of a horse and cart. Witness did not go to Boos Adams, the owner of the other cart, after the accident and ask him not to mention to the tramway people that Hill and Hunter were drunk when the first collision occurred.

Re-examined: Witness had no interest whatever in this case.

Joseph McLaws, a carpenter, residing at Woodstock, deposed that he made the plan put in. He took the measurements himself, and they were correct. About eighteen months ago witness made a series of experiments as to the speed of the trams going over that spot. He timed over a dozen trams, and the slowest went about eleven miles an hour and the fastest over twenty miles an hour. The siding was there then. It would be about 250 feet from the scene of the accident.

By the Court: These experiments were carried on as nearly as possible about the same time of night as the accident occurred.

George Hill, a son of the witness Edward Hill, deposed that hearing of the accident he went to the Police-station and found plaintiff in the Casualty Ward. Plaintiff was then insensible. Witness saw his father at the Police-station about half-past ten that night. His father was not the worse for liquor, but he was very excited.

Tom Hill Robertson said he was a very old friend of plaintiff's, having known him since he came to this country fourteen or fifteen years ago. He was not the same man since the accident, and was not capable of doing as much work as before. He was very much changed for the worse.

This concluded the case for the plaintiff.

For the defence,

Henry David Emery, a fruiterer, carrying on business in Mowbray, was the first witness called for the defence. He deposed that at the time of the accident he was a steward in Valkenberg Asylum. He was in Mowbray on the night of the accident, and saw the first collision with a cart. Hunter and Hill were both drunk, Hunter more so than Hill. At the time of the accident they were

driving very fast. They then went to the Police-station, and after they came out they went into the hotel. He afterwards saw them drive away pretty fast. Witness afterwards heard about the accident with the tram, and from the condition in which he saw them, that did not surprise him.

Cross-examined: The roads were blocked by the works for the tramway at the time and place where the accident between the two carts occurred.

By the Court: Witness contradicted the evidence of the sergeant as to Hunter being quite sober when he left the police-station.

Arthur Rous, a plumber residing at Mowbray, deposed that he saw Hill and Hunter the night Adams's horse was hurt. Hunter was intoxicated when he got off the cart, and Hill was slightly under the influence of liquor. After they came out of the hotel witness saw Hunter helping Hill into the cart. Hill was not, in witness's opinion, in a fit condition to drive.

Cross-examined: Witness was not in the police-station when the statements of Hunter and Hill were taken down.

Re-examined: They were driving recklessly, and witness had not the least doubt but that their being drunk caused the accident.

John Farrell, a special constable in charge of the prison at Wynberg, deposed that at the time of the collision between Adams' and Hill's carts he was stationed in Mowbray. Hunter walked to the police-station and Hill remained in the cart, witness leading the horse because he thought Hill was incapable of driving. Hunter was heavily intoxicated. Witness expected they would be detained at the police-station, and was surprised that they were not. Afterwards they went to the hotel, and witness had to remain twenty minutes looking after the horse. He was taken away before they left.

Cross-examined: Witness did not draw the attention of the sergeant to the fact that the men were in liquor. It was not his place to do so. He did not bring the men in for being drunk.

By the Court: Witness did not see the accident himself.

Mountstuart Jamieson, a sergeant in the Cape Police, stated that in 1896 he was a constable at Woodstock and remembered Mr. Hunter being brought there insensible. Witness was not prepared to say Hunter was drunk, but he smelt of liquor. Hill came in

but could give them no information. He said it was so sudden. He was under the influence of liquor. Witness went to Hill's hotel next morning, but could then get no further information as Hill said he could not remember.

Boos Adams, living in Mowbray, said he saw Mr. Hunter and Mr. Hill at the police-station after the accident to his (witness's) horse. They were in the police-station after the accident to his (witness's) horse. They were under the influence of liquor. Sergeant Lindsey came to witness and said that certain of the tramline people had been to him and he had said that Hill and Hunter were not drunk, and he asked witness to say

Cross-examined: Witness's wife was present at the time. It was true witness's driver was deaf and dumb. He was still driving, and now drove a four-in-hand. This was the first time witness had said anything about Sergeant Lindsey coming to him.

Mrs. Kate Webb deposed that on the night of October 24 she was walking along the road with her daughter and some other persons near Rochester House. She saw the cart coming up on the left-hand side of the road and then cross the line when the tram was nearly on top of it. The tram stopped, but subsequently went on. Witness could not say Hunter smelt of drink. He was lying on the ground apparently dead. Mr. Hill was excited, and smelt strongly of liquor. Witness attributed the accident to Mr. Hill's carelessness.

Cross-examined: The tram was going at ordinary rate. She had never seen a cart and horse go as fast as this tram. The trams did go along that road at a fast rate. Mr. Hill's excitement might have been caused by the accident. Mr. Hill and the artilleryman lifted Hunter into the tram.

By a Jurymen: Witness heard no bell sounded from the tram.

Re-examined: Mr. Hill was not sober.

By a Jurymen: There were lights on the cart at the time of the accident.

By the Court: The lights on the cart went out owing to the collision. No one left the car after the accident. When the first tram came from Mowbray they stopped it, but the tram-man refused to take Mr. Hunter on the car.

George Way, a guard in the employ of the Cape Town Tramway Company, deposed that he was motorman on a car coming to town on the night of October 24, 1896. He stopped the car at Rochester House, and saw Hunter lying on the ground uncon-

scious. Mr. Hill was in the cart, and witness asked him to get out, but he did not. Judging from his appearance in the cart, witness would say he was under the influence of drink. Witness's car went on, several passengers remaining behind to look after Mr. Hunter. Witness had known Mr. Hunter for ten years. He was not of intemperate habits, but witness thought he might be steadier. Hill was about the same.

Cross-examined: Witness passed the motorman Avery before he reached Hunter. Avery said nothing about the accident. When witness came up to Hunter there was nobody there except the injured man and Hill, the latter being in the cart. Neither Mrs. Webb nor anybody else was there at the time. Witness thought he was allowed to travel ten miles on that section. Witness would say that the maximum speed that could be put on was thirteen miles an hour.

After counsel had addressed the jury on the facts,

Laurence, J. summed up, first of all dealing with the points of law involved, and pointing out that the jury had first to decide whether the plaintiff had proved negligence on the part of the defendants; and then the other question was, whether it was that negligence which had caused the accident, because, of course, if there was negligence on the part of defendants—if they were not doing their work as carefully as they might—but still if that negligence did not do plaintiff the harm, then the plaintiff was not entitled to claim damages upon it. He pointed out, however, that there might be a middle view, and that the jury might consider that both parties were to blame, in which case they would have to say whether in their opinion the conduct of the defendants was the immediate and substantial, as it was said the proximate, cause of the accident. His lordship then reviewed the evidence at length, especially with regard to the speed of the tram, saying that it appeared to him that the only real ground upon which the action was based was that at the time the accident occurred the tram was travelling at an excessive rate of speed. In dealing with the question of damages, he said, in conclusion, that the only result, if juries gave extravagant damages, would be that jurymen would be called upon more frequently for that work, and he pointed out, moreover, that if damages were given in

excess of what was reasonable, there might be further inconvenience in applications arising for new trials on the ground that the damages were too much.

The jury found for the plaintiff with damages assessed at £1,750.

Postea (February 14th).

Mr. Graham formally moved for judgment in this case for £1,750 and costs, in accordance with the finding of the jury.

Judgment was accordingly entered for £1,750 and costs.

[Plaintiff's Attorney, Gus Trollip; Defendant's Attorneys, Messrs. Scanlen & Syfret.]

SUPREME COURT

[Before the Right Hon. Sir J. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), and the Hon. Mr. Justice LAURENCE.]

ADAMS BROS. V. EXECUTORS { 1900.
OF DE VILLIERS. { Feb. 14th.

Horses—Injuries—Repairs. -

This was an action upon a disputed account.

The plaintiffs' declaration was as follows :

1. The plaintiffs reside and carry on a partnership business at Somerset West Strand under the style or firm of Adams Bros. The defendant De Villiers, who is the widow of the late D. G. de Villiers, and the defendant De Smidt reside at Beaufort West. The defendant Oliff resides at Worcester. The defendants are the executors testamentary in the estate of the late D. G. de Villiers, and are sued in their capacity as such, letters of administration having been duly issued on the 4th July, 1899.

2. On or about the 10th of February, 1899, and at Somerset West Strand, the plaintiffs, at the request of the late D. G. de Villiers and the first-named defendant, acting on behalf of her said husband, performed certain services in taking charge of, attending, and curing certain three valuable horses belonging to the said late D. G. de Villiers, the said horses having met with certain serious injuries.

3. The plaintiffs, on or about the said date, and at the request of the said D. G. de

Villiers, and his said wife acting on his behalf, performed certain work in and about the repairs of a certain stable, carriage, chairs, and bedstead belonging to the said late D. G. de Villiers.

4. The late D. G. de Villiers, and his said wife acting on his behalf, promised and undertook to pay the plaintiffs a fair and reasonable price for the services rendered, material supplied, and the work and labour so performed by them.

5. The value of the services so rendered, the work and labour performed, and the material supplied as aforesaid is the sum of £34 8s. 11d., and the plaintiffs annex to this declaration an account giving full details of the said charge, which the plaintiffs say is a fair and reasonable one.

6. A copy of the said account has been served upon the defendants with a demand for payment thereof, but the defendants wrongfully refuse to pay the same or any portion thereof.

The plaintiffs prayed : (a) For judgment in the sum of £34 8s. 11d., as aforesaid; (b) alternative relief; (c) costs of suit.

The defendants in their plea admitted liability on behalf of the estate to pay a fair and reasonable price for the said services, and tendered £17 10s. in payment of the account, being £10 10s. for the first item (attending the horses) and £7 for the second item (repairs to stable).

Mr. Graham, Q.C. (with whom was Mr. Close), for the plaintiffs.

Mr. Upton for the defendants.

John Hamp Adams said that he was a builder and contractor, residing at Somerset West Strand. He came out to this colony from Herefordshire, England, about three years ago. His father was a large stock-farmer there, and witness had been mixed up with stock all his life. In February, 1899, he was employed by Mrs. De Villiers, acting on behalf of the late Mr. De Villiers, to treat certain horses. Mr. De Villiers, of Beaufort West, had come to reside at Somerset West Strand for about a month, and had brought with him three valuable horses, had brought with him three valuable horses, stallions. These were put into a stable in which there was no partition dividing them. On February 10, 1899, Mr. De Villiers sent his coachman across to witness to ask if he could put the stable right, it having been broken to bits, and he also said that as the horses were very sick, Mr. De Villiers wanted witness to see them. Witness went

to the house and saw Mrs. De Villiers, who told him he could not see her husband, as he was lying down rather unwell. He then said he had come to see about the stable, and Mrs. De Villiers said she could show him all about that. She also asked witness if he understood horses, and on his replying in the affirmative, she said she had been recommended to him by Mr. Malan. Witness then went to the stable, which he found covered with blood; a lot of plaster had been kicked off the walls, the manger was completely torn to pieces, and the window was kicked out, although the frame still remained. Mrs. De Villiers instructed witness to erect a new manger all along the stable. Witness pointed out the advisability of putting in partitions, and Mrs. De Villiers authorised him to do so. Witness then went over to where the horses were at Walbrugh's stable, and Mrs. De Villiers pointed them out, saying, "There they are; you can make what you can of them. I cannot look at them; I am so much upset." Witness looked at the horses, and said that so far as two of them were concerned he could guarantee a cure, but not in the case of the grey horse, the injuries were so severe. Mrs. De Villiers said, "I shall be much obliged if you would try your best, for I value these horses more than £100. He said to Mrs. De Villiers, "I will not give you any hope of the grey horse, but I will try my best." He also said it would take a considerable time before the horse would be well. Mrs. De Villiers left witness with the understanding that he was to commence work. The horses were all covered with blood when he saw them. Witness described the nature of the injuries to the horses, and also the manner in which he treated them. He treated the horses for about a month, and visited them twice a day regularly, and on several days three times. The horses had been removed to Mrs. De Villiers' the following night. Witness's house was about 600 yards from the stable. Owing to the reticence of the horses he had sometimes to have assistance. When he first attended the horses it took him considerably over two hours each time. Witness had spent on medicines about £2 7s. 6d. or £1 10s. He effected a perfect cure and the horses were driven two days before they left Somerset Strand. Witness subsequently sent in an account addressed to the executors of the late Mr. De Villiers, and received a reply to the effect that the executors had not yet been appointed, but when

they were the account would be attended to. He had written several times about the account since then, but had received no reply, and a tender was only made when the plea was put in.

Cross-examined: Witness would say the horses were not more than nine or ten years of age. He did not consider that he should charge as much as a veterinary surgeon would, but he considered that in that case the charge would be very low. Witness had valuable recipes, but he did not care about giving these away. He used to go to the chemist and get what he wanted.

Re-examined: Witness was a perfect stranger to Mr. De Villiers. On several occasions before this witness had charged people for attending their horses. He was known in the Strand for his treatment of horses, and had had several very successful cases. He had always charged, and the people had always been willing to pay. Witness knew Mr. Malan. Witness considered that the pair of greys were worth about £200, seeing they were a splendid match. The brown horse would be worth about £75.

Walter Jeffrey Adams, brother of the last witness and in partnership with him as a builder and contractor, deposed as to his brother having attended Mr. De Villiers' horses for about a month. Witness saw the horses the Sunday after the accident. One of them was severely injured. Witness had helped his brother on two occasions, on Sundays. He was angry with his brother for attending these horses, because at the time they had several contracts on hand, and he considered they were losing more by their contracts not being looked after than if they were well paid for attending the horses. Witness valued the pair of greys at from £175 to £200, and the brown at about £60. He thought the charges for the repairs to the stable were fair and reasonable.

John Frederick Stanford, a farmer residing near Somerset West, said that the pair of greys in question must have been worth about 150 guineas when they were five years old, and the brown horse was worth about seventy-five guineas. Witness had seen the injuries sustained by the horses. They were severe, those of one of the grey horses being much worse than those of the others. Witness had himself employed Mr. Adams when his horse was suffering from a severe kick. Mr. Adams had had the horse for a couple of hours, and had charged 15s., with which charge witness was perfectly satisfied. He

had heard of other cases treated by Mr. Adams. After the evidence he had heard, witness did not think he was charging too much in the present case.

Cross-examined: Witness thought the pair of greys would be worth about £100 at present, as they were very handsome horses. The brown one was certainly worth seventy-five guineas.

Willem Walbrugh deposed that he saw the horses after they were injured. He thought that one of them would not recover, and told Mrs. De Villiers so. Witness valued the pair of greys at £170.

David Alphonse Barrett, a builder and contractor, said that he considered the charges for the repairs to the stable fair and reasonable.

Dr. Hutcheon, Colonial Veterinary Surgeon, said that after hearing the evidence as to the condition these horses were in and as to the way they were treated he did not consider £26 10s. an excessive charge. It was not too much if it was necessary for Mr. Adams to attend to the horses personally every day as he had done. In certain cases the dressing was most important, and if the coachman could not do that without Mr. Adams's assistance, he considered the charge very reasonable. If a veterinary surgeon in practice in Cape Town had had to go to Somerset West to attend to these horses he would not have charged less than five guineas.

Cross-examined: An injury to the head would make a horse very unmanageable, and it would grow worse, as the wound would irritate more as it healed. A veterinary surgeon in ordinary practice would not charge more than 5s. a visit, witness thought, if he just went to give advice and to see that that advice was carried out. If he had to do the dressing, &c., and spend some time with the horses he would probably charge 7s. 6d. a visit.

John Boase, veterinary surgeon, said he thought that the charges made in this case for treating the horses were reasonable. Witness generally charged 5s. a visit, but that was merely for giving advice, and did not include dressing the animals or performing an operation. He generally charged a guinea for an operation.

This concluded the case for the plaintiffs.

For the defence,

Mrs. Elizabeth Maria de Villiers, widow of the late Mr. D. G. de Villiers, and one of the executors in his estate, deposed that in

the fight in the stable one of the horses was severely injured, but the other two were not so badly hurt, and she had driven them together a couple of days after the accident. Her husband sent for a carpenter and Mr. Adams. He was working in the stable when witness saw him. Witness asked him about the horses, and he told her one was very badly injured but he could make it all right. Witness did not know how Adams came to be employed in treating the horses. She was told he knew something about horses, and knew he was going to attend to the horses, but she did not instruct him to do so. As a matter of fact, witness knew he had been attending the horses with the consent of her husband. He attended the horses during the month of February. Her husband fell ill on March 6, and ten days before that witness and her husband drove to Morkel's farm, three-quarters of an hour distant, and on this occasion they used both the grey horses. The grey horses were now thirteen years old. They were four or five years old when her husband bought them, and he then paid £120 for them and a second-hand trap. Witness had tried to sell the horses a fortnight ago, but could not get her price—£80 for the pair.

Cross-examined: Her husband had told her that Adams would see to the horses. She never took the horses to Adams, and never said she would not lose the greys for £100.

Charles de Smidt, co-executor in the estate of the late Mr. De Villiers, and an attorney of the Supreme Court, said that some time ago, before the declaration in this case was issued, he met Mr. Adams at Mr. Kayser's office, and after conversation with him made a tender of £15 in settlement of his claim against the estate of the late Mr. De Villiers.

David Veils, formerly coachman to the late Mr. De Villiers, said that one horse was seriously injured in the fight; the other two had marks upon them, but they were not very severe. Witness went to Mr. Adams, and told him to come and repair the stable. He did not say anything about attending to the horses. Adams had attended to the horses for about three weeks. He generally came twice a day, but sometimes he skipped a morning or an evening. On one occasion, some time after the injury, witness had driven Mr. and Mrs. De Villiers out to Mr. Morkel's farm, using both the grey horses.

Cross-examined: That was about ten days before Mr. De Villiers died. It was during the month of March. Witness had heard Mr. Malan telling Mr. De Villiers that Mr. Adams was a skilful man in his treatment of horses.

Peter Johannes Mohr, who had formerly been overseer for Mr. De Villiers at Beaufort West, said that to-day the pair of greys were not worth more than £50. As a speculation, he would not give more than £40 for them. He thought that 5s. per day, or 2s. 6d. per visit, would be a reasonable price for attending to the horses.

Cross-examined: Witness had never attended horses himself for payment. Mr. De Villiers had been proud of these horses. The brown horse was worth £20.

This concluded the evidence.

The Chief Justice asked Mr. Graham if his clients would be prepared to take £20 as fees for treatment of the horses and medicines.

Mr. Graham, after consultation, said they were prepared to take that.

Mr. Upton was then heard for the defence on the facts, after which the Court gave judgment for the plaintiff for £27 18s. 11d. and costs of suit.

De Villiers, C.J., said: There is no doubt that the horses, especially one of them, sustained very severe injuries, and the only question now is whether the charge made is reasonable or not. Upon the whole I think the charge is somewhat too high, but at the same time I think the tender was also greatly too low. I attach very much weight to the evidence of Dr. Hutcheon, than whom there is no more skilful veterinary surgeon in the country, and after hearing the evidence given by the plaintiff, Dr. Hutcheon thought that he had shown great skill and care in the way in which he attended to those horses. Then at the time there was considerable business doing in the plaintiff's own line of business, and he was taken away from that for the purpose of attending to these horses. He did not satisfy himself with a mere perfunctory visit, but took upon himself to do what was necessary to attend to the wounds of these horses, cleaning them out, and in other ways attending to them, and also feeding them when that was necessary. It is said, however, that the horses were old, and not very valuable, but we ought to attach to these horses the same value as the owners themselves attached to them, and although they were old, they considered them of sufficient value to have

them well attended. I think there is no doubt that if there had been a veterinary surgeon in Somerset West he would have been sent for, and I am satisfied, therefore, that the charges would have been about 15s. per day for the first fortnight, and 10s. per day for the second fortnight, which would amount to £17 10s., and this, with the £2 10s. for medicines, &c., would make £20. Adding that to the £7 18s. 11d. for the repairs to the stables, makes £27 18s. 11d., and judgment will be given for the plaintiff for that amount, and as that is far in excess of the tender made by the defendants, the judgment will carry costs.

Laurence, J., concurred.

[Plaintiff's Attorneys, Messrs. Walker & Jacobsohn; Defendant's Attorneys, Messrs. Van Zyl & Buissinne].

SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G.), the Hon. Mr. Justice BUCHANAN, and the Hon. Mr. Justice LAURENCE.]

PROVISIONAL ROLL.

BOSMAN, POWIS AND CO. V. C. } 1900.
W. CORLETT. } Feb. 15th.

Mr. Nathan applied for provisional sentence for £305 5s., due on two promissory notes.

Granted.

B. H. HEATLIE V. JOHN CHARLES STEPHAN.

Mr. Gardiner applied for provisional sentence for £50, of which £20 was due on a good-for value received and £30 on a promissory note.

Granted.

ARDERNE V. DAVOD.

Mr. Jones applied for provisional sentence for £200, with interest thereon from January 1, 1899, on a mortgage bond, which had become due by the reason of non-payment of interest. There was also a prayer that the property specially hypothecated be declared executable.

Granted.

LOMBARD V. YOUNG.

Mr. Buchanan, for the plaintiff, asked that this matter be allowed to stand over until February 22.

Mr. Molteno, for the defendant, consented to the postponement.

The postponement was granted.

ILLIQUID ROLL.

HOWARD AND SCOTT V. GRADY.

Mr. Benjamin applied, under Rule 319, for judgment on a declaration claiming the sum of £32 17s. 6d., work and labour performed, goods sold and delivered, and certain moneys disbursed.

Granted.

REHABILITATION.

Mr. Uppington moved for the rehabilitation of the insolvent estate of Martin & Co. The application was made with the consent of creditors, and there was the usual affidavit certifying that all the creditors against the estate had consented, in writing, that the third meeting had been held, and that the final liquidation account had been confirmed.

Order granted as prayed.

GENERAL MOTIONS.

IN THE MATTER OF THE PETITION OF
RICHARD TILLARD.

Mr. Buchanan moved in the matter of the petition of Richard Tillard, in his capacity as chairman of the Boys' and Girls' Public Underdenominational School, of Fort Beaufort, praying that the rule *nisi* for the transfer of certain property be made absolute.

The rule was made absolute.

SEA POINT MUNICIPALITY V. PEDERS N.

This was an application that the rule *nisi* restraining the respondent from using certain houses be made absolute.

Mr. Benjamin appeared for the applicant.

Mr. Buchanan, for the respondent, said that the matter had stood over from February 1 to allow certain work in connecting the drains of respondent's property with the drainage system to be carried out. He was informed that the work was not yet fully completed, and he therefore asked

that the matter be allowed to stand over for another week, the respondent undertaking to pay all costs occasioned by the delay.

Mr. Benjamin said he was not instructed in the matter of the postponement, and he drew the attention of the Court to the fact that the respondent had had ample time since the matter was last before it to carry out the work, it having been stated then (February 1) that the work would be completed in ten days, and although more than that period had now elapsed, it had not been completed. It was an important work, being in connection with the sanitary arrangements for four cottages which were being put up, and two of these cottages were already occupied.

The Chief Justice said it would be better to allow the matter to stand over for a week, as there could not be much damage done by that.

The matter was therefore allowed to stand over, respondent undertaking to pay the costs occasioned by the delay.

MUNRO V. WALKER AND CO. AND OTHERS.

This was an application on notice given on behalf of Egbert March Munro, of Worcester, to the respondents, Jno. Cleghorn, Jno. Harris, and Joseph Walker, trading in Cape Town as J. Walker & Co., A. P. Holm, broker, and Johan Wilhelm Krahe, both of Cape Town, calling upon them to show cause why an order should not issue from the Court authorising the attachment and sale of certain furniture and other effects purchased by the respondent Krahe from the respondents Walker & Co, or in the alternative, the attachment and sale of certain promissory notes, made by one Brinsley in favour of the respondent Krahe, amounting in all to £117 19s. 1d., now in the hands of Walker & Co., in and toward the reduction of the balance of capital and costs due under and by virtue of certain judgment in favour of the applicant, given in the Circuit Court held at Worcester on October 7: as also an order for the attachment of £800 owing on an open account, and a certain promissory note for £25 made by Brinsley in favour of Krahe and alleged by the respondent Holm to have been ceded to him in and toward the reduction of the balance of capital and costs due under the judgment of the Circuit Court, or an order on the respondent Krahe for an increase of the monthly payment in reduction of the said judgment ordered by the Supreme Court on November 9, 1899. Costs

of the application were prayed for against Krahe, but against the respondents Walker & Co. and Holm only in case they should oppose the application.

From the affidavits, it appeared that the judgment obtained by the applicant in the Circuit Court was for £200, on which there were £66 16s. 10d. taxed costs, and £3 ls. 6d. Sheriff's charges. The judgment and costs being unsatisfied, application for a decree of civil imprisonment against Krahe was made in the Supreme Court on November 9 last, when Krahe pleaded inability to pay. The Court granted a decree of civil imprisonment against him, but stayed execution pending the payment of £3 per month, with leave to the applicant to apply again should he be able to prove that Krahe had property. It was alleged that since then it had been ascertained that when Krahe sold his business in Worcester in September last he was partly paid by promissory notes payable at different dates, and amounting to £147 19s. 1d. in all. The applicant had also ascertained that respondent had in September, purchased certain furniture and effects from Walker & Co., Plein-street, Cape Town, and handed the promissory notes in question to Walker & Co. as security. It also appeared that when before the Supreme Court on November 9 respondent had said he had purchased the furniture to replace that belonging to his wife, which he had sold before leaving Worcester, but it was pointed out that that furniture realised only a little over £18. The affidavit also gave details as to the £80 and promissory note for £25 ceded to Holm.

In his affidavit Joseph Walker, of the firm of Walker & Co., said with regard to the furniture that in the months of September and October last his firm supplied Mrs. Krahe (wife of the respondent) with furniture to the value of £300 or thereabouts upon the hire-purchase system, it being a condition that a deposit payment of at least one-third of the value of the goods hired should be made, and in pursuance of that condition his firm received three promissory notes, two for £30 each and one for £52 19s. 1d., made by W. S. Brinsley in favour of J. W. Krahe. Two of these notes had already been paid, and the last mentioned matured on the 12th proximo. That in consequence of the said Mrs. Krahe being unable to pay the monthly instalments in terms of the agreement of hiring his firm had terminated the agreement and retaken possession of the furniture hired, as he had the power to do under

the agreement which stipulated, *inter alia*, that when the hiring was terminated and the goods returned to the owner the hirer should not on any ground whatever be entitled to any allowance, credit return, or set-off for payments previously made; that the whole transaction with Mrs. Krahe had now closed, and he submitted that the furniture and promissory note were not liable to attachment.

Mr. Buchanan appeared for the applicant; Mr. lose for respondents Walker and Co.

Mr. Justice Buchanan: What is Walker's position in the matter?

Mr. Close: He takes up the position that he is entitled to the furniture and everything paid under the agreement.

The Chief Justice: Would not Krahe himself be entitled to claim the goods on payment of the balance?

Mr. Buchanan: Not if the Court upholds the clause as to forfeiture in the contract.

The Chief Justice: What does the Act No. 38 of 1884 say as to the effect of a provisional order on a judgment?

Mr. Buchanan: Section 2 provides that from and after the publication of notice of intention to surrender, "it shall not be lawful to sell any property belonging to the estate to which such notice relates, attached under any writ of execution or other process in the nature of an execution, at any time before the application for the surrender of such estate shall have been made and adjudicated upon, except by order of some competent Court." The furniture was Krahe's. He paid for it, although it was put in his wife's name. Applicant intends to object to the surrender. The estate is not really insolvent. Krahe has not denied applicant's allegation, and he has not come here to explain. As to Walker and Co., the agreement is not produced. It was signed after the matter came before the Court.

De Villiers, C.J.: As it has been stated during the argument that Krahe has given notice of his intention to apply for leave to voluntarily surrender his estate as insolvent, I think the matter had better stand over until the question of the surrender has been decided. It must stand or fall by that. The costs of this application will also stand over.

The matter was not again mentioned.

IN THE ESTATE OF THE LATE WILLIAM
FLEMING AND OTHERS.

Mr. H. Jones moved that the rule *nisi* granted with regard to the transfer of certain property be made absolute.

Granted.

IN THE MATTER OF THE PETITION OF
MARTHA ELIZABETH JEVON.

Mr. McKenzie moved, on behalf of the petitioner, the surviving spouse and executrix of the estate of the late George Jevon, for leave to mortgage certain property, situated at Sea Point, for the purpose of effecting drainage connection ordered by the Municipality. The heirs were all majors, and had consented to the sum of £300 being so raised on mortgage, but one of the heirs was married in community of property to one McLaughlin, who was now in the Transvaal, and with whom it was impossible to communicate owing to the war, and therefore it was impossible to obtain his assistance for his wife in giving her consent.

The order was granted as prayed.

IN THE MATTER OF THE PETITION OF
PIETER JACOBUS GELDENHUYSE.

Mr. Buchanan moved, on behalf of the mortgagor, for the cancellation of a certain bond on three-sixteenth parts of a farm at Riversdale. Eight executors had been appointed in the estate which held the mortgage, and as three of these executors were resident in the Free State, it had only been possible to obtain the consent of one of them. The Court was asked to grant an order authorising the Registrar of Deeds to cancel the said mortgage, and also that the costs of this application be deducted from the amount due under the mortgage.

An order was granted in these terms.

IN THE MATTER OF THE MINOR BASSON.

Mr. Buchanan moved for leave to mortgage certain property in the estate of the late M. G. Basson, for the purpose of carrying out the terms of the will of the deceased.

The Master had reported favourably on the application, as being in the interest of the minor.

Order granted.

IN THE ESTATE OF THE LATE EBRIEM
GAZANT.

Mr. Heydenrich moved for leave to mortgage certain property in this estate for the

sum of £70, for the purpose of carrying out certain sanitary arrangements in connection with the property.

Granted.

COLONIAL GOVERNMENT V. { 1900.
STEPHAN BROTHERS. { Feb. 15th.
 " 19th.

Declaration of rights—Cause of
action—Exception.

A plaintiff is not entitled to claim a declaration of rights merely because such rights have been disputed by the defendant, but he must prove an infringement of one or more of such rights.

This matter came up for argument on exceptions.

The declaration was as follows:

1. The plaintiff is the Honourable Albertus Johannes Herholdt, who sues in his capacity as Secretary for Agriculture and as such representing the Colonial Government; the defendants are Hendrik Rudolph Stephan and Johan Carel Stephan, trading as Stephan Brothers, in Cape Town.

2. The defendants are the registered owners of the farm Otterdam, situated in the division of Clanwilliam at Lambert's Bay: the said farm adjoins the sea-coast.

3. The said farm was granted to the defendants' predecessors in title on or about December 31, 1831, in perpetual quitrent under and subject to the provisions of Sir John Cradock's Proclamation, dated 6th of August, 1813.

4. The fifth section of the said proclamation, subject to which the said farm was granted, provides as follows: "In all places adjoining the sea or communicating with the sea by inlets therefrom the rights of the Crown are reserved, with the power of re-assumption of any quantity of land not exceeding twenty morgen, paying the proprietor for such buildings as he may have erected according to a fair valuation, provided such ground be wanted for public purposes, and if given up by the Crown it shall not be transferred to another individual, but revert to the proprietor or his representatives."

5. Thereafter the Governor by Proclamations of the 6th of June, 1849, and the 18th of November, 1899, acting under and by virtue of the powers contained in the Proclamation of Sir John Cradock as aforesaid,

reassumed on behalf of the Colonial Government for public purposes twenty morgen of the said farm.

6. Disputes have arisen between the Colonial Government and the defendants with regard to the purposes for which the said land can lawfully be used, and it has become necessary that a declaration of the rights of the plaintiff in respect of the user of the said land for and on behalf of the public should be made by this Honourable Court.

7. The plaintiff submits that the Colonial Government has the right to use the land reassumed as aforesaid for the purpose of landing and shipping goods imported or exported by the Government or by members of the public; for the erection of buildings for the transaction of business connected with the landing or shipping of such goods, and for the temporary storage of the same; for the excavation of quarries to be used in the construction of wharves and erection of buildings for the accommodation of Her Majesty's Customs officials, and for the construction of such wharves and erection of such buildings for the better landing and shipping of goods; for the erection and construction of buildings, sheds, and yards, for the curing and temporary storage of fish by the public, for the erection of bathing-houses for the use of the public and stables for the housing of animals used in the conveyance of persons or goods, and for the erection of buildings for the accommodation of persons having business to transact at Lambert's Bay.

8. The defendants deny the right of the Government to use the land reassumed as aforesaid for all or any of the purposes above set forth.

The plaintiff claims (a) That it be declared by this Honourable Court that the said land may be used by the said Government or by persons thereto authorised by the said Government for the following purposes:

1. Landing and shipping goods imported or exported by the Government or the public.

2. The erection of buildings for the transaction of business connected with the landing or shipping of such goods, and for the temporary storage of such goods.

3. The excavation of quarries to be used for the construction of wharves for landing

and shipping goods, and for the erection of buildings for the accommodation of Her Majesty's Customs officials.

4. The construction of wharves and the erection of buildings referred to in the preceding sub-division.

5. The erection and construction of buildings, sheds, and yards for the curing and temporary storage of fish by the public.

6. The erection of bathing-houses for the use of the public, and of stables for the housing of animals used in the conveyance of persons or goods.

7. The erection of buildings for the accommodation of persons having business to transact at Lambert's Bay.

(b) Alternative relief; (c) such order as to costs as may seem meet.

The defendants excepted to the declaration on the ground that (1) it disclosed no cause of action; and (2) that it was inconsistent and embarrassing, inasmuch as paragraph 7 and the prayer set up different claims.

Sir H. Juta, Q.C., for the exceptors, the defendants in the suit.

Mr. Ward for the plaintiff.

Sir H. Juta: We object to the declaration on the ground that it raises a purely academical question, and that there is no cause of action disclosed upon which the Government can bring us into court. We have done nothing to interfere with the rights of the Government, nor have we committed an overt act of any description whatever. The Government have not taken transfer of the land, and have not occupied it. All they have done is to issue a proclamation. They must first exercise their rights before they bring defendants into court.

The Chief Justice: But supposing they have erected wharves. Are they first to erect the wharves, and go to all the expense, and then come into court?

Sir H. Juta: They can take possession of the land and do some act to show they are in occupation for the purpose of carrying out those works which they contend they have a right to go on with.

The Chief Justice: The Court has often decided cases for declaration of rights where the rights had not been infringed.

Sir H. Juta: That is not what the Courts of justice are for. The point is not trivial. It is really very important for the defendants that nothing should be done until the plaintiff has exercised his rights of ownership.

The Chief Justice: Is not a denial of rights sufficient, for example, in cases of bending, or of servitude, for a plaintiff to bring an action?

Sir H. Juta: No. Something must be done, some overt act.

Mr. Justice Buchanan: Would it be a good declaration if they claimed transfer?

Sir H. Juta: If we refused transfer, they could bring the action.

Mr. Ward: There has been a deduction on the plan in the Deeds Office, and the Government has been in occupation for years.

Sir H. Juta: There is nothing in the declaration about occupation.

Mr. Ward: I refer to paragraph 7 of the declaration.

Sir H. Juta: But it claims that the Government may authorise other people to do these things. They claim more than they submit they are entitled to. I take exception to that.

C.A.V.

Postea (February 19).

De Villiers, C.J.: The defendants have excepted to the declaration on the ground that it discloses no cause of action. The prayer of the declaration is that it may be declared that certain quitrent land reassumed by the Crown under the 5th section of Sir John Cradock's proclamation of the 6th of August, 1813, may be used by the Government or by persons thereto authorised by the Government for certain specified purposes. The only facts stated in support of such a declaration of rights are that disputes have arisen between the Government and the defendants with regard to the purposes for which the land can be lawfully used, and that the defendants deny the right of the Government to use the land for any of the specified purposes. To lay the foundation, however, of an action, it is not sufficient to prove that disputes have arisen between the parties, or that the plaintiff's rights are questioned by the defendant. There is a peculiar form of action derived possibly from the practice of the Roman Law (*Code* 7, 14, 15), by which a person who publicly alleges that he has an action against another may be compelled either to bring such an action within a certain time or be debarred therefrom, and have perpetual silence imposed upon him. But that is not the form of action here, nor indeed would it have been maintainable, because it is not alleged that the defendants pretend to have any action against the Government. The

allegation is that the Government claims certain rights against the defendants, but that is not enough without a further allegation that one or more of such rights have been infringed by the defendants. In the absence of such a further allegation, the exception must be allowed with costs.

[Plaintiff's Attorneys, Messrs. J. and H. Reid and Nephew; Defendants' Attorneys, Messrs Van Zyl and Buissinné.]

VAN DYK V. UDWIN. } 1900.
} Feb. 15th

Promissory note—Consideration—
Cancellation of void deed of sale.

In an action on a promissory note brought in a Magistrate's Court by the payee against the maker, the defendant pleaded that there was no valuable consideration, inasmuch as the note had been given as "smart money" in consideration of the plaintiff agreeing to the cancellation of a certain deed of sale between the parties "which deed of sale was never in force and of no value." The Magistrate having decided that he could not go behind the promissory note, Held, that the plea was a valid one, and that, in order to enable the defendant to prove it, the case must be remitted to the Court below for decision on the merits.

This was an appeal from a decision of the Resident Magistrate of Bredasdorp, given in the Resident Magistrate's Court there in November last, in a case in which judgment was given against Dykman on a promissory note for the sum of £75. On behalf of Dykman, an exception was taken on the ground that the plaintiff was not the legal holder of the promissory note, having parted with the same and received his money for it. This was overruled. The defendant's agent then pleaded that there was no consideration, inasmuch as the note in question was obtained from the defendant for "smart" money on the cancellation of a deed of sale and purchase, which deed of sale was never in force and of no value, owing to the want of the signature of the plaintiff (Udwin) to the said deed of sale and other irregularities.

The Magistrate ruled that he could not go behind the promissory note, and gave judgment for the plaintiff in the sum of £75 with costs of suit.

Against this an appeal was lodged.

In his reasons, the Magistrate said he did not consider it competent for him to go behind the promissory note, which was in order, and upon the face of which there was nothing to show that the plaintiff was not the legal holder thereof: moreover, it was beyond the jurisdiction of his Court to enter into any question affecting the sale and purchase of landed property.

Mr. Close appeared for the appellant.

Mr. Burton for the respondent.

Mr. Close: The Magistrate ought to have heard some evidence to show him that the defence was not a good one before giving judgment.

The Chief Justice: Why should he hear evidence if the plea showed no good defence?

Mr. Close: I submit the plea did disclose a good and valid defence.

Mr. Burton: If the Court finds the plea is not a good defence, the Court will not upset the Magistrate's decision simply because he has given no reasons. If the plea had stopped at the words "no consideration," plaintiff would have been out of court. But the plea went too far, and assigned the reasons for the plea, which are not valid.

The Chief Justice: The phrase "other irregularities" is very wide. Would it not be a good defence if the bill of sale was only signed by one party?

Mr. Burton: Then the plea should have been "No agreement." The utmost the defendant can say is that the deed was invalid, and that when he gave the note as "smart" money, he gave it under a misapprehension of his legal position. There was no doubt or mistake between the parties as to the facts. Under these circumstances the Magistrate would have been entitled to say that that was no good defence. See *George v. Kimberley Town Council* (2 H.C. p. 231), and *Port Elizabeth Town Council v. Vitenhage Divisional Council* (Buch. 1868, p. 221). According to the latter case the money could only be recovered if the plaintiff was equitably entitled to it.

Mr. Close, in reply: The document was a mere memorandum of an agreement which was to be entered into.

De Villiers, C.J.: The only question in this case was whether there was any consideration for the note sued upon in the

Court below. The action was brought by the payee of the note against the maker, and the defence was that the note was given as "smart money" in consideration of the plaintiff agreeing to the cancellation of a certain deed of sale between the parties, "which deed of sale was never in force and of no value." The Magistrate held that he could not go behind the promissory note by inquiring into the consideration for it. In this view, however, he erred. The defence of "no consideration" is valid as against an immediate party, although it would not avail against a remote party who is a holder for value. How then may valuable consideration be constituted? The answer is given in the 25th section of the Bills of Exchange Act of 1893, as follows: "By (a) any cause sufficient to support an action founded on contract or agreement; (b) an antecedent debt or liability." In the present case, if it be proved that the deed of sale was never in force, a promise made in consideration of the cancellation of the deed would not be sufficient to support an action founded on contract, nor would it create a debt or liability. It would have been different if the cancellation had been agreed to as a compromise of a disputed liability, but there is no allegation to that effect, and, if there had been, an opportunity ought to have been given to the defendant to prove the circumstances under which the cancellation was agreed upon. As the plea stands, it virtually amounts to this, that the defendant gave the promissory note in consideration of the cancellation of a deed of sale which was represented as binding on him, although it really was not binding. The defence has been compared by the plaintiff's counsel with the case of a person seeking to recover back money paid in ignorance of the law, but it can be more aptly compared with the case of a person who has given a note for a debt represented by the payee to be due, though not really due. Such a person does not seek to recover money already paid, but to avoid payment of a liability not legally incurred. The appeal will be allowed, and the case remitted to the Magistrate for decision on the merits as well as on the costs of this appeal.

[Appellant's Attorney, C. W. Herold; Respondent's Attorneys, Messrs. Dempers and Van Ryneveld.]

SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G.), the Hon. Mr. Justice BUCHANAN, and the Hon. Mr. Justice LAURENCE (Judge-President of the High Court of Griqualand West).]

REGINA V. MICHAU. { 1900.
Feb. 16th.

The Attorney-General (Mr. Solomon, Q.C.) mentioned the matter of J. J. Michau, on whose behalf an application for bail was made on February 15. It was then made a condition of the bail-bond that Michau should reside either in the district of Cradock or in the district of the Cape. He (the Attorney-General) now applied that the condition of the bail-bond should be that Michau should reside in the Cape.

The bail-bond was ordered to be given in terms of the application.

KOCH V. KOCH.

This was an action by Mrs. Janetta S. Koch against Hugo E. E. Koch, her husband, for restitution of conjugal rights, or in default a decree of divorce.

Mr. Howel Jones appeared for the plaintiff.

Evidence given by the plaintiff showed that the parties were married at Kenhardt on April 20, 1891, and lived happily at Upington until July, 1898, when defendant went on a visit to his relatives in Berlin, and had not since returned. There were two children of the marriage. Notice had been served personally on the defendant in Berlin.

The Court granted an order as prayed, the defendant to return to his wife on or before May 15 next, failing which, to show cause on 31st May why a decree of divorce should not be granted.

[Plaintiff's Attorneys, Messrs. Tredgold, McIntyre & Bisset.]

EASTERN AND S.A. TELEGRAPH { 1900.
COMPANY V. CAPE TOWN { Feb. 16th.
TRAMWAYS COMPANY. { " 19th.
" 24th.
" 3rd.
" 13th.

Electricity—Damage—Negligence—
Telegraph Company—Tramway
Company—Right of action—

Statutory powers—Construction of Act—"or otherwise"—*Damnum sine injuria*.

An Act incorporating the defendant company authorised it to work its lines of tramway by electric power, provided that the company "specially undertakes that in the event of any electric leak taking place, and any damage being thereby caused at any time by electrolysis or otherwise it will make good to the Town Council, or other body or person, all costs, damages and expenses; and provided that nothing in the Act contained shall entitle the company to use the rails as a part of its system of conductors for the return electric current without the consent of the Council." Such consent was obtained, but it was found that there was an escape of current from the rails into the earth over a considerable area with the result that the outside sheathing of the cable laid by the plaintiff company in the bed of the sea, picked up a portion of such current, and by "induction" caused disturbances to the plaintiffs' signalling apparatus upon the stopping of tram cars.

Held, that such an escape of current from the rails did not constitute a "leak" in terms of the Act, and that even if it did the disturbance to the signalling apparatus was not a damage "caused by electrolysis or otherwise."

A short section of the lines of tramway was not included in the lines authorised by the Act, but the road authority granted permission to the defendant company to lay tramways in such section. Held, that under these circumstances, there was no negligence on the part of the defendant company in using the rails on such

section for the return of the electric current, that the disturbance of the plaintiff company's signalling apparatus did not constitute an infringement of any clear legal right, and that the indirect and incidental damage, if any, caused by such disturbance was a "damnum sine injuria."

This was an action for £50,000 damages by reason of an alleged nuisance on the part of the defendants, and for a perpetual interdict.

The plaintiffs' declaration was as follows:

1. The plaintiffs are the Eastern and South African Telegraph Company, a joint stock company, incorporated under the English Companies Act. The said company carries on the business of transmitting telegraphic messages by electric cable, known as the Western Cable, between Cape Town and Europe and elsewhere, with the sanction of the Governor of the Cape of Good Hope.

2. The plaintiff company, acting lawfully in that behalf, has laid a submarine cable, which, after leaving Loanda, on the West African coast, and after passing through the waters of Table Bay, a territorial water of this colony, arrives at or near the Central Jetty, Cape Town, whence the communication is established by wires connected with an office in the Standard Bank Buildings, Cape Town, where the messages are received and recorded, and whence they are also despatched.

3. Telegraphic communication is maintained by the plaintiff company by means of signals transmissible by electric force operating through the said submarine cable. The operations of the said company are protected by the provisions of Act No. 20 of 1861, so far as regards the working of the submarine cable in this Colony and the territorial waters thereof.

4. The defendants are three joint stock companies, respectively incorporated under the provisions of Act 22 of 1895, Act 29 of 1896, and Act 24 of 1881, for the purposes of constructing, equipping, and working certain tramways mentioned in the said Acts.

5. The defendants have, under the provisions of the aforesaid Acts, severally constructed and equipped, and do now maintain and work divers lines of tramway mentioned in the said Acts in certain streets in Cape

Town, and in the main road passing through the municipalities of Green Point and Sea Point, Cape Town, Woodstock, Mowbray, Rondebosch, Claremont, and Wynberg. A plan is annexed hereto, and marked B, which the plaintiffs pray may be considered as herein inserted, showing the situation of each of the said tramways.

6. The Cape Town and Green Point Tramway is a joint stock company incorporated under Act 33 of 1861, for the purpose of constructing, maintaining, and working a line of tramway from Sea Point to Somerset road, Waterkant-street, Long-street, Orange-street, and Mill-street, Cape Town. The term of incorporation under the said Act expired on the 1st July, 1882, but by Act 19 of 1879 was extended to the 1st July, 1903.

7. The time of incorporation of the said Cape Town and Green Point Tramway Company was further extended for a period of 17 years from the 1st July, 1903, and extended powers and obligations were imposed on the said company by Act No. 23 of 1895.

8. The said Cape Town and Green Point Tramway Company have, under the provisions of the Acts referred to in paragraphs 6 and 7 preceding, constructed and equipped, and, until the date of the cession hereinafter referred to, maintained and worked the tramways mentioned in the said Act, and which are shown on the aforesaid plan heretofore annexed.

9. On or about the 8th day of June, 1897, the said Cape Town and Green Point Tramway Company, under the powers given under section 5 of Act 23 of 1895, and section 35 of Act 22 of 1895, ceded and made over to the first-named defendant, the Metropolitan Tramways Company, all the rights and powers conferred by the Acts referred to in paragraphs 6 and 7 preceding, together with all the liabilities incurred by it. Since the date of the said cession the first-named defendant has, and is now maintaining and working the said tramways under the provisions of the said Acts.

10. The first-named defendant has, in addition to the tramways hereinbefore mentioned, constructed and equipped, and does now maintain and work, under the provisions of Act 22 of 1895, a line of tramway shown on the aforesaid plan, and within the municipality of Cape Town, running from the Standard Bank corner to Woodstock Toll, parallel to the line of tramway constructed by the third-named Defendant under the provisions of Act 24 of 1881.

11. All the tramways referred to in the preceding sections and belonging to the several defendants are worked by them conjointly, under the style of the Cape Town Tramway Companies, Limited, under a working agreement, the terms of which are unknown to the plaintiffs.

12. The defendants severally employ electricity as the motive power for working the cars on the said Tramways, and have done so continuously since August, 1896. For the purpose of obtaining the necessary electrical power, the defendants have jointly erected a generating or power station, situate in the municipality of Woodstock. At the said station are four engines aggregating over 1,500 horse-power, driving dynamo machines, which furnish the necessary electrical power for running the tram-cars on the defendants' tram-lines.

13. The effect of the use of electricity by the defendants on their said tramways is seriously to interfere with the operations of the plaintiff company in respect to the receiving and recording of messages by means of their aforesaid submarine cable, in that the said cable is continually affected by variable electric currents passing through the earth and caused by electrical leaks from each of the defendants' rails. The said electrical earth currents produce disturbances on the said cable during the hours the tram-cars are running, which make it at times impossible, and at all times difficult, to decipher the messages received by the plaintiff company by their said cable.

14. By reason of the facts alleged in the next preceding paragraph the plaintiffs have sustained serious damage. They specially say that in consequence of the disturbances referred to in that paragraph they have sustained damage and loss of business, and have been compelled to lay special sea cables, eventually taken out as far as Robben Island, in order to endeavour to counteract as far as possible the effects of such disturbances, at considerable cost, as will be more particularly seen on reference to the account hereunto annexed, marked "A," amounting altogether to £50,000.

15. The aforesaid disturbances are an intolerable nuisance to the plaintiffs, and unless such nuisance is abated, the business of the plaintiff company will be seriously damaged in the future also.

16. Under the provisions of section 28 (f) of Act 22 of 1895, section 24 (f) of Act 23 of 1895, and section 25 (f) of Act 29 of 1896, it became, and still is the duty of the de-

fendants incorporated and working their tramways under these Acts respectively to carry on their operations in such manner as not to injure or interfere in any way with electric cables or wires.

17. In terms, furthermore, of section 4 (d) of Act 22 of 1895, of section 4 of Act 29 of 1896, and section 21 of Act 23 of 1895, the defendant companies thereby respectively incorporated have become and are liable to reimburse and make good to the plaintiffs all the costs, damages, and expenses to which they have been put by reason of the damage caused by the electric leak which has taken and is still taking place, as hereinbefore in paragraph 13 of the declaration set out.

18. The defendant company, the City Tramways Company, is employing electricity, a force which by escaping is liable to cause damage, as a motive power for working the cars on its tramway without authority to do so, and is liable to reimburse and make good to the plaintiffs all the costs, damages, and expenses to which the plaintiffs have been put by reason of the damage caused by the electric leak from its rails which has taken and is still taking place as hereinbefore mentioned in paragraph 13 of the declaration set forth. Wherefore the plaintiffs claim:

(a) The sum of £50,000, the amount referred to in paragraph 14;

(b) An interdict restraining each of the defendants from so maintaining or working any of its tramways as to inflict any loss or damage on or cause expense thereby to the plaintiffs, or to injure the electric cable belonging to the plaintiffs, or to interfere with the effective working thereof in the manner set forth above;

(c) General relief;

(d) Costs of suit.

The defendants pleaded as follows:

1. They admit the allegations contained in paragraphs 1, 2, 4, 5, 6, 7, 8, 9, 10, and 11.

2. They deny the allegations contained in paragraphs 15 and 17.

3. With reference to paragraph 3 they admit that telegraphic communication is maintained by the plaintiff company in the manner therein described, but they deny that the provisions of the Act 20 of 1861 confer upon the plaintiff any rights as against the defendants which are affected by the issues raised in this action.

4. They admit the allegations contained in paragraph 12, save that they say that the power station referred to therein is situated within the municipality of Cape Town.

5. They do not admit the allegations in paragraph 13, and they put the plaintiff company to the proof of the said allegations; they say specially that no damage is caused to any property or plant of the plaintiff company by electrolysis or otherwise through any electric leak due to the operations of the defendants.

6. They do not admit the allegations contained in paragraph 14, and put the plaintiffs to the proof thereof, and they specially deny that the plaintiffs have sustained any damages for which the defendants are liable in law.

7. They admit the allegations contained in paragraph 16, but they say that the sections therein mentioned refer only to the construction and reconstruction of the works authorised to be done by the defendants under the said Act; they say further that such works have been constructed in a suitable and proper manner, and with all due and reasonable care and skill, and the said works have been constructed, and the operations and working of all the said tramway lines by the defendants carried on in accordance with the duties and obligations imposed, and the rights and powers conferred upon the defendants by the said Acts 22 of 1895, 23 of 1896, 29 of 1896, and 24 of 1881, and that the defendants are protected by the provisions of the said Acts.

8. They admit that the City Tramway Company is employing electricity as a motive power for working its line, and they say that the said company is entitled to do so, but they deny the other allegations in the 18th paragraph.

Wherefore they pray that the plaintiffs' claim may be dismissed with costs.

The replication was general.

On these pleadings issue was joined.

The Attorney-General, Mr. MacGregor, and Mr. Benjamin appeared for the plaintiffs; Mr. Innes, Q.C., and Mr. Graham, Q.C., were for the defendants.

The Attorney-General, in opening the case, described the method in which the Telegraph Company carried on their business, the construction and position of their cables, and the powers conferred on the defendant company by their various Acts of Parliament. Really there were three companies—the Metropolitan Tramway Company, the Southern Suburbs of Cape Town Tramway Company, and the City Tramway Company—who traded together under the name of the Cape Town Tramways Company. The first named had powers to construct and work lines of

tramway from Darling-street to the toll the Southern Suburbs Company had power to work from Mowbray Hill to a point near Constantia-road, Wynberg; and the extended statutory powers of the old Cape Town and Sea Point Tramway Company had been taken over. The City Tramways Company had constructed the line from the toll to Mowbray Hill without any statutory powers. On 6th August, 1896, the Tramway Company started running their cars by electric force between the corner of Darling-street and Mowbray Hill, and at once the effect was felt by the Cable Company. It was found that the signals received at the station at the Standard Bank Buildings, were so distorted while the cars were running that it was always difficult and often impossible to decipher those signals. The Tramway Company kept extending their system, and between August, 1896, and January, 1897, the effect on the cable was such that no receiving work could be carried out except between 12.30 at night and six o'clock in the morning, the time when the cars were stopped. What receiving work was possible had to be taken on the eastern cable at Durban, and when, in December, 1896, that cable broke down, there was great delay and loss of business. Mr. Wilkinson, an electrical engineer of great experience, was sent out by the Cable Company in May, 1898, to investigate the causes of these disturbances and what was the best remedy. He made a great many tests, and embodied his views in a lengthy report. The correctness of his tests was not disputed, and the conclusion he came to was that quite 20 or 30 per cent. of the electric current generated to drive the cars, and which should return to the generating-station by means of the rails, escaped into the ground. It naturally travelled into the earth under the sea, and thus came in contact with the cable, and, by the process known as induction, affected the copper conductor along which the electric current travelled. That was the cause of the disturbance and the distortion of messages. The Cable Company, hoping to find a remedy, laid down in Table Bay a five-mile long "earth" cable, alongside the main cable, with the view of neutralising the disturbance, and that proved an advantage. Then a ten-mile "earth" cable was laid, with excellent results for a time, but as the Tramway Company's operations and system extended, so the "area of disturbance" widened, and things became as bad as before.

Therefore the company now sought the intervention of the Court, and asked for damages. They brought no charge of negligence or unreasonable use of statutory powers against the Tramway Company; but, by certain sections of their incorporating Acts they made themselves liable for damage caused to individuals or public bodies by leakage of electricity from their rails—the authorised medium of return-currents. As to the City Tramways Company, which had no statutory authority, the Cable Company relied on recovering damages from them at common law. The first item in the account of damages was £20,000, set down as due to loss of and inconvenience to business since August, 1896. It was exceedingly difficult to estimate what damage was sustained through loss of business, but it appeared that whenever the eastern cable was down, and all the receiving work had to be done on the western cable, and in consequence of the signals being distorted, there had to be a great deal of repetition; great delay, amounting sometimes to two or three days was caused, and the most lucrative portion of the company's business, the Stock Exchange traffic, largely ceased, because in the absence of news operators would not speculate. The Company were also advised that they ought to have a cable-station on Robben Island, and that would cost £1,500. Then there was the cost of a new twin-core cable, £8,500; maintenance (calculated at £500 a year, and capitalised at twenty years), £10,000; and other incidental expenses brought the whole claim up to £50,000. The substantial issue before the Court was really, what was the cause of the disturbance of the cables; whether the escaped current from the rails affected the cables, and whether that was an "electric leak" within the meaning of the Act, for which the Tramway Company would be liable?

Mr. Innes said there were other points. The defendants said the word "electrolysis" in the 4th section of the Act governed the construction of the words "or otherwise." Electrolysis was a physical injury or damage to a material substance, such as a water or gas pipe, and if the escaping current damaged that there might be ground of complaint. But he would contend that the mere interference with an electric current transmitting a signal along a wire was not such damage as was contemplated by the Act.

For the plaintiffs,

Henry D. Wilkinson, electrical and mechanical engineer, and member of the Institute of Electrical Engineers, said he had been practising in London since 1876. He had had a good deal of experience in submarine cable work, chiefly in the Java and China Seas, and was acquainted with the methods of working. In May, 1898, he came to Cape Town in behalf of the Cable Company, to investigate the causes of their cables being affected, and to supply proofs, and he conducted a long series of experiments with that object in view. [Witness described the structure of a submarine telegraph cable and the method of transmitting signals.] It was necessary to produce perfect conditions that every fraction of electricity must go back to the originating station. In his experience there had been no instance of a submarine cable being affected by a tramway company's operations prior to this one. His attention was first drawn to the matter by a paper and discussion at Westminster in May, 1897, when Mr. Trotter read a paper on the subject, and after that witness gave a great deal of attention to it. When he arrived here in May, 1898, the Tramway Company's system was in operation as far as Wynberg. The Cable Company were then working with a five-mile "return" cable, and were about laying down the ten-mile cable. He proceeded out into the Bay, disconnected the cable, and made a series of experiments with an instrument. The signals sent while the tram-cars were running, in the daytime, were so mutilated as to be almost illegible; those sent at night, after the cars had stopped, were perfect. He was convinced, after further experiments on the cables and on the rails also, that those disturbances were caused by earth currents coming from the tram rails, and reaching the copper conductor of the cable by induction. The outside steel sheathing of the cable of course lay on the sea-bottom, and was thus in contact with the escaping earth-currents. He had measured the amount of electricity sent out to a given length of rails, and fully 30 per cent. of that quantity escaped into the earth. That leakage could be stopped by a well-known method, and reduced to a very small percentage. Electric leaking was a term quite understood in electrical science, both from insulated and non-insulated systems. The ten-mile cable laid alongside the main cable to a large extent

neutralised the disturbance, but only for a time. The company had asked him to advise whether the duplex system could be worked. That was a system whereby messages could be despatched and received at the same time on the same wire, and it added about 60 per cent. to the working capacity of the cable. The principle of the duplex system was the same, whether applied to a single or a twin-core cable, and he advised that until the area of disturbance had been defined and the effect of the "return" cable seen, they should not lay the twin-core cable. In his opinion they could eliminate the disturbances by having the two cores together in one sheathing. In order to discover the value of the twin-core cable it was necessary to have one end free, landed on Robben Island. He had looked through the account of damages claimed, and he thought the item of £1,500 for a cable hut on Robben Island could be reduced to £600. The charge for maintenance he thought could be put at £150 a year.

Cross-examined by Mr. Innes: He was engaged in the first instance for three months, but he actually spent five months in Cape Town, making his experiments and preparing his report. His stay was afterwards extended to eleven months. Really he supposed he was sent out to get up the case against the Tramway Company. Mr. Trotter, in the paper mentioned, had recommended the twin-core cable as a perfect remedy for the disturbances, and witness knew that before he left England. Similar experiments to these had been tried at Coney Island, New York, but not with proper apparatus. When the Cable Company tried the duplex system previously they had made no allowance for the "earth" in the Bay. Mr. Trotter's assertion in his paper was that one twenty-millionth part of the power generated by the Tramway Company would affect the cable, and witness did not doubt his word. He knew that the area of disturbance affected the Bay. He agreed with the weight of scientific opinion that a twin-core shore-end was the only effective way of remedying these disturbances, but he had not recommended the laying of such a cable, as it would have meant disconnecting the main cable, diverting it to some other spot on the land, and a great interruption of traffic. His view was that the separate five or ten mile cable should be laid alongside the main cable, to neutralise the trouble. By his experiments between

the five and ten mile cables he found that the area of disturbance extended slightly beyond Robben Island. He held that the disturbances went out as far as the ten-mile cable for several reasons. Matters were not improved by taking the cable to Robben Island and earthing it there. He had recommended the taking of the eight-mile cable from the point where it was originally earthed in the sea to Robben Island for accessibility and convenience generally, but it would have had no result in counteracting the disturbances. The five-mile cable might possibly have been moved whilst being repaired, owing to the boat which was grappling the cable having drifted. The disturbances to the working of the cable were due, not to the strength of the earth currents, but to the variation; if the current were continuous no effect would be produced, but if the output from the power-station were increased and there were ten tramcars running in the place of two a very much bigger kick would be produced.

By Mr. Justice Laurence: He considered that ten miles was the minimum of safety to lay the cable, but if the tramway system were to be extended he could not say whether in that case it would still be sufficient.

Cross examination continued: The company at one time were thinking of taking the cable into St. Helena Bay. The distance from the sea of the cable hut had nothing to do with the disturbances, although to a certain extent it was better to be nearer the sea. He could not say whether in the case of the west coast cable the core was smaller than the eastern one, but if it was it would not be able to do so much work.

Re-examined by Mr. Solomon: There was no such expression as "electro-tight" in the same way as water-tight, for it was possible that there might be a little leakage even with the very best insulators. This was the first case of the kind in which he had known of the disturbances from an electric tramway system reaching the submarine portion of the cable. It depended very much upon the position of the generating station and also upon the nature of the soil. The disturbances increased as the tramway extended its system.

George Benham Stacey, superintendent of the Cable Company at Cape Town, stated that when he came here in 1897 there was a five-mile cable laid along-

side the main cable. At that time the disturbances were not very bad, although at times they were troublesome though not sufficient to stop work. The disturbances would on the average cause a repetition in every second message, which of course delayed the traffic very much, and consequently there was a considerable loss of business. In 1888 a ten-mile cable was laid, and after that the disturbances were very much reduced; in fact, almost eliminated, except for the big kicks. At present the ten mile cable was sufficient, but if the Tramway Company were going any further it would not be sufficient.

Cross-examined by Mr. Innes: The capacity of the east and west coast cables was about the same, but the east coast would take more work, as it was working shorter lengths. If the east coast cable was working it would do all the work, provided there were no specially bad disturbances. It was capable of doing all the work in ordinary times. It was only in regard to the messages received in Cape Town that the disturbances had any effect, except in the case of repetitions.

Henry Johnson Spetch, clerk in charge of the Cape Town Station, said that immediately on the opening of the tramway system disturbances were experienced at the office, and a difficulty in reading the messages occurred. The disturbances affected them so much that they could not do the receiving while the cars were running, and many repetitions were necessary. Sometimes, in fact, the same message had to be repeated several times over. Various experiments were tried in an endeavour to cure the disturbance. In regard to the loss of business, Government messages had preference, and were sent at half-rates, so that if the Government messages shut out the other traffic there was a loss. After the five-mile cable was laid it was possible to work, but the kicks became bigger and more frequent, and the reading of messages was greatly impeded, the extension of the tramway system increasing the number and frequency of the kicks.

Cross-examined by Mr. Innes: There were, of course, delays on the land lines from Durban at times, and it would not be fair to charge the Tramway Company with such delays. Occasionally also there were disturbances caused by lightning.

George Mitchell stated that he was acting clerk in charge after Mr. Spetch left and before Mr. Stacey arrived. Up to the

time that Mr. Stacey arrived the five-mile cable was working all right. Witness corroborated the evidence given by the previous witness, and said that after the five-mile cable was laid the kicks gradually got worse, and made it very difficult to receive messages.

For the defendants.

Frank Jacob, said he was a Fellow of the Physical Society, and had been for twenty-one years chief electrician to Siemens Bros., the great makers of submarine cables and electrical apparatus. Witness had been personally connected with the laying of 22,000 miles of cable, in all parts of the world. It was the invariable rule, in order to obviate disturbances from the land, to make the shore-ends of cables twin-cored. He considered that a twin-core two miles long in Table Bay would entirely do away with any disturbances arising from stray currents escaping from the tramway rails through the earth. The twin-core principle had been in use since 1886, as applied to shore-ends. In his opinion if the twin-core were carried out two miles in Table Bay it would do away with all risk of disturbance even if the Tramway Company extended their system. He was rather against having a shore-end on Robben Island, as he objected to the multiplication of shore-ends, as centres of disturbance. The cost of laying a two-mile cable would be about £2,000 to lay here. He knew the expression "electric leak" had frequently been used, but there was no such thing as a leak when it could not be prevented. A leak was something which could be stopped. There was not the slightest reason why the duplex system could not be worked on these cables; the disturbance that affected the simplex instrument would not affect the duplex any more markedly. He should have expected to find disturbances on the cable as soon as the trams commenced running, and if he had seen a proper plan that would have been clear from the beginning.

Cross-examined: Witness said he was not sure that the sub-marine portion of the cable at Coney Island had been disturbed by the tramway currents. The real reason why they ran twin-core at the shore-end was not to get over the first splice. There was no splice so close in. He had heard that at Madras the submarine cable was not in any way affected by the tramway currents. His estimate of the two miles of twin-core cable depended on the strength of the escaping current. If the company were

running cars on only one section of the system the effect on the cable might be smaller. His definition of an electric leak would be the contact of a telephone or telegraph wire with the trolley wire, thus permitting the current to escape by conduction. There would be no escape if the rails and the whole system were insulated, but that would constitute a danger to the public, as by contact with the rails they would complete the earth circuit and receive the full power of the trolley wire.

Harry Gibson, secretary of the S.A. Association, and an incorporated accountant produced a chart which he had prepared, showing the periods of interruption of the two cables during the past five years, and the fluctuations of the company's income. The chief item of damage charged against the defendants was for the interruption of work from July 27 to September 21, 1897, £11,400; in that period the Western cable was interrupted and down for fifteen days, but no allowance was made for that. During last year the cable was interrupted from May 25 to June 9, but the traffic was actually greater during that period than it was in the preceding month.

Mr. Innes said the object of this chart was to show there was no necessary relation between corresponding months of different years.

In three cases allowances were not made. Witness had checked every figure himself. He had also been handed a number of cable messages sent to the Tramway Company here from London during 1897 and 1898, and the average delay shown was four hours nineteen minutes when there was no interruption of the cable, and thirty-three hours when there was an interruption. He had also been supplied with a return of cables received by the Bank of Africa, and there was an actual delay shown when there was no interruption of seven hours and a half; that was during the years 1895 and 1896.

Cross-examined: He presumed that if there was a delay to the cable it must mean loss of business. The majority of the cables to which he had referred had been received p.m.

Samuel Edmonds Smith, secretary of the Tramway Company, said that he originally selected the cables from which the table had been drawn up. The New York and Philadelphia cables had been excluded, and there had been no selection in the matter at all. He had prepared a plan of the tramway line, which he put in. He

presumed the plans were submitted to the City Engineer, for there was a blue print of a plan which was found at the tramway offices, which was signed by the then City Engineer, but the formal sanction of the Town Council in writing was not received until May, 1898.

(Cross-examined: The distance from the Toll-bar to Mowbray Cemetery was approximately a mile and three-quarters, and from the Toll-bar to the Standard Bank a mile and a quarter. At the time that the City Tramway Company asked for permission to run a tramway from the Toll to Mowbray the power in use was horse power.

Charles Edward Shipton, clerk in the Bank of Africa, said that the cables received by the bank, of which a selection had been handed to Mr. Gibson, were selected quite at random from the cables received by the bank in Cape Town.

This completed the evidence in the case.

Posta (February 24).

The Attorney-General: It is common cause in this action that the plaintiff company have sustained damage through the use by the defendants of electricity as a motive power to work their tramway system. It is also common cause that that damage has been caused by an escape of electricity from the uninsulated tram-rails that are used to take back the return current, passing through the earth, then coming in contact with the sheathing of the cable, running along the sheathing, and, by induction, getting in contact with the conductor of the cable. The most important question for the Court to determine is whether the damage we complain of is covered by the special undertaking which is given by the defendant company in the Metropolitan Tramways Act of 1895, and the Southern Suburbs Tramways Act of 1896, to the 4th sections of which Acts I have already referred. The section in each Act reads as follows: "And the company specially undertakes that in the event of any leak taking place and any damage being thereby caused at any time by electrolysis or otherwise, it will reimburse and make good to the Council or other body or person, all costs to which the Council or other body or person may be put by reason thereof, and provided further, that nothing in this Act contained shall entitle the company to the use of the rails on any of the said lines of tramway as a part of its system and as conductors for the return of electric cur-

rent without the consent of the Council first had and obtained." We can regard the different companies in this case as one company working different sections of the tramways under different Acts. There is the section from Sea Point to Cape Town, working under the Cape Town and Green Point Tramway Act, No. 23 of 1896; then there is the section which is included within the Municipality of Cape Town, as far as the Toll Bar on the Sir Lowry-road, which works under the Act 22 of 1895; and then there is the section, which is very important in this case, extending between the Toll Bar and Mowbray Hill, which is constructed and worked under no statutory authority whatever. The last section is that between Mowbray Hill and Constantia, worked under Act 39 of 1896. Now, before I come to the construction of those sections, I think it will be important, perhaps, to discuss very briefly indeed what is the liability of the company under the common law. I think it is important, my Lord, to discuss what the common law is on this question, not only because one of the sections of their lines must be made liable under common law since it is worked without any statutory authority at all, but also because I do think that the common law is some indication as to what construction should be placed upon the sections of the Acts of Parliament to which I have referred.

The Chief Justice: As you refer to that portion of the line which is on your statement worked without statutory powers, I should like to say that there is no evidence that if worked by itself and leakage had ensued, any damage would have been caused.

The Attorney-General: Oh, yes, my Lord. Mr. Jacobs gave evidence on that very point, and I shall presently refer your lordship to it. The principle which was laid down in the leading case of *Rylands v. Fletcher* would apply to a case of this kind. That case is reported in *Law Reports*, 3, *House of Lords*, page 330, and at page 339 the House of Lords takes over the judgment of Mr. Justice Blackburn in the Court below, and approves the principle he laid down. (Judgment quoted.)

The Chief Justice: And you add "electric leak"?

The Attorney-General: Yes, and I am going to show authority for it. I do not see anything in the principle in that case of *Rylands v. Fletcher* which is in any way whatever antagonistic to the principles of the Roman-Dutch law. I cannot find any

case decided in the Supreme Court of this colony in which that decision has been made the basis of the judgment of the Supreme Court, but it has been quoted often in argument at the Bar without any intimation from the Bench that it did not apply in this colony.

The Chief Justice: I think in some of the appeals the Court has taken the principle.

The Attorney-General: And it is a sound one. We say we are lawfully where we are; we have laid our cable at the bottom of the sea, under the powers given us by the Governor, whose consent is required under the Telegraph Act, 1861. We say they have brought electricity on to their property—a most dangerous force—and that if that force escapes, even although there be no negligence on the part of the company, and, escaping, does damage to us, they are liable for it on the principle stated in the decided case of *Rylands v. Fletcher*. To that judgment your lordship said I wished to add electric fluid as one of the escaping things that might do harm. Now, fortunately for me, those words have been added to the judgment in that case, and very recently in a case tried by Mr. Justice Kekewich. I shall have to refer more than once to this case, because it is very much to the point here. It is the case of the *National Telephone Company v. Baker*, reported in 2 Chancery, 1893, at page 186, and on several points it is analogous to the present one. In this case the National Telephone Company of Leeds sued Baker, as representing the Tramways Company of that town, for damage done to the telephones by the escape of electricity from the rails, exactly in the same way that the electric currents escaped in this instance. Those tramways were constructed under statutory authority. There, the Tramway Company also used the rails for the return current, and the National Telephone Company used the earth for their return, instead of bringing the current back by a metallic conductor. Their telephones were injuriously affected by the currents which escaped from the tram-rails, and they brought an action for damages against the Tramway Company. Several points were raised in argument, to which I need not now refer the Court, but on this question of the common law I would refer to the judgment of Mr. Justice Kekewich at page 198. He says: (Judgment read). He there refers, as your lordships will see, to the Scotch Law, to which I will refer presently, and hope to show that it goes far enough for my purpose. The judge

there laid down a principle, which seems at all events to be accepted as sound, if I may say so, because there has been no appeal from it at all. In consequence of that decision, a Joint Committee of the Houses of Lords and Commons was appointed to inquire into the question as to the advisability of allowing Tramway Companies to use uninsulated rails for their return currents. I say the judgment of Mr. Justice Kekewich seems to have been accepted as a sound judgment, and according to that, it is perfectly clear that a case of this kind is brought within the doctrine laid down in *Rylands v. Fletcher*. So, it is clear that if any person brings on to his property electric power which is known to be mischievous, and if that electric power escapes, even though there may have been no negligence on his part, if it does damage to any other person, that person has an action against him.

The Chief Justice: Was that not held to be merely a nuisance?

The Attorney-General: I suppose there were several defences set up by the company, but the main defence was that they were acting under statutory authority.

The Chief Justice: Was not Justice Kekewich's view held to be mere *obiter dicta*?

The Attorney-General: It may not have been necessary for the decision of the case, for he held that under the statute under which they were working they had these powers.

The Chief Justice: So that, although it was an interesting discussion, it was not necessarily an accepted decision in the case?

The Attorney-General: The argument is very strong; much stronger, I am afraid, than I can put before the Court. It is only argument on the point, judicial argument.

The Chief Justice: Of course, it is an argument in favour of your view, but still it is not a judicial decision.

The Attorney-General: Oh, I do not say it is.

The Chief Justice: You say there has been no appeal, and that that decision has been accepted, but it has not been laid down as law; it is merely an *obiter dictum*.

Mr. Justice Laurence: And what was held was that the Tramway Company were protected from liability.

The Attorney-General: Under the statute, yes. I cannot say whether it has gone before any superior Court at all, or called forth any comment from a superior Court, but I have not been able to find any. But I do

say that Justice Kekewich's argument seems to me to be a very strong one, and he could make no distinction between electric power and any other escaping force.

Mr. Justice Buchanan: You adopt his argument to-day?

The Attorney-General: To the fullest extent, where he says that there is liability for the escape of anything which is known to be dangerous and mischievous if it escapes, after he has brought it on to his land for his own purposes. Your Lordships will note that Mr. Justice Kekewich says in the course of his judgment that “I believe that in Scotland the principle laid down in *Rylands v. Fletcher* has not been accepted, and is not regarded as consistent with justice between man and man.” I have here a Scotch authority which shows that if at all events it has not been accepted to its fullest extent, as in England, it is accepted quite far enough for my purpose. I will refer your Lordships to *Gleig on Reparations*, at page 275, in the chapter on Unnatural Uses. (Read.) I cannot there see much difference in the Scotch law and the principle laid down in *Rylands v. Fletcher*, except that the Scotch Judges will insist on calling it *culpa*. They say that if you bring a dangerous thing on to your property you are liable if it escapes, even if you do not show negligence in the escape itself, because it is negligence on your part in bringing a dangerous thing on your property. I do not care very much what their reasons are; they come to the same conclusion as the English judges in the case of *Rylands v. Fletcher*, and I take it that their principle is also this: If a man brings on to his property a dangerous thing which, if it escape, is likely to do mischief, and if the thing does escape and do mischief, even although there is no negligence on the part of that person, he is liable for the damage it does. Therefore, on this principle of common law, the defendants under the common law would be liable to us for the damage which has been done in the manner which has been described to the Court, and which is common cause. And I say, also, that it would be important to know what the liability would be under common law, because as to a section of their line, that from the Toll to Mowbray Hill, they are working it under the common law, and without any statutory powers whatever, and as to that portion they cannot come to us and say: “We have statutory power to do this, and you must show negligence on our part in carrying out our statutory powers.” They have no statutory authority for working that

piece of their lines; it is an unauthorised line, for the proper working of which they are liable at common law, and they cannot be protected by their statutes. It has been asked, supposing they were working this portion alone of their line, should we have been damaged. On that point I will refer the Court to the evidence of Mr. Jacob. The Court will see that Mr. Jacob is of opinion that supposing that was the only part of their system that was being worked, I mean that between the Toll and Mowbray Hill, and that they were running tram cars on that line alone, that would have been sufficient to have caused some disturbance to our cable, and that at all events we should have required a twin-core cable a mile out to sea. I come now to what is the most important part of the case, that is the construction of these statutes. With regard to the 4th section of the Metropolitan Tramways Act, and the 4th section of the Southern Suburbs Tramways Act, the construction we place on those sections is really declaring the common law to be what it is. We say that under those sections large powers are given by the Legislature to these companies. It was known, I suppose, that a certain amount of current is likely to escape, and all the Legislature says is: "We do not know what damage you may do; we do not know how much current may escape, but you must give an undertaking in consideration of the large powers we give you that you will be liable for any damage caused by the electric current escaping from the rails." That is the construction we place on these sections, and that construction merely places upon these companies exactly the same liability for damage as would be placed upon them under common law. After all they are private Acts; they are merely in the nature of contracts between the promoters and the public, and the only compensation the public could get under these Acts from the promoters is, as we construe the Act, that in the event of any damage being done by an escape of electricity from their system the companies will be responsible for that damage. My learned friend says they are going to put a very limited construction on two or three words of these sections. Those are the words "electrolysis or otherwise," and they are also going to put a limited construction on the word "leak." If the construction my learned friend is going to place on the section is correct, all I can say is that I fail to see what was the use of getting the special undertaking from the Tramway Company, because he would ask them then to be liable

only for the damage which takes place in a certain way, that is damage caused by a process called electrolysis. It is common cause that electrolysis is *sui generis*, and if you give the words "or otherwise" the narrowest construction, we might as well strike out those words altogether, because there is nothing else to cause damage.

The Chief Justice: Fusion is a possibility.

The Attorney-General: But no one contemplates that for one moment.

Mr. Justice Laurence: with such a subject as electricity something might occur which you could not call electrolysis, and yet which might be analogous.

The Attorney-General: I think it is far more reasonable that the words "or otherwise" were put in to give them the most general application, because the Legislature did not know what particular damage was going to be done.

The Chief Justice: Then why insert electrolysis; why not say any damage which shall be done?

The Attorney-General: We have several Acts of Parliament where the Court has given the widest possible application to general words following specific words, and where the same argument was used. However, I say that if my learned friend's construction is correct then the Legislature intended that this company should only be liable for the damage caused by electrolysis, and the only persons who would benefit by it, the Town Councils and the Water Companies at all would be, as far as I can make companies, because they would be the owners of the only kind of thing that could be injured by electrolysis, that is gas and water pipes. But the unfortunate owners of telephone or telegraph wires who would be injured in a different way to electrolysis would have no remedy whatever under this section, because their damage could not be classed as electrolysis. I say if it is possible for the Court to put a wider construction on that section the Court will put the wider construction on it so as to make the companies liable for damage not confined to electrolysis.

Mr. Justice Buchanan: You say the construction ought to be a liberal one.

The Attorney-General: I say this is the only section of the Act which gives any compensation whatever to any persons who are likely to be injured by this dangerous power which is brought upon the tramways, and that therefore the Court ought to put a liberal construction on any section of the Act whereby compensation is intended to be given. Now let me come to deal more

closely with the details. I take it that where you have general words following specific words, it is not for the Court to put a limited construction on those general words. The Court must give those general words their most general meaning, unless there is something in the clause or the statute which shows that it was intended that those words should have a limited meaning. That is the tendency of the Courts now, and I will refer the Court to several cases where that principle has been discussed. There is the case of *Anderson v. Anderson*, which the Court will find in Law Reports, 1 Queen's Bench, 1895, page 749. (Judgment of Lord Esher read.) There is the general principle of the construction of general words following several specific words laid down by the Court in that case. Take the words "electrolysis or otherwise"; what is there in that section which plainly shows that the general words "or otherwise" are to be read in a restricted sense? I would say rather that the Legislature intended to make the words as general as possible and to give damage to all persons who might be injured in any way whatever through an escape of the electric fluid from the Tramway Company's rails. Your lordships will see that by looking at the class of persons who are protected. The Legislature did not only protect the Town Councils who possess property which might be injured by electrolysis but the words are made as wide as possible. "The Company specially undertakes that in the event of any electrical leak taking place and any damage being thereby caused at any time by electrolysis or otherwise, it will reimburse and make good to the road authority or any other public body, company, or person." That makes the class of person who is protected as wide as possible and I say there is absolutely no reason whatever on the face of the section to believe that there was any intention of any kind on the part of the Legislature to restrict the meaning of general words "or otherwise." There is a plain indication, as far as I can see, in the section that the words ought to be interpreted according to the ordinary canon of construction, that is to give them the most general interpretation, because there is nothing in the section to show that they ought to have a more limited meaning. As a matter of fact the preamble of the Act says that this is a contract entered into between the promoters and the Town Council, and I dare say the Town Council put in that word "electrolysis" because that would be the only mode in which

their gas pipes and water mains could be injured. But when we know that there are other persons here who can be injured by a different mode than by electrolysis, I think it is clear to the Court that in this section the words "or otherwise" should have the widest meaning.

The Chief Justice: It is argued that if that was the intention why did not the Legislature say any damage caused at any time to any person without saying "by electrolysis or otherwise." I suppose your argument is that it means that.

The Attorney-General: Yes, I contend we must take the ordinary meaning of the words "or otherwise" which is in any other way whatsoever.

The Chief Justice: Then why mention electrolysis?

The Attorney-General: Oh, the same argument might always be used; why use any special words at all when there are general words following if the general words are to receive the widest construction possible.

Mr. Justice Laurence: Does it not mean the widest construction possible without losing sight of the bearing of the special word, which is the key so to speak of the whole clause.

The Attorney-General: It may mean that.

The Chief Justice: The impression on the ordinary reader would be that this damage must consist of something physical, something having a physical effect, and not a disturbance at a distance caused by a current which does not damage the wire proper. There is no physical injury by these currents.

The Attorney-General: That I admit. I admit the injury done to us is not a physical injury at all.

The Chief Justice: It is a very remote effect, this influence on the signalling.

The Attorney-General: Your lordships will see that at the time the Act was passed it was pretty well known that there would be an escape of electricity, but I do not know that the Legislature knew very much about that. There had been the Joint Committee of the Lords and Commons sitting on the matter, and it was generally known, in the scientific world at all events, that damage was done to telephones and telegraphs and other things by the escape of electricity from the tram rails.

Mr. Justice Buchanan: I think you mentioned casually during the hearing of the case that protection was given to the Electric Lighting Company under this Act.

The Attorney-General: Only during the construction of the tramways. The Electric

Lighting Company was specially protected under the Southern Suburbs Act, but that was only in regard to injury done to their pipes and so on during the construction.

Mr. Innes: The words are "the operation of this Act."

The Attorney-General: I will refer the Court to another case on these general words, which is *Bairdson v. Baillie*, in Law Reports, 11 Queen's Bench (1895) page 301, where the same words are used as here; these words "or otherwise." That was a case in which they appeared in connection with a bill of lading. The contention there was upheld that the shipowner was exempted from the wrongful acts of persons specifically mentioned. "The act of the servants of the shipowner in navigating the ship or otherwise."

Mr. Justice Laurence: What servants are mentioned specially?

The Attorney-General: The master, the pilot, or other servants of the shipowner.

The Chief Justice: But it must be some act akin to navigation.

The Attorney-General: No, it was held not. The argument was that the words "or otherwise" included some negligence in some act akin to navigation, and the Court said they could not put the construction on the words.

Mr. Justice Laurence: Was not the point whether some of the servants of the company mentioned were not servants who had nothing to do with navigation, and that therefore the words "or otherwise" were put in so as to include some of those servants?

The Attorney-General: No, my lord. (Counsel read portion of the judgment of Lord Esher.) Now there is only one more case I wish to refer the Court to, and that is the case of the *Richmond Hill Steamship Company v. The Corporation of Trinity House*, where the question was whether cattle carried on the ship would come under the words "or other goods." The contention there was that "other goods" must include goods of a wooden nature as the ship was mainly carrying timber, but the Court held that the words "or other goods" were general in their application and included cattle. (Counsel read judgment of Lord Russell of Killowen.) Now apply the reasoning there to this case. It may be that the Legislature did not contemplate any such damage as we complain of. It may be that they only contemplated electrolysis and did not bother them-

selves much about any other kind of damage, but the question is, as the Lord Chief Justice of England put it, are the words used in the section wide enough to cover the acts which were not contemplated at the time the statute was framed. I contend that it does not matter whether they contemplated this particular kind of damage or not. Are the words wide enough to include the damage we complain of, and I say it has been laid down very clearly in these cases that the Court must put the most general construction on the words "or otherwise" unless there is something in the section itself, using the language of one of the judges, "some plain indication in the section itself," showing that a more limited construction should be put on those words. As my learned friend points out to me the *Richmond Hill Steamship* case was confirmed on appeal; therefore I say that these cases taken in conjunction with what must have been the intention of the Legislature show that the words "or otherwise" should receive a general construction, and in that case they will include any damage caused in any way whatever through the escape of electricity from the tramway rails. Now I come to another point, and that is the meaning of the word "electric leak." The question is, does the escape of this electric current in the way in which it has been described to the Court in evidence come within the meaning of "electric leak." That, my lord, is rather a question for electrical engineers, but I will again point out that my learned friend must admit that the mischief which the Legislature at all events aimed at was electrolysis; they sought to make the company liable for damage caused by electrolysis, and it is common cause in the case (at least, Mr. Jacob says so) that the thing in the Tramway Company's system that is likely to cause electrolysis is an escape of electricity from the rails. It is perfectly true we may have an escape of electricity from an overhead wire, but that is not likely to cause electrolysis, to the same extent, at all events, as an escape of electricity from the tram rails. The escape of electricity from overhead wires rarely occurs, and if it happens, you do not get electrolysis. There was no necessity for the Legislature to provide against a leak from an overhead wire.

Mr. Justice Laurence: When you speak of Mr. Jacob's evidence and an escape of electricity from the rails, did he not say such an escape would be likely to produce electrolysis of the rails themselves?

The Attorney-General: Not according to the evidence. Electrolysis is caused by the current getting away from the rails into the earth and setting up some chemical action.

Mr. Justice Buchanan: The section would not protect the company against that?

The Attorney-General: No, my lord.

Mr. Justice Laurence: That is, of course, the argument.

The Attorney-General: I was pointing out that it will, I think, be admitted at any rate that the Legislature intended to protect people against electrolysis, and it is clear from the evidence that electrolysis is principally produced by an escape of electric currents from the rails. The only other part of the system from which you can have an escape of electricity, or a leak, is from the overhead wires, and that is so unlikely to occur—in fact it can only occur if there is gross neglect on the part of the company—that one can hardly understand why the Legislature, in consideration of the large powers they were conferring on those companies, should require from them a special undertaking against a case of that kind. It would be far more likely that the Legislature would protect people against the escape of electric currents from the rails than from an overhead wire. Then there is another point showing clearly that these precautions were aimed at an escape from the rails, and that is contained in the proviso, which, it is curious, should follow immediately after the undertaking. Why should it come so closely after the undertaking? It seems to me that what the Legislature said was this: "You are to be responsible for any escape of electricity from your system which does damage; but, because we make you liable for loss or damage, you are not to take it from that that you can use these rails for your return current unless you can get the consent of the Council; or, in other words, you may use the rails for the return current if you get the consent of the Town Council, but in every event, in all circumstances, you are liable for any damage caused by the escape of electricity from your system." That, I think, is the fair construction of that section and proviso. But the ordinary man, speaking of this escape of electricity from the rails, would call it a leak. That is, the ordinary person who does not know much about electricity. He would say, at all events, "Here is a metal conductor which is intended to convey the return current back to the generating station. It is intended to convey as

much as possible of the return current, and whatever portion of that current gets away from this conductor, which is intended to convey it back, will be spoken of as a leak!" Mr. Jacob was very fair; he said he would not be surprised at an ordinary individual speaking of an escape of electricity from the rails as a leak, but he would be surprised to hear electrical engineers speaking of it in such a way. On this, because it is an important part of the case, I will refer the Court to some of the evidence on commission. I am not going to read a great deal of it, because I quite agree with the Chief Justice that much of the evidence taken on commission is utterly irrelevant to the issue before the Court. But I do think the evidence as to whether this is a leak or not is very relevant. I refer now to the evidence of Major Cardew. Here is a gentleman who has had large experience in these matters, who advises the Board of Trade and drafts the Board of Trade regulations with regard to tramways worked by electricity, and he speaks of this escape as a leak. After that we have the discussion before the Joint Committee of Lords and Commons, which was very important. I have got that report here, which I may read from as a scientific work.

Mr. Innes: I do not mind my learned friend referring to the report in general terms, but there are a number of eminent persons who could be quoted on both sides. That report, too, has not been put in as evidence.

The Attorney-General: I am not going to read the report. Major Cardew, however, in his evidence on commission, refers to the discussion before the Joint Committee—a committee appointed to consider and report whether the granting of statutory powers to use electricity ought to be qualified by any prohibition as to earth return currents or any provisions as to leakage, induction, or similar matters, and, if so, in what cases and under what conditions. At that committee Major Cardew was one of the witnesses, and along with him were many eminent scientific men, such as Lord Kelvin, the late Dr. Hopkinson, Mr. Preece, Mr. Compton, and so forth. And, as Major Cardew says, their evidence completely bears out his statement. In this discussion that took place before the Joint Committee of the House of Lords and Commons the question was considered whether tramways should be allowed to use their rails for con-

veying the return current and the escape of electricity therefrom was commonly referred to as leakage.

Mr. Justice Laurence: Mr. Jacob says that scientific men have to popularise their language very much to suit the intelligence of their audience. These were mere committees.

The Attorney-General: What Mr. Jacob said was that he was not surprised at an American using this language, but it was an American who came here and got this concession. He suggested that the American may have used loose language, but thought that more correct language would have been used in a formal legal document. But Major Cardew is perfectly clear that these currents escaping from the rails would mean leakage, and that even leading electrical engineers had spoken of them as leakage currents. Then your lordships have heard Mr. Wilkinson's evidence. Mr. Wilkinson is also of large experience in these matters, and he has spent a considerable time in America in the study of electric tramways. He also says that as an electrical engineer he would have no hesitation in speaking of these currents as leakages. Then papers have been put in through the commission in London. We have the paper of Mr. Trotter, and that paper is at all events most important in this case. Your lordships will see that that paper was read, not before what Mr. Jacob would call a popular assembly, but before a scientific assembly, before the Institution of Electrical Engineers. One would have supposed that Mr. Trotter, who had been for years the Government Electrician to the Cape, would be most exact in his language. What do I find him saying? That on the 6th of August, 1896, he suggested to the Postmaster-General certain things which are set forth in that paper. In that report to the Postmaster-General, he uses this very term leakage in connection with his matter. It was not necessary for him, as an expert, to strain language at all so as to bring it within the comprehension of those whom he was addressing, or to bring it within this section. He was reporting to the Government on what had occurred here, and, as an electrical engineer, he uses language that he knows is familiar to electrical engineers. He there uses the term leakage in reference to these currents. Then there was a discussion on Mr. Trotter's paper by scientific men, eminent men; there was not a single scientific man who joined in that discussion who found fault with the language used

by Mr. Trotter, and not one pointed out that this was not leakage, or found some other name for the escape of current. In fact, some scientific men concurred with him in calling it leakage. You have on the other side witnesses who gave evidence in the case, and who wished the Court to come to the conclusion that an escape of electricity through the rails cannot possibly be called a leakage within the meaning of the section. There is the evidence of Professor Ayrton—and I believe my learned friend will admit that Professor Ayrton is very shaky on the point, as the Court will find on reading Question 189 and those which follow.

It is perfectly clear that Professor Ayrton had evidently read this section of the Act and he would not admit that it was a leakage. At all events Mr. Trotter is a scientific man and he uses the word leakage, and of all the persons who joined in the discussion not a single one objected to his language. I cannot quite understand Mr. Jacob. Take the ordinary case of water, an artificial watercourse with a bottom which is not water-tight. That artificial watercourse is intended to carry all the water, but some of it escapes through the bottom and you call that a leakage in ordinary language surely. It is not intended that electricity should escape, but, because the conductor is not insulated, some of the electricity gets away and I can quite understand Mr. Jacob saying that ordinary people speak of that as leakage, and he goes on to say that in America, which is the birthplace of electric trams, the Americans speak of that as a leakage. I do not know that I can carry that point of the case much further. I say that the words electric leak will include the escape of electric current from the rails in the manner which has been described, and if that is so it is perfectly true that the liability imposed on these people by statute is exactly the same as the liability in common law and that they are liable to us for damages.

Now I come to the question of damagee. One would have almost thought that these two companies might have agreed upon the measure of damage, but when I find that the difference is so wide, that we ask for ten miles of twin-core cable and they say that two is sufficient, I can quite understand that there is no agreement between them. The defendants contend that we ought to have sustained no damage at all because we ought to have had the shore end of our cable twin-core. If that is so, when this system was invented in 1886 we ought

to have changed our system here and put a twin-core cable on our shore end. At all events they say this, that as soon as the Tramway Company started operations we ought to have provided a twin-core end, and that if we had done so we should have sustained no damage. I wish to point out that the system which we use, the single core cable, is a system which is used generally. The only people who do not use that system are people who have cables laid by Messrs. Siemens and Co. So that at all events we cannot be said to be negligent because we have a system of cable here, a single cable for our shore end, when we find that a great many other companies in the world are using the same system, and the only companies not using the system are people who have their cables laid by Siemens and Co. It is not clear for what object Siemens and Co. provide a twin-core cable; Mr. Jacob says it is to obviate disturbance, but he could not quote a single case in which their cables had been disturbed by currents escaping from an electric tram. He could only refer to the case of Coney Island, and as far as Coney Island is concerned it is clear that one other company whose cable is alongside to that of the company for which Messrs. Siemens provided a twin-core cable had no twin-core.

The Chief Justice: It is admitted now that the twin-core cable is the perfect cure; that was known, and was it not your duty to have put it on for a distance of two miles?

The Attorney-General: Do you mean, my lord, as soon as they started operations?

The Chief Justice: Yes, as soon as your instruments were interfered with; the damages you sustained for the time that it would take to lay a twin-core cable and the expense of the cable.

The Attorney-General: Very much so, my lord, but as soon as the Tramway Company started operations, Mr. Jacob says we ought to have known at once what length of twin-core cable was required. We were obliged to perform certain experiments and to find out exactly what the area of disturbance was before we could provide a twin-core cable. But on this point I should again like to refer the Court to the case of the *National Telephone Co. v. Baker* (L.R., Ch. Div., 1893, Vol. 2). It would seem to me, according to the view taken by Mr. Justice Kekewich, we should have said that we were not going to change our system.

The Chief Justice: But on the other hand would they be justified in saying that, seeing that the Electric Tramway Company had no power to come on their property and add a twin-core cable.

The Attorney-General: I do not wish to take up that position; I am only taking up the position that they cannot say that we have no claim for damages, because when they started operations we did not provide a twin-core cable.

The Chief Justice: Then are you entitled to all your expenses for your experiments seeing that there was a well-known means of preventing it; what right had you to go and make all these experiments?

The Attorney-General: I say first of all we went in for all these land experiments in order to find out whether the disturbance was limited to the shore or whether it extended to the sea, whether it could be cured by land appliances, or whether it was necessary to have an earth cable out. We thought at first we might cure the disturbances by purely land appliances.

Mr. Justice Laurence: You say the disturbances began immediately. If I am not mistaken the date of Mr. Trotter's paper was May, 1897, and in that paper he mentions that as the only certain remedy.

The Attorney-General: Yes, and the reason why we put down a five mile cable at first was that we did not want to go to the expense of a twin-core cable at first, because we might have found that we should have had to go further. I think it is common cause that we must have a twin-core cable, and the question is, what is the length of twin-core cable to which we are entitled? And we say that we are entitled to a twin-core cable to the length of ten miles. We have come to that conclusion, my lord, after experience. They say that by means of a wonderful mathematical formula of Mr. Jacob's, we are only entitled to a two-mile length. We have come to the conclusion in regard to a ten-mile cable on facts, and we are satisfied that the disturbances necessitate our having a ten-mile cable. In January, 1897, a five-mile cable, was laid out to sea, and your lordships will remember that after putting down that five-mile cable the disturbances were almost eliminated. We only felt what we call the big kicks, and it worked fairly satisfactorily with the five-mile cable for some time. It is clear from the evidence in this case, that as the tramway system extended, and as the traffic increased, we felt the disturbances more, even with the five-mile cable. Now if Mr. Jacob

is right in his theory, never mind how far the system extended after January, 1897, we were perfectly secure with this five-mile cable, or at all events we were as secure after the increase as we were before. It appears from Mr. Wilkinson's report, to show that the area of disturbance is affected by the quantity of traffic, that on a particular day, which was a holiday, when more trams were running, the disturbances were more felt than on ordinary days, and yet they say a two mile twin-core cable would be sufficient. If so why was it that in January, 1897, we found that the five-mile cable was not sufficient to eliminate the disturbances? Now Mr. Jacob gets over that by saying that the five-mile cable was shifted, but before the date when it was repaired in June, 1897, the disturbances had increased, and according to Mr. Jacob's rule we ought to have been as safe from disturbances with the five-mile cable as we were with the ten-mile cable. Then, the five-mile cable not working satisfactorily, we put in a ten-mile cable. Now the ten-mile cable gave us almost absolute relief. At all events according to Mr. Wilkinson's report we were working most satisfactorily. The five-mile cable when the system was extended and the traffic increased was found not to be sufficient; when we put a ten mile cable in those disturbances were almost eliminated. What is the reason of that unless the disturbances extended beyond five miles? Here we have the plain fact that after we found the five-mile cable did not assist us we put in a ten-mile cable, and that ten-mile cable made the disturbance less. After March, 1897, we were prevented from carrying on our operations properly; we were disturbed with the five-mile cable.

The Chief Justice: I understand that this five mile cable was not a fair test, because it was not laid sufficiently close to the old cable.

The Attorney-General: I admit that a five-mile cable is not as good a safeguard as a twin-core cable would be, but I say if those disturbances did not extend out far enough to injuriously affect our working why would a ten-mile cable make any improvement. The extra five miles would be no good at all because it was in an area which was not disturbed. The ten miles is in exactly the same position as the five miles. We should have had exactly the same result with the ten-mile cable. We did not go to the twin-core cable at first, but we put in a

five-mile cable; the ten-mile cable had all the defects of the five mile with regard to the parallels.

The Chief Justice: Now in regard to Mr. Jacob's mathematical formula; until you have laid a twin-core cable for two miles you cannot contradict his evidence.

The Attorney-General: We have first of all to satisfy the Court that the disturbances extend beyond five miles.

The Chief Justice: But, as I understand Mr. Jacob's evidence, he admits that the disturbances go beyond two miles, but he says the disturbances will not have any effect on the signals if you have a twin-core cable.

The Attorney-General: Well, my lord, I say our experience is entirely different. I say you have the same conditions exactly with the ten-mile cable as you have when the five and the ten-mile cable improved matters vastly, which showed at all events that the protection beyond the ten-mile cable was a protection beyond the five-mile cable. Putting down the ten-mile cable was extending the five-mile cable to another five miles. Now it is clear that if we had extended the five-mile cable for another five miles it would have given us a far better protection. Surely that shows that the disturbances came from a distance beyond the five miles.

The Chief Justice: But that disturbance will not affect the signals in the case of a twin-core cable; it is admitted that the disturbance goes beyond.

The Attorney-General: It is admitted that the disturbance goes far beyond, a disturbance sufficiently strong to affect our signals.

The Chief Justice: After all it is mere theory; a twin-core cable has not been laid.

The Attorney-General: Then shortly I will deal with Mr. Jacob's reason, by which he comes to the conclusion that a twin-core cable would be sufficient for two miles. And what struck me first of all is the curious thing that we hear of this extraordinary rule for determining the disturbances from Mr. Jacob. No question of the kind was asked of the witnesses in London. According to Mr. Jacob it really does not matter what the conditions are when the disturbance takes place. Here is this infallible rule of three which tells you exactly what distance you must take out the twin-core cable. Mr. Jacob has never made any experiments to test whether this mathematical equation which he puts before the Court is accurate or not. He has been out here for a long

time, and has had ample opportunity for testing its accuracy. Mr. Jacob himself points out a way by which it might be ascertained with certainty by experiments. He has been here for two or three weeks doing nothing, and one would have supposed that the first thing he would have done would have been to test by experiment whether this mathematical equation of his was correct or not. Because whenever a mathematician deals with certain natural phenomena by means of mathematics he tests by actual experiments whether his mathematical formula is right. All the scientific men do that, and they very often find that their mathematical equations are not correct and they have to bring some other factors into their calculations. Here we have Mr. Jacob trying to bowl out our experience with his mathematical equation, and he has never taken the trouble to ascertain whether this equation is correct or not. He had an opportunity at Coney Island; he had an opportunity of testing this at Coney Island, because he says that he does not require to go to a place; a plan is quite sufficient. One would have supposed that a scientific man would have tried to find out whether the twin-core cable at Coney Island was sufficient. I say, my lord, on no occasion has he ever experimented to find whether this rule which he lays down to find the length of a twin-core cable is correct or not. He says he went out to the Cable Company's station and he saw the disturbances on the signals on a Saturday afternoon, and he takes a hundredth part as a fixed quantity, and he says that not one hundredth part of the disturbance would have been felt at the receiving station. But what I find is this: he takes a sectional area of the wire, but he does not take a sectional area of the sea water at all. He finds out the superficial area of a hollow cylinder of water around the cable for a length of two miles and he says because the superficial area of this hollow cylinder of water is so much therefore the current of electricity will prefer that to the sheathing of the cable. But he does not take the sectional area of the sea water. He treats the sea water as merely a hollow cylinder of water surrounding this conductor. According to his calculation depth of sea water has nothing to do with it at all. It would be the same thing if you simply had right through the Bay a depth of water two feet high, ignoring the great depth of ocean, and merely having a shallow pool of water which is to cover this conductor. He starts by saying that

the resistance varies inversely to the sectional area, and he takes the sectional area of the conductor, but he does not take the sectional area of the sea water at all. It is clear that Mr. Jacob does not take into account the depth of sea water. Now let me come to the evidence of Professor Jamieson, questions 477 to 489.

The Chief Justice: I was going to suggest that you should come to some arrangement as to what the damages should be, because after all we are groping in the dark as to what distance a twin-core cable would be required for. It is impossible for the Court to say definitely what is necessary. Could not the parties agree upon a certain distance, say four miles or five miles, in case the Court holds that damages are payable?

The Attorney-General: I might suggest that Mr. Wilkinson is quite prepared to go down and show Mr. Jacob that the disturbances are felt at a distance of ten miles on the receiving instrument.

The Chief Justice: I suggest this by way of compromise.

The Attorney-General: We are so absolutely certain that the disturbance is going on over five miles.

The Chief Justice: Such disturbances as will affect the signals?

Mr. Justice Laurence: If both parties are so confident in their view would it not be better to test it in this way: let the defendants supply whatever quantity they think is necessary with an undertaking that if it is not sufficient they must supply the additional amount required.

The Chief Justice: It comes to very little per mile. The initial expense is bringing the steamer out to lay the cable. The laying of the two miles could not make much difference. It would be much more satisfactory if the parties would come to some arrangement as to damage.

The Attorney-General: Mr. Wilkinson assures me that he is prepared to demonstrate to Mr. Jacob that the disturbances extend for ten miles.

The Chief Justice: Then what do you say ten miles would cost?

The Attorney-General: £6,000.

The Chief Justice: That includes everything; could not you accept that, Mr. Innes, £6,000?

Mr. Innes: Your lordship means abandoning all the other claims for damages?

The Chief Justice: Oh no, we go step by step. The only other claim for damages would be the time which it would take to lay this cable.

The Attorney-General: Of course we also claim damages for the five-mile cable which we laid out to sea as an experiment.

The Chief Justice: I think you should give that up.

The Attorney-General: The other substantial claim is the loss of business sustained in consequence of the interruption in cabling. We say we did not really find out what the disturbance was until the end of 1897. The Tramway Company went on extending its system until December, 1897.

The Chief Justice: I would suggest that £10,000 be accepted by both parties.

The Attorney-General: I was going to suggest the same figure.

Mr. Innes: I have no instructions, and with every desire to shorten the case, I do not think I could agree to that. But there are so many claims for damages which are fantastic.

The Chief Justice: It is a reduction to one-fifth, because they claim £50,000.

Mr. Innes: There are two twenty thousand pounds made up of all sorts of claims which I should certainly not advise my clients to consent to, but without consulting my clients I could not consent to that.

The Chief Justice: I understand you would have accepted £6,000 as a total?

Mr. Innes: No, my lord; we stand, my lord, upon the fact that Mr. Jacob says that the cost of laying a twin-core cable would be £2,000. I am prepared to argue that they have sustained no loss on the basis which they have adopted. I am prepared to argue that neither of the two bases of damages which they have adopted can hold damages.

The Chief Justice: There is no sum which you are prepared to suggest?

Mr. Innes: Not without consultation, my lord.

The Attorney-General: Then I must go on with regard to this two-mile cable. Mr. Jacob in his evidence says we can disregard length altogether, and according to him you would require no depth at all of sea water. I was referring to Professor Jameson, who is also an eminent man with large experience in submarine cables and also consulting engineer to Siemens and Co., and this is what he says at question 489. Professor Jameson says three miles and Professor Ayrton says something between seven and nine miles.

The Chief Justice: It would save time if we say that the Court would accept £6,000 for the laying of the cable.

The Attorney-General: Then with regard to the loss of business. I admit that it is an exceedingly difficult thing to form any correct idea of what business the company has lost in consequence of these interruptions. It is clear that they have lost some business, because we have it from the evidence that there were great delays, and therefore there must have been a considerable loss of stock exchange business. Mr. Hibberdine, who is the accountant of the company, puts before the Court two ways of calculating the loss of business in this case. The first is based upon our not having what is called a duplex, but I am not going to rely upon that. Mr. Hibberdine puts it before the Court another way. He takes the months after the disturbances commenced when the eastern cable was down and he compares the takings in January, 1897, with the January of the preceding year, 1896, before the disturbances commenced. He comes to the conclusion that about the same amount of business is done in the January of one year as the other, and he gives it in his table showing what were the earnings during the corresponding months of previous years, and he comes to the conclusion that there has been a loss of business amounting to £20,000. It struck me that there was another way of showing that a specific loss has been sustained by the company; it is difficult to make a calculation even from this. We have put in a table showing the earnings of the company every year since 1894, and we have put in a table showing the interruptions of the eastern cable also since 1894.

The Chief Justice: Mr. Innes, when you say that you could not agree without consultation what did you mean?

Mr. Innes: My lord, I have every desire to accept any reasonable offer, but the case is one which will very likely go further. It is really in the hands of the directors in London; there is a local board here, but I do not think they would agree to any offer without cabling to London first, that is the position.

The Chief Justice: I thought perhaps a compromise might be effected with regard to the final decision. It could not affect the question of liability. Any agreement like that would not affect the final liability. It is only in case there is a liability for damages what amount should be paid.

Mr. Innes: Quite so, my lord. We attach the very greatest importance to Mr. Jacob's evidence. He is a man who has

laid one-fifth of the submarine cables of the world and he pledges his reputation that two miles is sufficient and that it can be done for £2,000. In the face of that I could not agree to £6,000.

The Chief Justice: Before the Court finally decides I suppose you would be able to cable; your messages would have to go through the company of course.

The Attorney-General: My lord, I was going to point to the fact of how difficult it is for the company to show that the company has sustained serious loss. I compare the months after these disturbances commenced; I will take a month after the disturbances commenced, for instance, when the eastern cable was down, and I will take the earning power during that month and compare the earnings during that month with the earnings in a corresponding month before the disturbances commenced, and when the eastern cable was also intercepted, and it will be found in every case that the earnings before the disturbances commenced were greater. According to the tables which have been put in, in December, 1894, the eastern cable was down for ten days and the revenue for that month was £25,635. I take December, 1896, when the eastern cable was down for seven days; that was after the disturbances, and the earnings were £24,040. There was a difference of over a thousand pounds in those two months, although in one case there was seven days' interruption and in the other case ten days. Then I take January, 1895; the eastern cable was down for ten days before the disturbances, and the receipts for that month were £27,448.

Mr. Innes: I do not wish to interrupt my learned friend, but could he give the assurance that the tariff was the same? I am informed that tariff used to be 9s. a word.

The Attorney-General: Well, take July, 1896, that was after the tariff was changed.

Mr. Justice Laurence: I think there were two changes, the first from nine shillings to five and the second from five to four.

The Attorney-General: Now July, 1896, is after the tariff was altered; the eastern cable was down for thirteen days before the disturbances, and the receipts were £27,115. In July, 1897, after the disturbances the eastern cable was down for four days, and the receipts were £24,804, a difference of three thousand pounds, although in 1896 the eastern cable was down for thirteen days, and in 1897 it was only down for four days.

Mr. Justice Laurence: Is it likely that the effect of those four days would be so marked?

The Attorney-General: But here you take the conditions as nearly alike as possible. The eastern cable was down in both cases, and after the disturbances we make less than we did before the disturbances. It is impossible to arrive, however, at any mathematical conclusion as to the loss which we have sustained in consequence of these disturbances, but we must have sustained a considerable loss. There is a loss because of the delays in the sending of messages which prevented business from the stock exchange; there is a loss there of something very substantial and whichever way we take we know that it is not mathematically correct; still, whichever way we look at it, it is perfectly clear that the losses have been very considerable.

One would almost be inclined to think that in almost all cases in which the cable was in its normal condition a man would cable even if there was some delay, because at all events he would know that he would be in the same position as other people.

The Attorney-General: The speculators would not cable with three or four days' delay; the market might have altogether changed. Of course the Cable Company do not keep a record of the messages not sent in consequence of the delay. There is no way in which the company can put before the Court the exact measure of their damages. They have only certain figures to show that their loss has been very considerable.

Mr. Justice Laurence: What do you suggest as the loss of business?

The Attorney-General: I was going to suggest a very moderate figure; I was going to say £5,000.

The Chief Justice: I think you must confine yourself to the damage which could have been caused during the time that the twin-core cable would have taken to lay.

The Attorney-General: We say we could not have laid the twin-core cable until they had completed their system, because we should not have known what length of twin-core cable to get, and further, we could not have laid our twin-core cable until we knew what the area of disturbance was going to be, which again depended on the extent of their system. One cannot put evidence before the Court that would be entirely problematical.

Mr. Justice Laurence: Is the £5,000 you mentioned what you paid for laying the five or ten-mile cable?

The Attorney-General: It is for loss of business only, my lord. I think I can see the view the Court seems to take, that we cannot claim for the ten-mile single cable, and that we ought to have laid a twin-core cable before. The only ground on which we could claim for that ten-mile cable is that it was a spare cable, which it was necessary to have in case of any fault in the twin-core cable, in order to carry on our operations. That is shown by the company now having a double twin-core cable laid as far as Robben Island to do away with inconvenience and delay should something happen to the one twin-core. In any event, I think £5,000 is a very moderate estimate of the loss which we have sustained. I do not wish to go further into the question of damages.

Mr. Justice Laurence: Probably because you cannot. I do not wish to disparage your case, but the nature of the case makes it impossible to say with any precision.

The Attorney-General: There are many cases in which you cannot prove exactly the damage you have sustained, and put before the Court figures with the view of enabling it to arrive at some conclusion. At present I do not propose to carry the case any further, mainly because I have a right of reply, as my learned friend says.

Mr. Innes, for the defendant company: The plaintiffs are alleging what is not seriously denied, that the effect of the electricity used on our lines interfered with the use of their cable, and they claim damages on two grounds. I take it the claim for an interdict, in paragraphs 1 and 2 in the declaration, is not pressed, it is merely a question of damages, which they claim, as I have said, on two grounds. The first is, I suppose, the more important; that we are liable under our own statutes. As to the second, I did not follow my learned friend very well; does he claim against each one of these companies for damages under the common law, or only against the one company which he says has no statutory powers? I am not quite clear what position he takes up with regard to the liability, or the alleged liability, of the defendant company under the common law; whether he restricts it to the small section of line between the Toll Bar and the Cemetery, which is not included expressly in any statute, or whether he wishes it to be held

that under common law, apart from the statute altogether, any of these other companies are liable?

The Attorney-General: I did not say so.

Mr. Innes: I should like to have that perfectly clear. Then, with regard to the companies generally, I am not to deal with the common law; I am only to deal with the statutes?

The Attorney-General: Yes.

Mr. Innes: Then, my learned friend, I take it, relying on the statute with regard to the main portion of the companies' lines, would rely on the common law in regard to the bit between the Toll Bar and Mowbray Cemetery.

Mr. Justice Laurence: Except that he uses the common law as explanatory of the statute.

Mr. Innes: But not as a ground of liability for he accepts the judgment of Justice Kekewich, that the statute protects us, and that we do not come under the common law at all, as regards our general operations; only as far as that small section is concerned. It is quite clear that there is no question of negligence in the case, but upon that I should like to be perfectly clear, so that I need not address the Court at all on those sections of the statutes that are relied on in the declaration, but which my learned friend now abandons. They are sections 23f, 24f, and 25, of their respective statutes. I take it my learned friend abandons them?

The Attorney-General: I have not argued them; my own opinion is that they do not support our case, but I am not bound to argue them.

The Chief Justice: He is not bound to argue them, nor is he bound to admit them.

Mr. Innes: Then your lordship does not wish me to address to the Court any observations on those sections?

The Chief Justice: I think you must follow your own feeling. Of course we cannot give an opinion, because counsel has not argued on those sections, but it does not follow that the Court may not wish to hear you.

Mr. Innes: I will in the first place at any rate consider the sections of the Acts on which my learned friend did address your lordships. They are section 4 of the Act 22 of 1895, and section 4 of Act 29 of 1896, which are the Acts regulating the Metropolitan and the Southern Suburbs Tramways Companies. My learned friend did not press the case at all against the Green and Sea Point Company, and the Act of that company does not contain a corresponding sec-

tion to this section 4 in the other Acts. That was perhaps the reason why my learned friend addressed no remark to your lordships on the construction of the Act that incorporates the Green and Sea Point Company and authorises them to work.

Mr. Justice Laurence: They did not undertake to be responsible for any damage.

Mr. Innes: No, my lord. Therefore I shall confine myself to the Acts dealing with the Metropolitan and the Southern Suburbs Companies. Those sections are identical in terms, and I will take section 4 of the Act 22 of 1895. Now, to make us liable under that section, and under the corresponding section of the Act of 1896, two things must concur; first, there must be a leak, an electric leak, and, secondly, there must be damage caused by that electric leak, by electrolysis or otherwise. Those two things must concur, if we are to be liable at all. The section says "In the event of any electric leak taking place and any damage being thereby caused." I will first consider whether an electric leak has taken place, and therefore I must consider what is an electric leak. What we contend is that a leak implies an abnormal condition; it certainly cannot be a normal condition. You cannot call that a leak which is a normal occurrence, one that would exist normally in regard to the article we are considering. A leak is something abnormal, something that can as a rule be remedied, and we say therefore that "leak" is a wrong term to apply to the condition of things on our tramways, which is inevitable and cannot be stopped.

Mr. Justice Buchanan: Would you call a leak in a watercourse a normal or an abnormal thing, if it were not a cemented watercourse?

Mr. Innes: I should certainly call it an abnormal thing if it were a cemented course; if there were a crack in the cement, that would be an abnormal thing, and that would be a leak.

Mr. Justice Buchanan: But if it were not a cemented course, and the water must escape, even as the electricity must escape?

Mr. Innes: You would find a hole in the furrow, causing damage; that would be a leak, something abnormal. That would be a leak, that is a leak which you could locate.

Mr. Justice Buchanan: The earth would absorb the water.

Mr. Innes: But we would not talk about it as a leak. The earth might be moistened round the spot, but it would be a mere ordinary escape.

Mr. Justice Buchanan: It would reduce the current of water running through the course; would that be abnormal or normal?

Mr. Innes: It would be abnormal if it came from something which was not contemplated in the original construction of the furrow. To illustrate what I mean of the difference between my learned friend's contention and mine with regard to the meaning of the word leak I cannot do better than refer the Court to two answers given by Mr. Wilkinson at questions 207, 304, and 357. There he was using a generally accepted term, but he did not say he would call it a leak. He uses the word leakage perfectly correctly at 307, but he would not call it a leak when the return current starting to go home along the wire leaves the sheath and goes away through the water. As an electrical engineer, he would not say that was a leak, whereas he would say it was a leak if there was a defect in the cable whereby an outside current got through on to the conductor. That is just the sense in which we use the term; there must be something which is not of the very nature of things, which arises from something abnormal in order to constitute a leak. Mr. Jacob gave us several instances; he took the wet string of a kite coming in contact with the trolley wire. Now, that would be something abnormal not contemplated, interfering with the insulation and taking the current from the trolley wire, perhaps on to a telephone wire or some other conducting substance, and thereby doing mischief. That would be a leak, but it is not a leak when you talk of an escape of electricity which is unavoidable, and which you did not mean to avoid. The point is that the Legislature sanctioned or allowed the use of the rails for the return current, and the Legislature must be taken to have known that it was impossible to return all the current to the generating station by those rails, that the rails and the earth touching, the rails not being insulated, were in the same position as the bundle of copper wires referred to by Professor Ayrton in his answer to question No. 208. You cannot send the current through the one without sending it through the other. It is only a question of more or less; you may reduce the amount of current which goes to earth, but you cannot eliminate it, and it is not desirable to eliminate it. To eliminate it would be both impracticable and dangerous. Mr. Jacob's evidence was very clear on this point at question 743, where he says there must be something abnormal before you can have a leak. A leak is something you can stop, and which was not con-

templated when you made the conductor. But when it escapes in an inevitable way, and in a manner provided for by the people who made it, that is not a leak. Now, on the point raised by my learned friend I think it would be a dangerous doctrine to apply such a different rule of construction to private Acts than that applied to public Acts. We have only to do with what comes out of the Legislature, and we must consider that the same attention has been given by the Legislature to all the Acts it passes. The very proviso dwelt upon by my learned friend shows that the Legislature must have intended to deal with an escape of current from the rails because the wording of the proviso is clear. I take it that proviso makes against his contention, because if his construction were correct there would be no need for the proviso at all. If his construction were correct the word leak would include an escape from the trolley wire and the rails, for I know of none other for practical purposes, and if the company were liable for every escape there is no need for the proviso. Those words were only put in because the Legislature saw there was only a very limited liability on the company, and therefore they said "well, as we do not intend to make you liable for the escape from the rails you must get the consent of the local authority before you use those rails." That is really the meaning of the proviso, and it cuts very much against my learned friend's contention. If the Legislature had intended that this tramway company should be liable they would not have insisted on this agreement with the local authority; it was just because the Legislature saw they did not mean to deal with the escape from the rails that they said the company must not use the rails except with the consent of the local authority.

Mr. Justice Laurence: That would be crediting the Legislature with an enormous amount of foresight and acuteness.

Mr. Innes: Just as every private person is supposed to know the law so *a fortiori* the Legislature is supposed to know the law and the future consequences of the law. But my learned friend also said that if the escape from the rails was not a leak then the section was almost meaningless, because there was so little else—electrolysis could hardly take place in any other way. I think that is a fair way to put his statement. Theoretically it can take place from the trolley wire, but practically the escape

from the rails is the way in which damage would be chiefly done by electrolysis, and he said there would be no remedy for damage done by electrolysis from the tramway rails. But he had omitted to notice a section of the Act which occurs a little further on, and which is not without significance in construing these sections. I refer to section 15 of the Southern Suburbs Tramway Act and the corresponding section 16 in the Act 22 of 1895. The Legislature there says that the Tramway Company is liable for all damage by electrolysis or by negligence; that is a fair way of putting it. What was the object of inserting that section there if they meant to deal with the whole subject of damage by electrolysis in section 4. It is a remarkable thing indeed. It appears certain that the Legislature must have seen that in section 4 they were only dealing with the very limited amount of damage by electrolysis arising from the trolley wires which are insulated, and from leakages in those wires, and therefore it would not cover the larger amount of damage which might be done by electric currents passing from the rails through the earth and getting on to gas pipes and water pipes. Therefore they inserted these sections 15 and 16 in the respective Acts saying that in any case of damage by electrolysis the company should be liable. These sections are meaningless if my learned friend's construction of the meaning of the word is what he contends it is.

The Chief Justice: I have been looking at several dictionaries. I find that the original meaning of the word "leak" in Johnson is a crack, crevice, or aperture. The first meaning of the word is given as a "crack," crevice, or fissure, that permits water or other fluid to escape." A second meaning is "the oozing or passing of water through a crack, fissure, or aperture."

Mr. Innes: Which is exactly my contention. There must be a crack, fissure, or aperture; there must be a defect in the conducting channel.

The Chief Justice: The word "leakage," I suppose, would have a wider meaning?

Mr. Innes: I can understand that that word might be more widely used, especially by people talking in a non-technical way; "leakage" is more apt to be loosely used than the term "leak."

The Chief Justice: That seems to have been the original meaning; a crack, fissure, or aperture.

Mr. Innes: That is putting it in the way I have endeavoured to put it before the Court, that the word "leak" presupposes an abnormal condition of things, and not a normal condition. The point here is that the Legislature allowed us to use the earth for our return current, and so long as we keep to that we have protection. I would put it another way. You can only talk of a leak, speaking electrically, in regard to an insulated conductor; and it is dangerous and impracticable to use the rails as insulated conductors. That is what Mr. Jacob said, at question 747. And Mr. Wilkinson also admits it would be impossible, at question 373. Therefore, I contend, it was the intention of the Legislature that these rails should be uninsulated, because it would be impracticable and dangerous to make them insulated. There is one thing to which I should very much like to refer the Court, as I submit it materially strengthens my argument. That is, the terms of the Government regulations put in, I think, during the cross-examination of Mr. Wilkinson. These are the regulations, my lord, passed by the Government, doubtless under the advice of the Government electrician, and the Act under which they were framed is the Electric Lighting and Power Act of 1895. They are, as I understand, mainly on the lines of the regulations adopted by the Board of Trade, and the Act says, in any event they shall not be more strict. Mr. Wilkinson, in his report, very accurately gives the respects in which these regulations differ from the Board of Trade regulations in England. It is not important that I should take up the time of the Court by dealing with those points of difference, but I should like to read to the Court regulations Nos. 2 and 3. The insulated line is the trolley wire; the uninsulated return is the rails. Then I refer to regulation 7, which deals with the escape from the rail to the earth.

Mr. Justice Buchanan: It does not say that when the rails are used for the return current they may not be insulated; it says they may be, and when they are insulated there is no leakage.

Mr. Innes: But it would be dangerous. As Mr. Jacob pointed out, if a horse stepped on to that insulated rail it would be killed, and if the iron-tired wheel of a cart touched the rail it would receive the whole potential. Of course, the rails might be entirely insulated by the use of glass or some other non-conducting material, but contact with the iron tyre of a cart would send the whole current to earth. It could not be done, and

Mr. Wilkinson admits that. Regulation 7 deals, I wish the Court to observe, with the escape of current through the rails to the earth. "Where the return is partly or entirely insulated, the Inspector shall make a periodical test of the differences of potential" and so on. That is the way in which they deal with the escape of current from the rails. They say it shall in no case exceed a certain amount of units of pressure, and if it does, steps shall be taken at once to reduce it. That may be done either by a booster, as these companies have done, sucking back the current along the rails, or by having more generating stations, sub-stations at various points of the line, and dividing the line into sections and applying your power to the trolley-wire at various points, because the pressure is always greatest at the furthest end, and therefore you can diminish it by having more stations. That would be very expensive, and therefore we attain the same end by boosters. But the important point is contained in Regulation 10, which deals with leakage of the current from the trolley-wire. Could I have any stronger argument in favour of the contention I put before the Court? Here is a regulation drawn up carefully, under the advice of the electrician to Government, and it deals in two ways with the escape of current—one escape from the rails, and the other escape from the trolley-wires. The escape must be minimised as far as possible. When it is from a wire, if it exceeds a very small amount, it is to be localised; you must go to some portion of this wire and find out where the abnormal condition of things exists in the wire, and where the extra amount of current is escaping. That is called a leak.

The Chief Justice: Supposing there is a leak from the trolley-wire, how does it manifest itself?

Mr. Innes: I suppose there is some instrument or some means of measuring the whole of the infinitesimal leakages that may be going on. I am informed that they can tell at the station at once.

The Chief Justice: How does it show itself? I mean, practically. Would it show at the station where the leak is? Could they tell whether it was at one point or another, or whether it is a gradual escape?

Mr. Innes: It is, theoretically, possible to absolutely insulate the trolley-wire, but there may be minute defects which might allow a small but not dangerous leak.

The Chief Justice: But is that by contact with a wet string, or anything of that kind? The Legislature has wished to guard against some injury. I want an illustration of a leak from the trolley-wire by which injury can be done.

Mr. Innes: I will take the biggest leak of all, which would be localised at once. That is, breaking of the trolley-wire. Supposing it snaps and falls on a telephone wire; it sends the whole force of the current along the telephone wire. If there is no fuse ready fitted to melt at the end of the telephone wire that current will injure the instrument, and perhaps the person at the instrument.

The Chief Justice: Would the Legislature call that a leak?

Mr. Innes: Oh, yes; certainly that would be a leak.

The Chief Justice: I should call it a breakage.

Mr. Innes: I am giving an extreme case.

Mr. Justice Buchanan: That would not be a leakage so much as a contact, although unintentional.

Mr. Innes: It would be a defect; an escape through a defect in the wire, whether intentional or unintentional.

The Chief Justice: I am in doubt still whether the Legislature would call that leakage. I can understand some other wire getting in contact with the trolley-wire.

Mr. Innes: That is the next case I was going to put. If a wire got in contact with the trolley-wire, and at the point of contact there was some defect in the insulation, then the trolley-wire would impart its current to the other wire. Or, suppose that the trolley-wire, at the place where it is suspended between the posts, had some defect or break in the insulation; a large portion of the current would pass down the post into the earth, and might cause great danger by way of fusion or electrolysis. Or, take another instance. Supposing the trolley-wire is passing a gas-lamp, and if the insulation is imperfect, touches that lamp; it would fuse the gas-pipe, and might probably cause an explosion. All these are instances which occur to me; I do not know whether I am really giving them accurately, but they occur to me as cases in which damage might arise through leakage. Evidently, the trolley-wires carry a very strong current, and it is necessary for the public safety that they should be kept absolutely insulated, as far as practicable. The Legislature have gone a long way in saying that if there is an es-

cape of only 1-100th of an ampere the company shall localise and find out where that leak is, and put it right.

Mr. Justice Buchanan: I understand the trolley-wire is insulated throughout its entire length?

Mr. Innes: Yes; it is suspended between poles by a wire fitted with special insulators at each point of suspension.

Mr. Justice Buchanan: But that is only an insulation between each pole; it is not an insulation of the whole trolley-wire.

Mr. Innes: If anything goes wrong the current comes down the pole.

Mr. Justice Laurence: Then does your contention go so far as to say that the word leak cannot refer to an escape from an un-insulated rail?

Mr. Innes: That is my contention, that "any leak" can under no circumstances refer to an escape from an uninsulated rail.

The Chief Justice: Supposing a copper wire were attached to a rail, and the current conveyed thereby in no way damaged any metal; would not that be a leakage for which they would be liable in the same way as where there is a wire connected with the trolley-wire, and which causes a leak? Might there not be a wire attached to the rail which would cause a leak?

Mr. Innes: In theory, yes; but it would not be very likely to occur; perhaps, however, I ought to modify my answer to Mr. Justice Laurence to that extent, but I still say that in speaking of a leak electricians would really speak of a defect in an insulated return. That is my first contention. If the Court is against me there, at any rate I say it does not mean a continuous escape all along the line, which the Legislature contemplated should take place.

Mr. Justice Buchanan: I quite follow your argument. For a wire to touch the return is something so very unlikely as not to be considered?

Mr. Innes: Your lordship put a question to me which perhaps I did not answer as fully as I might have done on the last occasion. It was with regard to the analogy of water and a leak from a water-furrow. Let us take the analogy of an escape of water from a furrow. I would rather put it this way. Supposing you had a tank of water from which you pumped water to a distant place, and that water was bound to return and did return by a hose or pipe. Suppose that hose or pipe were made of material in a certain extent permeable, or porous, which must allow a certain amount of water to escape, and that that pipe lay in loose ground,

so that the water escaping from the pipe would run down and find its own level, and so get back to the tank. If you take it that that water has no elasticity and no weight, that would be as nearly as possibly analogous to the electric current, and you could under no circumstances talk of a leak when you referred to the necessary escape of water from the hose or pipe.

The Chief Justice: That is where the difference would come in between leak and leakage. In that case, would not the escape of water be called leakage? I think in a bill of lading case the word leak was used in the sense that the shipowner would not be liable for leakage; that is, not the entrance of water at one aperture, but generally throughout the ship. Therefore the fact that the word leak is used instead of leakage is in your favour.

Mr. Innes: One would say there was more to be said in favour of using the word leakage in the broad sense than of the word leak in the broad sense, but looked at scientifically and literally, I submit the word leak means some defect of the nature I have tried to explain. Now I come to consider the objection which my learned friend took, and which his lordship (Mr. Justice Buchanan) just now referred to. That is, that if in section 4 the Legislature meant to deal with a leak from the wire there was hardly any necessity for their guarding against electrolysis at all, because the cases where electrolysis may occur by leakage from the wire are so very few, and therefore you leave undealt with altogether the large number of cases of electrolysis which occur by escape from the rails. That is no doubt the greatest danger in regard to electrolysis; the damage caused to gas and water-pipes through the escape from the rails. There is some force in that contention, except that I would point out that it is possible there may be damage by electrolysis caused by a leak from the trolley-wire. If it goes down one of the posts, as I have said, it will escape from that post into earth, and cause damage in that way. But I pointed out on the last occasion the significance of the two sections which, I take it, were put in to meet that very case—sections 15 and 16 respectively of the Acts of 1895 and 1896. In section 4 the Legislature had already dealt with damage caused by an electric leak at any time "by electrolysis or otherwise." In section 16 they say the company undertakes to keep the Council or other body or persons harmless and indemnified from loss caused by electrolysis or negligence.

That is what the section means; they are to hold people harmless against electrolytical damage no matter how caused, whether by leak from the rails or trolley-wire. It seems as if the Legislature felt that they had dealt very imperfectly in section 4 with the whole question of the liability of the company to make good damage caused by any electrolysis.

Mr. Justice Buchanan: Perhaps they did not understand it.

Mr. Innes: One speaks with bated breath of the Legislature; they are supposed to understand everything.

Mr. Justice Buchanan: If section 4 covers it there was no necessity for section 16, but they seem to have put it in in order to protect the Town Council especially.

Mr. Innes: In regard to an escape from the rails and electrolysis, no matter how caused.

Mr. Justice Buchanan: That was to protect a constituted body, and not the public.

Mr. Innes: No; it says any person. It might protect a private water company having their mains near the wires.

Mr. Justice Buchanan: You say this is not injury by electrolysis at all?

Mr. Innes: I am coming to that in a moment. The other argument against the construction I have endeavoured to put on the word leak was that mentioned by my learned friend, and founded on the insertion of the proviso to section 4. I submit that proviso is very much in favour of the construction we wish to put on this section, because if the Legislature had meant by the preceding words of section 4, sub-section (n), to deal with all electrolysis, both by escapes from the wires and the rails, and had meant to provide for the liability of the company for all damage arising from all such escapes, why should they have said "You must not use these rails unless the local authority give you leave to do so." The fact that they put in that proviso shows that they had not dealt adequately at all with the escape from the rails.

Mr. Justice Laurence: They might say, on the other hand, "You shall be liable for damage, but you shall not even have the right to use your powers until you get the consent of the authority."

Mr. Innes: I think the argument I put before the Court is stronger, because if the Legislature provided against all damage caused in any way, by escapes of electricity, there would be very little reason for

giving the road authority control over the company. Then we come to consider the next point: even if there were a leak, has damage been caused thereby "by electrolysis or otherwise"? Shortly, we contend that the doctrine *ejusdem generis* should be applied to the construction of the words "or otherwise," for that is a doctrine which has not entirely disappeared I think, from the ordinary canons of legal construction. Maxwell, in his *Interpretation of Statutes*, edition of 1896, deals with the matter at page 468 and following.

Mr. Justice Buchanan: If your argument is sound, it can only be damage done "otherwise" than by an electrical leak?

Mr. Innes: Yes, my lord.

The Chief Justice: Assuming that; then you come to "otherwise"?

Mr. Innes: That is so. Maxwell gives many illustrations.

Mr. Justice Laurence: I think the Attorney-General's argument is that we must give the words "or otherwise" some effect. Otherwise, what reason is there for "electrolysis" being put in the clause?

Mr. Innes: That is the dilemma; if he is correct the word "electrolysis" need not have been used at all. I only wish to refer the Court to one case, that of *Warburton v. The Huddersfield Industrial Society*, in the Court of Appeal cases, 1 Queen's Bench Division, 1892, Vol. 1, page 817, which is of bearing as regards the See the judgements of Lord Herschel and Lord Esher. The common-sense Esher read by counsel. The common-sense rule in the interpretation of wills is to find out from the wording of the will what was the intention of the testator. So, in the cases of deeds and Acts of Parliament, the great thing is to find out from the document what really the Legislature or the person who subscribed to the document meant. And applying that rule to these sections, we find the whole of section 4 is dealing with material things, with the construction of underground wires, and so on; and it proceeds to deal, as we contend, with physical injury caused by such works, because it says "damage caused thereby." That is hardly an expression that the Legislature would have used if they had meant some intended injury done to some material in the neighbourhood, some physical lesion to something material. They never contemplated an interference by induction with something a long way off, say the transmission of signals along an electric cable.

Mr. Justice Buchanan: There is no damage done, you argue?

Mr. Innes: There is no damage; there is interference with signals, but there is no physical injury to the thing.

Mr. Justice Buchanan: They suffered damage by the interference.

Mr. Innes: Probably in a legal sense it may be an *injuria*, but there is no physical lesion of any of their property; there is no material harm done. There is much significance in the use of the word "electrolysis," which is the only species of injury hinted at before you come to the words "or otherwise." What is electrolysis? It is a physical injury caused to a material substance by certain chemical action. It is an injury caused by conduction, and yet the Court is now asked to extend the words "or otherwise" to the disturbances of signals by induction, not conduction. I submit that is giving much too wide an interpretation to the words "or otherwise." If the Legislature had meant that, what is the use of the word electrolysis at all?

Mr. Justice Laurence: What seems to be the natural interpretation is that injury might be caused by electrolysis or some physical damage of an analogous nature.

Mr. Innes: There is evidence of a great deal of possible physical damage, though not perhaps entirely of an analogous nature to electrolysis. If your lordships will look at Question 757 and later, in Mr. Jacob's evidence, you will see that. Without labouring the point any further, I would put it this way. If the Legislature or the parties who originally agreed upon these terms had had in their minds this point, that the company was to be liable for any interference with the signalling on the cable, surely very much wider and different language would have been used in the Acts. It is instructive to look at the language that is employed in other Acts when they wished to guard against this very thing which the Cable Company is now endeavouring to recover damages for. Act 42 of 1895 was passed in the same year as the Metropolitan and Green Point Acts, and a year previous to the Southern Suburbs Tramway Act, and what does that Act say? Look at section 5. That is the language used by the Legislature in the same year. True, this is a public Act, and that is the answer my learned friend worded. But it was passed, and it was used to provide against what the Cable Company now complain of; and it was passed a year

before the Southern Suburbs Tramways Act was passed. If, therefore, the promoters of the Southern Suburbs Tramways Act and the persons with whom they were engaging had intended to make the Tramway Company liable for interference with signalling caused by induction, they had these Acts passed the year before before them, and they surely would have used the language of this Act I have quoted from. I cannot take it further than that; it seems a strong point in favour of my contention. It may be, while on this Act 42 of 1895, instructive to note that in section 2, sub-section 4, in grouping together the various matters upon which regulations may be made, the Legislature actually groups together the prevention of injurious electrical action, or the fusion of gas and water pipes and other metallic substances and structures. They have grouped together the very two kinds of injury which Mr. Jacob gave as an illustration of what injury might be done by electrolysis "or otherwise." That is instructive as showing how the Legislature meant to deal with the whole matter. Then I must draw the attention of the Court to the terms of section 41 of the Act 29 of 1895, which is not a section easy to interpret, although its general object is clear. Evidently there were two companies, the Electric Lighting Company and the Cape Districts Waterworks Company, who were not satisfied either with the provisions of section 4 or section 16 of that Act, because in section 41 they got special protection. That includes, I submit, the working of the tramways as well as the making of the works before they started. I do not know why the Cable Company did not oppose the Bill, but if they meant to take up the position which the Electric Lighting Company evidently did take up, they would have put a clause in saying that if the operation of this Act, or the works of the company, rendered it necessary to make any alterations to their cables or any other plant of theirs, it would be done at the expense of the Tramway Company. But they did not do that, although the Electric Lighting Company did. Again, if the intent of the previous Act was as wide as my learned friend says it is, there would be no necessity for this special provision. What was meant was a special protection to the Suburban Electric Lighting Syndicate over and above the general protection of the Act. I also direct your lordships' attention to the last Tramway Act, 34 of 1899, although it

may be said that that was passed after this dispute had arisen.

The Chief Justice: How does that help us to construe these sections? They have no doubt made very careful provision, although you may say they are a little ambiguous.

Mr. Innes: It seems to me to have some bearing, by giving your lordships the view which the Legislature were taking. Supposing they had dealt with the matter in a dozen other cases in perfectly plain language.

The Chief Justice: Yes, in an Act passed several years afterwards.

Mr. Justice Buchanan: And in consequence of a dispute having arisen they wanted to prevent the possibility of another dispute arising.

Mr. Innes: I would now only point out that in the Green Point Act there is no corresponding section to section 4 in the order Acts, and on that account my learned friend did not press the case against the Green Point Tramway Company; they got their powers under a series of Acts, of which the last was 23 of 1895. In that there is a provision corresponding to those set out in section 15 of the Act 22 of 1895, and in section 15 of the Act 29 of 1895; that is section 21 of 23 of 1895.

The Chief Justice: Is there any provision here by which with the consent of the local authority the rails may be used for the return current?

Mr. Innes: That is not in the Bill at all. Of course, my contention is that as there is nothing in the Act to the contrary, there is nothing to prevent them using the rails for the return current, which is the only practicable and proper way. Then, a special point is made in the declaration that the City Tramway Company is not allowed by its Act to use electricity at all, and that therefore it is a trespasser every time it runs a car by means of electricity or uses that force. Their Act is 24 of 1881, but my learned friend did not lay any stress on that point in his argument. The relevant sections are Nos. 1 and 16. My learned friend did not argue this point, and surely the words "any other mechanical power" include electric power.

The Attorney-General: We admit that.

Mr. Innes: I would like it admitted that the City Tramway Company is entitled to use electric power.

The Chief Justice: Is that admitted?

The Attorney-General: We are instructed that that is so, my lord.

Mr. Innes: My learned friend wishes to add "as being included in the words mechanical power." I have now dealt with

that portion of my argument which deals with the allegation that the defendant company is liable under the statutes for damages. Now I come to consider the common law very shortly.

The Chief Justice: Is that bit of line for which there is no express statutory power included in this?

Mr. Innes: Well, it is not included expressly in any Act.

The Chief Justice: But the Act of 1881?

Mr. Innes: The lines are scheduled and the line runs only out to the Toll Bar.

The Attorney-General: I understand that the only line which the City Tramway Company is using is the line from the Toll Bar to Mowbray Hill.

Mr. Innes: The City Tramway Company is also using the line from Adderley-street to Sir Lowry-road.

The Chief Justice: For this portion there is no legislative authority.

Mr. Innes: No express authority; I shall contend later on that there is an implied authority. My lord, in regard to the liability or non-liability of the company under common law there is some difference between the English and American decisions.

The Chief Justice: Of course it may be in many cases a question of proof and in many cases the *onus probandi* may lie upon the persons who cause the damage.

Mr. Innes: The case of *Rylands and Fletcher* has been quoted, but the matter must be decided under our Roman-Dutch law. If your lordship will allow me I would first refer to *Crocoll on the Law Relating to Electricity*, section 215, which is headed Telephone v. Electric Railway. In most of these cases referred to both companies have had statutory powers, but the Court has given the preference to the tramway company because the streets are made to be walked over and not talked through. The highways are for the use of the travelling public. Now in America there is a case which is quoted in very approving terms by his lordship Mr. Justice Kekewich which I wish to refer the Court to. I have got a pamphlet here containing a full report of the judgment which I will put in. I will hand it into court; it is an instructive judgment, which is quoted with the highest approval by Mr. Justice Kekewich in the case of the *National Telephone Company v. Baker*. I wish to point out that really, however instructive and clear the remarks of Mr. Justice Kekewich are in regard to the doctrine of *Rylands v. Fletcher*, they are *dicta* only,

and were not necessary for the decision of the case. Because the real ground for the decision in Baker's case was that the Tramway Company being protected by Statute was not guilty of a nuisance in discharging electricity into the earth. Now, my lords, that leads to the consideration of how the case of *Rylands v. Fletcher* stands in relation to our law, which is really the point, because the Roman-Dutch law must settle this question. The case of *Rylands v. Fletcher* has been quoted in various cases both in this Court and in the High Court of Griqualand West. It has been quoted, for instance, in the Appeal Court in the *Victoria Diamond-mining Company v. De Beers* (1 Appeal Court, page 300.) But in giving judgment his lordship the Chief Justice rested his judgment not on Fletcher and Rylands, but simply and solely on our law. It is instructive to note that your lordship there made no reference to the case of *Rylands v. Fletcher*, but rested judgment of the Court upon the Common Law as laid down by Voet. I take it that by our Courts the same decision would have been arrived at as in *Rylands v. Fletcher*, upon the same facts—but upon different grounds. The remedy would have been under a special action—the *actio aquæ arcuæ*, which rendered any occupier of property liable in damages if he discharged upon his neighbour's land water which would not have come there under the ordinary course of nature; unless of course he had a servitude entitling him to do so. (See Voet, 39, 3, 2.) Apart from that special form of action, however, it is difficult to see where the Roman-Dutch Law would have given any remedy if there was no *culpa*. Certainly not by any action under the *Lex Aquilia*. So that it is to say the least doubtful whether the broad doctrines laid down in *Rylands v. Fletcher* are recognised by our common law here. And surely it is unduly straining the principle of the *actio aquæ arcuæ*, which dealt with physical damage to a neighbouring property, to apply it to an interference with electric signalling in ground belonging to neither party, and without any material damage resulting, I should like to refer your lordships also to the case of *Read v. De Beers* (9, Juta, 333). Then there is *Austen Bros. v. Standard D. Mining Co. (Limited)*, reported in the High Court Reports (1, p. 363). I do not want to read these cases because they are very long, and I thought it was sufficient to refer the Court to them but I cannot, as illustrating English criticism, in

Rylands v. Fletcher, refrain from reading to the Court a passage from *Pollock on Torts*, page 398.

The Chief Justice: Has any decision been founded on *Rylands v. Fletcher*?

Mr. Innes: No decision which could not have been founded on the Roman-Dutch Law.

The Chief Justice: Because *Rylands v. Fletcher* could not apply to the common law.

Mr. Innes: The only Supreme Court case which I can give your lordship is *Read v. De Beers*. But your lordships will see that the point I wish to make is this, that although the case of *Rylands v. Fletcher* may be quoted with approval, it is quoted because the same decision would have been arrived at under Roman-Dutch law. I submit that the safer course is to adopt the principle of the American Courts and to say it is a case of due care and diligence; if both parties are using concessions is the person who is inflicting some *damnum* upon his neighbour using due care and diligence in the exercise of his operations? I will not detain the Court further on that point; I will go on to consider the point that the case of *Rylands v. Fletcher* does not apply where a company is protected by statute, and I go on to consider the statutory position of this company. I take, first of all, the Green and Sea Point Tramway Company. Well, the Green and Sea Point Tramway Company has been taken over by the Metropolitan Company, and is effectually protected by its statutes. Now the Metropolitan Company works under Statute 22 of 1895. It was authorised to construct amongst other things, by Act 22 of 1895, a small piece of line from Adderley-street to the corner of Plein-street, and along Darling-street and Sir Lowry-road along the line then worked by the City Tramway Company to the Toll Bar, but in regard to this company this was a single line. A double parallel line has been made by the Metropolitan Company. Now under the Act of 1895, the Town Council is empowered to give its consent to any new lines, but the Town Council did not give its formal consent when the double line was made although the plan was approved by the City Engineer; no formal written consent was given by the Town Council. That position was afterwards cured by an arrangement made between the Town Council and the Metropolitan Tramway Company which placed this double line upon a perfectly legal footing.

The Chief Justice: What part are you speaking of?

Mr. Innes: Along Adderley-street and Sir Lowry-road.

The Chief Justice: But there is no question of that; it falls under the Act.

Mr. Innes: The single line falls under the Act, but the Metropolitan Company did, on the authority of the City Engineer, construct a double line, and it was not until May, 1898, that they got a formal consent from the Town Council. I was going to point out that really there would have been less disturbance with a double line than with a single, because there would be no necessity for sidings or passing places, the change of current at which is a fruitful cause of disturbance.

Mr. Justice Laurence: If the Legislature authorised them to lay one I suppose that meant two.

Mr. Innes: Then I come, my lord, to the bit between the Toll Bar and the Cemetery. Now the position of that is, shortly, this. The City Tramway Act allowed the Tramway Company to run a line from Adderley-street to the Toll Bar. On the 20th October, 1884, the Divisional Council allowed them to extend their line for a mile beyond the toll, and then on the 4th of March, 1890, they got the consent of the Divisional Council to go to the Cemetery. On the 17th May, 1890, an agreement was entered into between the Divisional Council and the Tramway Company allowing them to run and work the line which they had already been given permission to lay. That is the position then. Now the Divisional Council certainly had the power to give its consent to putting rails upon the roads for ordinary purposes of traffic. The roads by Act 40 of 1889 are absolutely vested in them.

The Chief Justice: I think that is going rather far, because supposing the whole of the system of tramways had been constructed only by the authority of the Divisional Council and the Town Council you would hardly contend that there would be no liability.

Mr. Innes: I could not contend that; I only want to point out in the first place that they are not trespassers.

The Chief Justice: The evidence is really rather meagre as to whether this little bit affected the wires or not; there is no evidence as to whether this little bit, added to the rest, did any damage. You see your argument goes so far as this, that it really required no statutory authority at all.

Mr. Innes: I only wish to make it clear that they are not trespassers. Not only is

the road vested in the Divisional Council, but I would give the Court the reference to Act 6 of 1873, which regulates the use of roads as showing that the Legislature did not intend the roads to be confined merely to horse traffic, but contemplated the use of road locomotives. I wish to point out to the Court now the terms of section 27 of the Southern Suburbs Tramways Act, which refers indirectly to this bit. In section 26 the power is given to either the Town Council or the local authority to expropriate that line after a certain number of years. Then supplement that section by reading with it the 31st section of Act 22 of 1895. The Metropolitan line ran to the toll; the southern suburbs began at the cemetery; between the toll and the cemetery was the small section constructed by the City Tramway Company with the leave of the Divisional Council. The Legislature said that if the southern suburbs line was expropriated, the small section was to be expropriated also; if the Metropolitan line was expropriated the owners of the small section were to have running powers into Cape Town. I say, my lords, if your lordships will refer to the terms of those two sections, it is almost impossible to escape the inference that the Legislature knew and recognised this small section as a portion of the whole system to be worked together with it. Surely this recognition is as valid for the purposes of my argument as any expressed statutory condition. We have not acted negligently, and it has never been alleged that we have. I must now trouble the Court for a short time on the question of damages.

Mr. Justice Buchanan: I thought that was practically agreed upon.

Mr. Innes: Oh, no, my lord.

The Chief Justice: You had better leave the question of damages for the present.

Mr. Innes: If your lordships will give me an opportunity afterwards, because we shall urge that there was a tender to lay six knots of twin-core cable complete for £4,600, and Mr. Jacob says that two knots can be laid for £2,000.

Mr. Justice Buchanan: That practically comes to the same thing.

Mr. Innes: Yes, that is for six knots; we say that two knots is sufficient.

The Attorney-General: My lords, I wish to endeavour to avoid travelling over the same ground twice, and I shall try and meet as briefly as possible some of the points raised by my learned friend. First of all, with regard to this section of the line from the Toll to Mowbray Hill, there is no statu-

tory authority whatever either for the construction of that line or for working it by electric power. Now in the Act of 1881, by which authority is given to the City Tramway Company to construct tramway lines, there is nothing whatever said about this section at all, and there is nothing whatever in the Act or in the schedule which expressly or impliedly authorises them to construct the line from the Toll to Mowbray Hill. Now really I think my learned friend goes very far indeed, because in section 27 of Act 22 of 1895, it is merely a power given to the municipality to purchase. The Legislature did not go into the question of whether this line was properly constructed or not. The Legislature was probably in ignorance of whether this line was constructed under statutory power or not. Even supposing that under this section the Town Council had acquired the section of this line between the Toll and Mowbray Hill that would not have made it a legally constructed tramway line. And the same remarks apply to section 31 of Act 22 of 1895, so I think my learned friend must admit that this section of the line was constructed without statutory authority.

The Chief Justice: Supposing the Court were to hold that negligence was essential and that the whole of the system was legally constructed would there be any proof of negligence in interposing this bit of line?

The Attorney-General: I wish to point out to the Court that negligence is not required.

The Chief Justice: I want you to argue the point on the understanding that negligence is the essence of the action.

The Attorney-General: Of course I would like to point out to the Court first of all that under our law it is not necessary to prove negligence and even if negligence is required there has been sufficient negligence in law to make them liable.

The Chief Justice: Supposing the Court holds that it is required; would the fact that they have interposed this small bit be necessary proof of negligence?

The Attorney-General: That in itself would be sufficient, but still if there has been negligence on their part and there has been an escape of electricity and that escape has damaged us surely they are liable for damages.

The Chief Justice: How can that be proved?

The Attorney-General: In this way, my lord. The tramways commenced operations on the 6th August, 1896, and the

only part of the line which they were working was the portion between the Standard Bank and Mowbray Hill. As soon as the tramways started we felt the effect on our cables. We were disturbed on our cables, and we were unable to work the cable until we put down this five-mile earth cable, so clearly the damage caused to us in August, 1896, was caused by running the trams on this unauthorised line. And Mr. Jacob says, that even this small section between the Toll Bar and Mowbray Hill, if that was the only part of their system working, would cause damage, and he would have recommended a twin-core cable. Now I submit that under the Roman-Dutch law a person who brings a thing which he knows is mischievous if it escapes—such as electricity—would be liable for the escape of the electricity even if there were no negligence on his part. And I may point out that the case of *Rylands v. Fletcher* on that point is perfectly clear. I cannot see the difference in the principle which has been laid down in the case of *Rylands v. Fletcher*, and the principle which has been laid down by the Supreme Court of the Colony in the cases of *Drummond v. Searle*, *Le Roex v. Fick* and other cases, which related to persons keeping dogs which were dangerous.

The Chief Justice: But is not the essence of the negligence that a person must know that a dog is vicious?

The Attorney-General: That is exactly what is laid down in the case of *Rylands v. Fletcher*, and is exactly consistent with the principles of the Roman-Dutch law. What *Rylands v. Fletcher* lays down is this, that if a man uses his property in an unnatural manner then he is liable.

The Chief Justice: Surely there is negligence in that.

The Attorney-General: Then admitting that negligence is required I say that they are entirely upon the horns of a dilemma. We say you have no statutory authority to do this; we say you have no statutory authority for having the electricity there, and therefore you are liable for the escape. Now, my learned friend has referred to this American case, but in this American case, my lords, they were dealing with a tramway company which was authorised by statute. I refer to the judgment of Mr. Justice Brown, page 8. And on page 12 he lays down the American law. Now, my lords, if that is the American law, there is no distinction between the American law and the English law, and the English law and the

Roman-Dutch law. But all three systems of law seem to me to lay down this, that if a person without statutory power makes an unnatural use of his own property, such as bringing electricity upon it, and that use causes damage to me, then I have an action against him. It is not necessary for me to prove negligence on his part. He is liable because he has made an unnatural use of his own property without statutory authority.

Mr. Justice Laurence: Might it not be argued that the Tramway Company had a concession from the persons who had the control of the roadway?

The Attorney-General: We cannot recognise that, because after all the Town Council has only statutory powers. I do not know whether the Town Council have even power to authorise the construction of the line, but I say the Town Council have no authority to grant powers to other people to use electricity. What is the difference between bringing a dangerous animal on your property and bringing a dangerous agent like electricity on your property? Now, my lords, I go to another part of my learned friend's argument, and that is with regard to the use of the words "or otherwise," and I really cannot add much to what I have already said on this point. My learned friend has referred to *Maxwell*, and he says that *Maxwell* refers to certain authorities. If your lordships have time I should like your lordships to refer to those authorities, because I do not think one of those authorities substantiates what *Maxwell* lays down. I would rather refer to the case of *Anderson v. Anderson*. I do not refer to that case so much for the special decision with regard to the particular circumstances there. I refer to that case more because of the view which is put forward in regard to the construction of general words following special words. It is distinctly laid down that the tendency of Courts now is to give general words their full meaning unless there is something in the clause which shows that the Legislature intended those words to have a special meaning. In all these cases the Court might have said if these general words are to have their full meaning, what is the use of the special words at all. But the Court has never taken that view. The case of *Bairdson v. Bailie* was a very strong case indeed. In that case the Court put the widest possible construction on the words "or otherwise," and gave those words their widest meaning, and in that case it might also have been said what

is the use of those special words if the Court is going to put the widest construction upon those general words. So I say that in this case in section 4 of this Act there is there is nothing to show that the Legislature wished to limit the words "or otherwise." I can quite see how the word "electrolysis" came in. The parties to the contract which this Act was to sanction no doubt knew that a certain amount of electric current would escape from the rails; they knew that would be likely to do damage, and the only damage they could think of was electrolysis. Then it occurred to them that it might cause damage in some other way, and so they put in the words "or otherwise" to cover every possible kind of damage. This is a private Act, and a private contract is really the basis of this Act. Now, my lords, I do not wish to say much on this question of electric leak. We want to find out what was really the intention of the Legislature and we say the Legislature intended to protect all persons who sustained damage in consequence of this dangerous agent, electricity, escaping from the property of the Tramway Company. The Legislature gives the Tramway Company the power to use the rails for the return current; it was intended that the rails should carry as much as possible back to the generating station, but in consideration of these large powers they give a special undertaking that, in the event of any damage caused by an electric leak, they would be responsible for that damage. I do not think the Court ought to take the dictionary meaning of the word; this is a very different thing indeed. Electricity is not a fluid; scientific men say it is a force which no one can explain, and therefore it is very difficult to apply the dictionary meaning of the word "leak" to the word "leak" in this section. My learned friend says that in every system there would be a leak from the trolley wires. Now Mr. Jacob pointed out that this would be such an unlikely thing that it would not be necessary for the company to give a special undertaking as to damage. My learned friend says that is made by section 16, which provides for electrolysis caused by electricity escaping from any part of the system. I say that is not the construction to be placed on section 16, because, if so, there is no need for section 4 at all, and my learned friend argues that section 4 only applies to electrolysis. Section 4 of the Act is wholly unnecessary as far as electrolysis is con-

cerned if my learned friend's contention in regard to section 16 is correct. In any case I say that if in section 4 it is clear that the Legislature intended to impose upon the Tramway Company liability for any damage caused by the escape of electricity from their system, then section 16 cannot in any way limit that liability. Well, my lords, I do not wish to take up the time of the Court any longer. I have put all my views before the Court with regard to the construction of the section.

(C.A.V.)

Postea (March 13th).

De Villiers, C.J., in giving judgment, said: The plaintiffs carry on the business of transmitting telegraphic messages by cable between Cape Town and Europe. The defendants carry on the business of conveying passengers in Cape Town and its suburbs in cars propelled by electrical traction. The entire system of the tramways in Cape Town is worked from one central station. The electric current is conveyed to the cars by an overhead wire with a pressure of electricity far higher than the earth or the rails. The cars take their power by means of a rod on the top of each car, which runs underneath the high-pressure trolley wire. The electric current goes down the rod, passes through the motors on the car, and is returned to the generating-station through the rails. In the course of such return part of the current escapes into the earth and causes electrical disturbances at a considerable distance from the place of escape. The effect of these disturbances upon the cable used by the plaintiffs for the transmission of telegraphic messages is a very peculiar one. When the earth current comes along, the outside sheathing of the cable lying on the bottom of the sea within the area of disturbance picks up a portion of the current which has left the rails. So long as this current, flowing along the sheathing, is steady and of constant magnitude and direction no effect is produced on the electrical apparatus for signalling the messages at the Cape Town station of the plaintiff company. But if the tramcars are constantly starting and stopping the current in the sheathing is constantly changing its magnitude and direction. The result is that the copper conductor—or "core" as it is called—inside the cable has a current "induced" in it, which has a disturbing effect on the signalling apparatus. The plaintiffs, by laying a second cable as nearly as possible parallel and near to the

existing cable as far as Robben Island, have succeeded in, to a considerable extent, reducing the disturbing effect of such induced current, but they allege that in the meantime they had sustained considerable damage from loss of business occasioned by the delays in transmitting messages. A completely efficacious mode of neutralising the effect of the disturbance would have been to lay what is known as a twin-core cable some distance into the sea. The twin-core is encased in the same sheathing, but one of the cores is fastened to the sheathing of the cable some distance out to sea. The going and returning conductors being thus placed as closely together as possible become subject to the same disturbance produced by any outside cause, and induction is thus prevented. There is some difference of opinion among the experts as to what the length of such twin-core cable should be to overcome the electrical disturbances of the plaintiffs' instruments, but they are all agreed that such a cable, if of sufficient length, is the only certain remedy. Accordingly the plaintiffs in their claim for £50,000 as damages include the cost of laying a twin-core cable to Robben Island and the capitalised cost of maintaining such a cable, in addition to damages for loss of business and for expenditure incurred by them in experimenting and laying the parallel cables on to Robben Island. They also ask for an interdict restraining the defendants from so working their tramways as to injure the plaintiffs in their business. The Acts under which the defendants have constructed their tramways are those numbered 22 of 1895, 23 of 1896 and 29 of 1896. Strangely enough, however, no legislative authority was ever asked for or obtained for the construction of a comparatively short section of the tramway, namely from the Toll to Mowbray, although that section connects the other portions of the system for which due authority has been obtained. As to the escape of electric current from this section, the plaintiffs rely upon the common law as entitling them to relief. As to the remaining portion of the system, they rely upon the provisions of the fourth section, sub-section (d), of Act No. 22 of 1896, and corresponding provisions of the other Acts of Parliament already mentioned. The terms of the sub-section are as follows: The company shall, subject to the provisions of this Act, have the right (d) "to erect, maintain, and work all necessary power and stations . . . subject to the approval

and in accordance with any resolution or standing order of the Council. . . . Provided that . . . the company specially undertakes that in the event of any electric leak taking place and any damage being thereby caused at any time by electrolysis or otherwise, it will reimburse and make good to the Council or other body or person all costs, damages, and expenses to which the Council or other body or person may be put by reason thereof; and provided further that nothing in this Act contained shall entitle the company to use the rails of any of the said lines of tramway as a part of its system of conductors for the return electric current without the consent of the Council first had and obtained." In the other Acts the consent of the "road authority" is required, and it is admitted that for the whole of the defendants' system of tramways the consent of the Council or other road authority has been duly had and obtained. The first question then which arises is whether the damage said to have been done to the plaintiffs is covered by the words "in the event of any electric leak taking place and any damage being thereby caused by electrolysis or otherwise." It is reasonably clear from the evidence that it would be practically impossible so to insulate the rails as to prevent a portion of the current returned to the generating-station from escaping into the earth. That this danger was present to the mind of the Legislature is clear from the proviso that the rails should not be used as part of the system of conductors for the return electric current without the consent of the road authority. The effect of such consent, when given, would be the same as if the Legislature had expressly and directly authorised the use of the rails for the return current. Now, supposing the Legislature had given such authority, it is extremely improbable that it would have required an undertaking from the defendants to be liable for any damage whatever that may be caused by any escape of current from the rails. At all events, if such was the intention of the Legislature, nothing would have been easier than to find appropriate words for the purpose. For instance, if the 4th section had enacted that the company "undertakes that in the event of any portion of the electric current escaping and causing damage the company will reimburse the damages," and so on, the last proviso would not have protected the defendants. But the

undertaking is more strictly limited, for it is confined to the case of a "leak" causing damage "by electrolysis or otherwise." According to Dr. Johnson, a leak is "a breach or hole which lets in water." According to Webster also this is the primary meaning of the substantive, but the secondary meaning is "the oozing or passing of water or other fluid through a crack, fissure, or aperture." The Imperial Dictionary gives practically the same definition of the term. The word "leakage" no doubt has a somewhat wider meaning, but that is not the word used in the Acts. Electricians have applied both words to the passing of an electric current from a conductor, but there is a difference of opinion among the experts who have given evidence in the present case as to whether the word "leak" is applicable to a general and gradual escape of the electric current from the rails. No good purpose would be served by an analysis of their evidence, and it is sufficient to say that I accept Mr. Jacob's views as substantially correct. Being asked whether he would call an escape of electricity from the rails, uninsulated, on its way to the earth, an electric leak, he answered, "No, I should not call it a leak." Question: "Why not?"—Answer: "Because we do not call it a leak when it is going into an actual conductor. It is forming a mass of conducting area which is better than the other mass of conductor. That is all. You can hardly call it a leak, because you cannot possibly stop it. We would call a leak a hole in the gutta percha or some other insulation which we could mend at any time." Being asked to illustrate what he meant by a "leak," he said "I should take it to be a hole in the gutta percha round the cable, or the touching of one of the trolley wires by another wire, causing a leak to earth." He pointed out also that complete insulation of the rails would be practically impossible, and that it would be positively dangerous, "because you would get exactly the same current as from the trolley wire." Q.: "As Mr. Wilkinson admitted, quite apart from accidents, if the iron-tired wheel of a cart drove over the rail, that would send the current to earth?" A.: "Of course it would; you would be connecting the whole system to earth. It is not the difference of voltage that now exists between the rail and the earth. It is the whole of the voltage you would get, exactly as if you touched an electric wire that is all insulated."

I am clearly of opinion that the Legislature, having sanctioned the use of the rails for the return current, did not intend to comprise in the term "leak" the necessary escape of current from such rails. But assuming that the term has the wider meaning contended for by the plaintiffs, the question still remains whether the disturbances to their signalling apparatus can be fairly regarded as "damage caused by electrolysis or otherwise." Several cases have been cited as to the proper construction of general words: following terms more specific, but it is difficult to lay down any rule of construction which shall be applicable to all cases. The general words must be read by the light of the statute as a whole, but the fact that they immediately follow some particular and specific word cannot be lost sight of. The Legislature would not have specified "electrolysis" as one of the forms of damage for which the defendants should be liable if it had intended that the liability should extend to every possible form of damage. The general scope of the statute as a whole, and of the 4th section in particular, satisfies me that the term "or otherwise" should be confined to forms of damage of a similar kind to electrolysis. It must be a physical damage, such as the fusion of some metal, and not a mere electrical disturbance of signalling apparatus caused by induction. I am of opinion, therefore, that the Acts on which the plaintiffs rely do not assist them in fixing the defendants with liability. The question still remains whether under our common law the defendants are liable for the disturbance so far as it proceeded from the short section of tramway, for the construction of which they have no legislative authority. They are not trespassers on the roadway, for they have the sanction of the proper road authority for the laying of the tram line and the running of cars on the line. So long as they carry on their business in such a manner as not to endanger the public or interfere with its use of the roadway they must be regarded as carrying on a lawful and honest business, as if the land on which the rails are laid were their own. The rule would apply to them, as it does to every owner of property, that they must use their property in such a manner as not to injure the rights of others. The question still to be determined is whether the rights of the plaintiffs have been in any way injured by the acts of the defendants as already described.

It is difficult to ascertain at the outset what particular legal right of the plaintiffs has been injured. There is an escape of electricity from the defendants' rails which spreads over a vast area of the earth; this current is taken up by the sheath which surrounds the plaintiffs' conductor and by a process known as induction a disturbance takes place on the plaintiffs' delicate signalling apparatus on the sudden stoppage of the defendants' cars. The quantity of electricity which causes this disturbance is infinitesimal as compared with the total quantity transmitted through the rails, and it does no damage to anyone beyond disturbing the sensitive instrument used by the plaintiffs for transmitting their telegraphic messages. That no doubt caused some loss to the plaintiffs in their business, but does that damage constitute an injury for which the defendants are liable? In the case of *Struben v. Cape Town District Waterworks Company* (9 Juta, 68), it was held that a person who, by digging a well in his own land for the *bona fide* purpose of improving the value of such land, abstracts underground water finding its way in undefined channels, is entitled to such water, although the abstraction may cause a diminution in the supply of other wells, or even of a public stream. The owners of the other wells are damaged by the loss of water, but as they have no legal right to claim that water percolating in undefined channels shall not be disturbed they have no remedy against the person who disturbed it in the exercise of his legal rights. It may be said, however, that the plaintiffs do not complain of something being taken from them, and that the analogy of water being accumulated by one owner and let loose on the land of another would be more to the point. In the case of the *Victoria Diamond Mining Company v. De Beers Diamond Mining Company* (1 S.C., A.C., 300) it was held that the defendants who, by piercing a barrier left in a tunnel connecting a shaft outside a diamond-mine with their claims within the mine, had thrown a body of water on the plaintiffs' claims, which would not have come to such claims in the ordinary course, were guilty of negligence and liable in damages. The English case of *Rylands v. Fletcher* (L.R., 3 E. and I.A.C., 330) was cited, but the decision of the Appeal Court was founded upon the well-known action *aquae pluviae arcendae* of the Roman law as adopted by the law of Holland (*Voet*, 39, 3, 2, &c.). That action was

originally applied only to the case of rain water, and was extended by this Court to the case of water accumulating in a mine, but there appears to me to be no analogy between the direct damage caused by a rush of water accumulated by the negligence of an upper proprietor and the indirect damage caused by the subtle escape of electric current into the earth with no other tangible effect than the disturbance of delicate telegraphic apparatus. Under the Aquilian law also an action lay for damage occasioned by wilfulness or negligence, and among the illustrations mentioned by *Voet* (9, 2, 26) is the case of waterpipes being attached to the wall of another in such a way as to damage the wall. The damage must be the direct consequence of the negligence (*Voet*, 9, 2, 16). The analogy between such direct damage and the incidental damages resulting from the defendants' operations is very far sought. But even if the analogy were complete, it is by no means clear to me that there was such a degree of *culpa* on the part of the defendants as to render them liable under our law. They had the right to use the rails for the transmission of the electric current over portion of their system, and they had the consent of the proper road authority to lay the rails, at all events, on the portion for the construction of which they had no legislative authority. The business they were carrying on was lawful and beneficial to the public and, on the short section in question, they made use of the method authorised by the Legislature for the remaining portions of their system. That method of employing electricity as a motive power appears on the whole to be the best hitherto invented. The plaintiffs mainly rely upon the decision of the House of Lords in *Rylands v. Fletcher*, where it was held that if the owner of land brings upon it anything which would not naturally come upon it, and which in itself is dangerous, and may become mischievous if not kept under proper control, though in so doing he may act without personal wilfulness or negligence, he will be liable in damages for any mischief thereby occasioned. That was a case of direct injury to the lessees of certain mines under land adjoining a close belonging to a mill owner. The mill owner employed competent persons, an engineer and a contractor, to construct a reservoir, but they took no care to block certain vertical shafts which communicated with the land above. The result was that the water introduced

into the reservoir broke through some of the shafts, and after flowing through certain old passages flooded the mine. There seems to have been such want of due care and skill on the part of the engineer and contractor as would under our law render the mill owner liable, but the decision proceeded on the wider ground that if a person brings or accumulates on his land anything which, if it should escape, may cause damage to his neighbours, he does so at his own peril. I cannot find any authority in our law which goes quite as far. No doubt the facts of the escape and damage would afford *prima facie* evidence of negligence, but where it is proved that the person causing the damage could not have reasonably expected that the work would damage his neighbour, and that he and those employed by him have used all due skill and care in the execution of it, the presumption of negligence would be rebutted. In the case of *National Telephone Company v. Baker* (L.R., Ch. Div. for 1893, vol. 2), Kekewich, J., expressed it as his opinion that a person who creates on his land an electric current for his own purposes, and discharges it into the earth beyond his control, is, on the principle of *Rylands v. Fletcher*, as responsible for the damage caused by that current as he would have been if he had discharged a stream of water. This opinion, however, was not necessary for the decision, which was in favour of the Tramway Company, on the ground that the company had acted under a provisional order of the Board of Trade, and had used the best known system of electrical traction, being the same system as that used by the defendants in the present case. "American law," said the learned judge, "apparently holds the owner of land used for a non-natural or extraordinary purpose responsible for the consequences of such user to his neighbour only when they result from that owner's negligence. . . . It seems to me that if the principle of *Rylands v. Fletcher* had been fully adopted in America, the conclusion of the Court in the Cumberland Company case must have been different. I believe that in Scotland, too, the principle of *Rylands v. Fletcher* has not been accepted, and is not regarded as consistent with justice between man and man. It does not fall to me to consider so large a proposition. The principle is thoroughly well settled here, and my duty is merely to consider whether it is applicable. . . . The electric current may be more erratic than water, and it may be

more difficult to calculate or to control its direction or force; but when once it is established that the particular current is the creation of or owes its special existence to the defendant and is discharged by him, I hold that if it finds its way on to a neighbour's land and there damages the neighbour, the latter has a cause of action." If the learned judge was right in holding that the question of negligence did not enter into the decision of the case of *Rylands v. Fletcher* I should certainly not be prepared to hold that it is a binding authority in this Court. But even if it were a binding authority it does not appear to me to follow that the defendants would be liable for the indirect and remote consequences of an escape of electricity from their rails. Water dammed up in a reservoir is palpably a source of danger to lower proprietors. In the same way the transmission of a powerful current of electricity through the trolley wire and the rails may be the means—under certain circumstances—of seriously damaging property in the neighbourhood of the road by the direct action of conduction. There would be no difficulty in holding that the legal rights of the owner of such property would be infringed by any damage thus done. But the legal right of the plaintiffs to be protected against the slightest disturbance of their delicate apparatus caused by the indirect effect of induction is by no means clear. That right becomes still more doubtful when it is borne in mind that, by laying a few miles of twin-core cable, the plaintiffs could have prevented the disturbance. It is quite true that the plaintiffs were in the field before the defendants, but when they first laid down their cable the plaintiffs could not reasonably have expected that, in the ordinary course of scientific invention and improvement, the whole area through which the cable went would always remain free from electrical disturbance. The utility of the twin-core cable seems then already to have been known, but even if it had not then been known, the plaintiffs, whose business it is to lay and use cables, might well have been expected, upon the discovery being made known to them, to lay the short and comparatively inexpensive twin core cable required to render their instruments safe against disturbance. The American case to which Kekewich, J., referred was for an injunction at the suit of a telephone company against a tramway company, which had legislative

authority to use electrical traction for its cars along its whole line, but in other respects it bore a resemblance to the present case. The opinion of the Court, after entering into an elaborate examination of the American and some English cases, concludes as follows: "The substance of all the cases we have met in our examination of this question is that where a person is making lawful use of his own property or of a public franchise in such a manner as to occasion injury to another, the question of his liability will depend upon the fact whether he has made use of the means which, in the progress of science and improvement, have been shown by experience to be the best; but he is not bound to experiment with recent inventions not generally known, or to adopt expensive devices, when it lies in the power of the person injured to make use of an effective and inexpensive method of prevention. . . . The damage incidentally done to the complainant is not such as is justly chargeable to the defendants, unless we are to hold that the Telephone Company has a monopoly of the use of the earth, and of all the earth within the city of Nashville, for its feeble current, not only as against the defendants but as against all forms of electrical energy, which, in the progress of science and invention, may hereafter require its use. . . . We place our denial of an injunction upon the grounds: (1) That the defendants are making lawful use of the franchise conferred upon them by the State, in a manner contemplated by the statute itself, and that such an Act cannot be considered a nuisance in itself. (2) That, in the exercise of such franchise, no negligence has been shown, and no wanton or unnecessary disregard of the rights of the complainant. (3) That the damages occasioned to complainant are not the direct consequence of the construction of defendants' roads, but are incidental damages resulting from their operation, and are not recoverable." For the reasons which I have already stated the plaintiffs are not entitled, in my opinion, to succeed in their action either for damages or for an interdict, and the judgment of the Court must be for the defendants, with costs.

Buchanan, J.: I cannot profitably add anything to what his lordship has just said. At the close of the arguments the only part of the case on which I had any doubt was as to the use of that portion of the Tramway Company's line which was not authorised by statute. After considering

the case fully and carefully, and in consultation with my brethren, I have come to the conclusion that the law as laid down by his lordship is quite correct, and I fully concur in giving judgment for the defendants with costs.

Laurence, J., said: This is an action for damages alleged to have been sustained by the plaintiff company in the working of their electric submarine cable by reason of the working of the defendants' electric tramways. They claim for loss of business, for the cost of certain investigations, for that of remedies which they have already tried, and others which they now propose to adopt. There is no doubt that they have sustained damage and that their signals have been disturbed. The nature and causes of the disturbance have been clearly explained by the witnesses, by Mr. Wilkinson among others, in the earlier portion of his evidence, and particularly in his answers to Question 38 and the following questions. There is also no doubt that the plaintiffs can remedy this trouble by laying a twin-core cable and earthing the second core at some distance out at sea, though there is considerable difference of opinion as to the length of this cable required in order to protect the plaintiffs from any serious disturbance in the future such as has occurred since the tramways were first worked by electricity in the latter part of 1896. The question for decision is whether the defendants are liable to compensate the plaintiffs for this damage and expense. The plaintiffs allege that the defendant companies carry on their operations under parliamentary powers; but it appeared at the trial that, as regards one small section of the line, between Woodstock and Mowbray, for a distance I think of about a mile and a half, this is not the case, and that the line has there been laid on the main road with the permission of the Divisional Council, but without statutory authority. The real question is whether the defendants in working their system, either with or without parliamentary powers, have done the plaintiffs a legal injury or actionable wrong. Several statutes have been cited, but in the material portions they closely resemble one another, and I may take the Metropolitan Tramways Act, 22 of 1895, as typical. The plaintiffs rely in their declaration on section 28 (f) and section 4 (d). They do not specially rely on section 16, which does not seem to extend the liability, though it may to some extent be of assistance in the

construction of section 4. The defendants in their plea specifically deny any damage within the meaning of these sections and generally any liability to compensate the plaintiffs. The plaintiff company, it may be observed, have not based their case on any allegation of negligence. I do not think they could have done so, merely on the ground that the defendants, after obtaining permission, as required by the Act, had utilised their rails for the return current, instead of adopting one of the other methods which might have been employed. It seems that their system—especially where there is only a single line of rails—is probably, in the present state of electrical science, on the whole the most advantageous and convenient system, and at all events one which it is quite legitimate to employ. This appears, I think, from the evidence in the present case, and is in accordance with the view expressed in the case of *National Telephone Company v. Baker* by Kekewich, J., at pp. 201-5, and with that of the Tennessee Court in the very valuable and instructive judgment in the case of *Cumberland Telephone Company v. United Electric Railway* (42 F.R., 275). Something, however, might perhaps have been said as to the conduct of the defendants in allowing a larger proportion of the electric current to escape than is sanctioned by the Government regulations, and it might have been contended that they could and should have materially reduced that percentage, and so probably the resulting disturbance, by the employment of boosters or the construction of intermediate generating stations. However the plaintiffs do not make any point of this, neither did their counsel rely in his argument on section 28, I think rightly, as on the whole it seems clear that the provision in clause (f) refers to injuries of quite a different kind, and to interference with sewers, drains, pipes, lamps, cables, or wires, of a direct or physical character, resulting from the construction, repairs, or maintenance of the tramlines. The plaintiffs, however, assert that the defendants have carried on their business in such a way as to cause a nuisance; but they rely mainly, so far as the defendants work under their Acts, on the special undertaking given in section 4, and, so far as concerns the other portion of their line, on their alleged duty at common law to prevent the electricity which they produce from injuring their neighbours, or disturbing them in the lawful exercise of their business and

enjoyment of their rights. So far as the question of nuisance is concerned, it was pointed out in the Tennessee case that "nothing authorised by competent authority can be treated as a nuisance *per se*," apart from some special feature in time, place, or manner in which the work is done, or the business carried on, and various cases, both English and American, are cited in support of that proposition. The main question seems to be with regard to the scope of section 4. As to the small portion of the defendants' system which does not come within any of the Acts, not only was this point not raised on the pleadings, but the evidence, I think, is insufficient to enable the Court to decide to what extent, if any, the electric current, escaping from this small section alone, would have caused inconvenience to the plaintiffs. All that is clear is that the extent of the entire system, and the volume of the traffic, was a very material element in the production of the disturbance of which they complain. I may here add that the *obiter dicta* of Kekewich, J., in the case cited above, based on the decision in *Rylands v. Fletcher*, really only assists the plaintiffs so far as this small section is concerned. The decision in that case was on the ground that the defendants were protected by their provisional order from liability for nuisance. Similarly, *Pollock*, in his work on Torts, in his interesting discussion of the former case, and of the tendency in more recent decisions to narrow its scope, points out that in any case there is an exception to its application in favour of persons acting in the exercise of powers specially conferred by law. He cites a case where the owners of a canal constructed under the authority of an Act of Parliament were held not bound at their peril to keep the water from escaping into a mine worked under the canal (*Pollock on Torts*, 2nd ed., 425-430; *Dunn v. Birmingham Canal Co.*, Ex. Ch.L.R., 8 Q.B. 42). I come now to the effect of the defendants' special undertaking, which appears to have been obtained primarily in the interest and on behalf of the City Council, to make good the damage "in the event of any electric leak taking place, and any damage being thereby caused at any time by electrolysis or otherwise." The plaintiffs contend that this is a case of an electric leak, causing them damage, not by electrolysis, but "otherwise" within the meaning of the section. Now, it is clear that this discharge from the rails as a conductor into the earth as another con-

ductor, and thence into the sea, might in a popular and general sense be described as "leakage." But I feel great doubt as to whether it can be held to fall within the description of "an electric leak." The use of the concrete word "a leak" seems to me much stronger. A leak, so to speak, is a thing, while leakage is a process. Moreover, the section says "in the event of an electric leak taking place." The use of the phrase "in the event" seems to imply that the thing may or may not take place: perhaps one might even go so far as to say that it implies that in the normal course it would not take place. But the use of the rails for the return current, with the consent of the Council, was expressly contemplated by the same section; the use of uninsulated rails for that purpose necessarily involves the escape of some portion of the current, and the phrase "in the event" seems therefore scarcely applicable to such a state of things. It means not a regular process, but an accidental and exceptional occurrence, which might be traced to its source, in the manner and by the tests provided, and then remedied in due course. Even, however, if I am wrong on this point, and have construed too narrowly the meaning of "an electric leak," I am further of opinion that the words "or otherwise" read in connection with the context, ought not to be construed as covering damage, not of a physical or tangible nature, not caused to any structure or material, not resulting from any lesion, corrosion, or fusion, and having no analogy or relation to the damage caused by electrolysis. It is contended that electrolysis is a thing *sui generis*, and that therefore, in order to give any effect to the words "or otherwise," they ought to have assigned to them the widest possible meaning. In that case the insertion of the four words "by electrolysis or otherwise" must be regarded as entirely superfluous, and the intention of the Legislature would have been equally well, and much more clearly, conveyed had they been entirely omitted. I think there is evidence that damage of a nature more or less analogous to electrolysis might reasonably have been apprehended when the Act was passed, and that the words "or otherwise" might therefore well have been inserted *ex abundanti cautela*. The damage in this case appears to me to be of a wholly different nature, too remote, and, if I may so put it, too impalpable in its character to be covered by these words. There is not much use, with regard to the principle of

construction of general words following particular words, in referring to the details of previously decided cases, as each case depends so much on its own details. I quite accept the general principle laid down in the recent case of *Anderson v. Anderson* (1 Q.B.D., 1895, 749), cited by counsel, in accordance with which in that case—as in the still more recent case of *Richmond Hill S.S. Company v. Trinity House* (1 Q.B.D., 1896, 493)—a wide meaning, including live-stock, was given to the words "other goods" in the construction of a deed and of an Act of Parliament respectively. As Lord Esher put it, "general words are to be taken in their larger sense, unless you can find that in the particular case the true construction of the instrument requires you to conclude that they are intended to be used in a sense limited to things *ejusdem generis* with those which have been specifically mentioned before." It may perhaps be suggested that the wider the general words the more probable it is that such construction will have to be applied. These very words "or otherwise" had, it is true, a very wide meaning given them in the construction of a section of the Patents Act in the case of *Skinner v. Shaw* (1 Ch., 1892, 413), but that was on a consideration of the whole section, and of the state of the existing law, and therefore on grounds that do not appear to assist the plaintiffs in the present case. There have also been various cases on the construction of the *prima facie* comprehensive words, "or other person whatsoever" in the Sunday Trading Act of Charles II., and the most recent decision I notice, pronounced a few weeks ago by a Divisional Court, is that these words do not include a barber, whose occupation, it may be observed, was similarly held not to be "trading" within the meaning of Ordinance 1 of 1838 by a decision of the High Court pronounced in 1889 in accordance, as it happened, with the contention of the present Attorney-General, who was then counsel for the appellant (*Marks v. The Queen*, 5 H.O., 363). Holding as I do, on these grounds, that there is no special provision in the Statute enabling the plaintiffs to recover, and that in the absence of such provision the defendants are protected in the legitimate exercise of their business by their parliamentary powers, there only remains the question as to the portion of the line between Woodstock and Mowbray, as to which I have already observed that there is not sufficient to show that, taken by itself, it

would cause the plaintiffs any material damage. Moreover, even with regard to this, in the absence of negligence the defendants could be held responsible only on a very rigid application of the reasons given in the House of Lords for their decision in *Rylands v. Fletcher*. On that case Sir F. Pollock observes, *loci citato*, that "no case has been found, not being closely similar in its facts, or within some previously recognised category, in which the unqualified rule of liability without proof of negligence has been enforced." No such rule appears ever to have been adopted in either the Scotch or the American Courts, and I can find nothing to show that it is in accordance with the principles of our system of jurisprudence to hold that a person exercising a lawful calling, in a lawful way, even when it involves the control of elements or the use of methods potentially hazardous, is liable for any resulting damage if he is able to show that he took all due precautions, and that the damage occurred without any negligence, or *culpa*, on his part. Many of the cases were examined, and the proper application of the general principle, *sic utere tuo ut alienum non laedas*, considered in the High Court case of *Reed v. De Beers Co.* (6 H.C. 179, 9 S.C. 369), in which the judgment was confirmed on appeal by the Supreme Court. It was there held that as there was no proof of any wrongful act committed by the defendants, to the prejudice of the plaintiff, or of any omission of a legal duty which they owed to the plaintiff, the case was one of *damnum sine injuria*. In the present case I think on similar grounds we must arrive at a similar conclusion. I wish to add only a very few words on the question of damages, as we were informed that whatever our decision the case would probably go further. There was a great deal of evidence on this part of the case, but it was not fully argued at the Bar. I take it however that the general principle in a case like the present is that the plaintiff should take all reasonable steps to minimise the damages which he seeks to recover from the defendant. Now I am satisfied from the evidence and from a passage in Mr. Trotter's paper (at pp. 508-509) that in the state of electrical science in 1896, when this question arose, the plaintiffs ought to have been able to find and to apply within a reasonable time an effective and certain remedy for these disturbances by laying a twin-core cable as described. I am inclined to think that a length of five miles would have been ample

to secure them against any appreciable disturbance; and even had it subsequently proved insufficient, I suppose it could afterwards have been lengthened or a longer one substituted at the expense, if they were liable, of the defendants. I may also point out that if this had been done between August, 1896, and the middle of 1897, there would only have been an aggregate period of about three weeks during which the Eastern line was interrupted, and the amount of interim damage or inconvenience which the plaintiffs would have sustained would, therefore, apparently have been very small.

Judgment was entered for the defendant company, with costs.

[Applicant's Attorneys, Messrs. Van Zyl & Buissinne; Defendant's Attorneys, Messrs Scanlen & Syfret.]

ISAACS AND ANOTHER V. ESTATE OF MILLS AND ANOTHER. { 1900.
Feb. 19th.

On the application of Mr. Innes, Q.C., the Court granted an order for the taking on commission of the evidence of Mr. David Isaacs, who had to leave for England by the next mail steamer.

Sir Henry Juta, Q.C., for the defendants, consented.

The order was granted.

Mr. Howel Jones being appointed commissioner.

COLONIAL GOVERNMENT V. WINTERBACH.

Mr. Moltano applied for a postponement of this suit, as defendant found it impossible to secure the attendance of material witnesses from Hanover and Swellendam by the 22nd instant, the day appointed for hearing.

Mr. Sheil, Q.C., for the Government, objected.

The Chief Justice said it was absolutely out of the question that the case could come on this term, looking at the state of the paper, and ordered it to stand over to next term.

SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G.) the Hon. Mr. Justice BUCHANAN, and the Hon. Mr. Justice LAURENCE (Judge-President of the High Court of Griqualand West).]

WEGNER V. TWINE } 1900.
} Feb. 20th.

This was an action for the recovery of money overpaid.

Mr. Benjamin, for the plaintiff, asked for judgment for £103 16s. in default of plea by the defendant. Appearance had been entered, but there was no plea. Leave was also asked to amend the summons, which was for £92 17s., whereas it should have been for the amount claimed in the declaration.

Leave was given to amend the summons as asked, and judgment was given for £103 16s. with costs as prayed.

DUNN V. FOWLER.

Partnership—Brokerage—Costs.

This was an action for money due, being a part of the brokerage or bonuses received by the defendant in respect of certain brokerage transactions in which the plaintiff and defendant were partners.

The declaration, stated that both parties reside in Cape Town, and on November 21, 1898, a written agreement was entered into between them for the purpose of the division of the brokerage or bonuses on the sale of hotels, bars, or canteens in Cape Colony during a period of six months. This agreement provided that there should be an equal division of any brokerage or bonuses made through the sale of hotels, bars, or canteens, whether made through the agency of one of the parties or through their joint action, after all expenses for advertising, &c., had been deducted. The declaration went on to allege that afterwards a further agreement was entered into verbally, by which the brokerage arising out of the sale of any property through the agency of either or both of the parties should also be equally divided. It was alleged that under this agreement, which by mutual consent remained in force until June 1, 1899, certain business was done and plaintiff had been paid £360 by the defendant, being a half-share of

the brokerage received under what was specifically plaintiff's branch of the business, viz., the sale of hotels, canteens, and bars. Accounts were annexed showing £100 1s. 8d, still due under the contract on which the plaintiff were now claiming. The defendant's plea admitted the written agreement, but denied specifically that any verbal agreement was entered into. With regard to the amount due under the written agreement, it was alleged that a final settlement was made on June 12, and the document signed by the plaintiff. In this settlement there were certain four items of about equal amounts due, and plaintiff agreed to accept two of these, while defendant agreed to accept the other two. These items had reference to brokerage or bonuses due on certain transactions with Messrs. Young, Woods, Spilhaus, and Sedgwick, the defendant taking the first two, and plaintiff the two last named.

Mr. McGregor appeared for the plaintiff.

Mr. Searle, Q.C. (with whom was Mr. Graham, Q.C.), appeared for the defendant.

John Dunn, the plaintiff, said he was at present a broker carrying on business in Cape Town. Previous to November 21, 1898, he had represented five firms in the liquor trade. Defendant approached witness on the subject of his coming into business with him, and on November 21 the agreement mentioned was signed, and they set up in business as brokers, the business being carried on in defendant's name. Previous to that witness had had something to do with sales of properties, and was in touch with the liquor trade. Defendant represented to witness that he had a number of good things on hand to put through, but witness discovered afterwards that instead of that he had not passed a broker's note in 1898. It was understood that as witness was the outside man he should attend to sales of hotels, while defendant was to attend to office work and other sales. After they had carried on business for some time a difficulty arose, and witness signed a written agreement. At that time there was opposition between two breweries, and as hotels were being bought up defendant asked witness to give him some security that in case he (witness) put through a sale the brokerage would be divided between them. Then defendant had the sale of Haylett's bakery business, and got paid for that. There was no bar or canteen connected with that property. Defendant then said he would not pay witness any of the brokerage on Haylett's property, saying it

was his branch of the business. Witness said that if that was so he would do no further business, and he left the office for a week. While he was away defendant sent witness's son to him, asking him to come back. The message was to the effect that it would be all right; would he come back? Witness said, certainly not, unless defendant complied with the verbal agreement as to the sale of all properties. Afterwards, defendant approached witness, and after discussion agreed to pay him the half of the brokerage on Haylett's bakery, and also that they should share everything in terms of their verbal agreement. That was clear. Witness went to the office next morning, and continued to do business. He had done good business; and had made £720 against defendant's £200. The business was in defendant's name, and all moneys were paid to him, and he paid witness his share. The verbal agreement was for no set period. Witness had refused to accept any document in writing purporting to be a full and final settlement.

A. T. Hennessy gave evidence as to one of the transactions, that in connection with Hutt's cottages. The sale was put through partly by witness's firm and partly by defendant's firm. There was £50 brokerage, and defendant said he was willing to forego some of the £25 (his firm's share) if his partner (Mr. Dunn) would consent. Ultimately Mr. Dunn consented, and witness sent over to them a cheque for £25, on the understanding that they would refund £5 to Mr. Hutt.

Thomas Dunn, the plaintiff's son, said he knew a good deal about the partnership business between his father and defendant. About April, 1898, there was an interruption over the brokerage on Haylett's business. Defendant said to witness's father that he would not pay him any of the commission on Haylett's property. Witness's father left and was away for some time. Afterwards defendant said to witness that he could not very well do without Mr. Dunn's assistance, and it was arranged that witness should see him. His father told witness that he would not go back unless he received the half of all the brokerage, &c., and witness repeated that message to defendant. Afterwards defendant told witness that he had seen Mr. Dunn and had arranged matters with him, and was to give him half of the brokerage on Haylett's property. Witness was present when his father was introduced to Hennessy by defendant as his partner. Defendant at

that time said he could not settle the business (in connection with the sale of Hutt's cottages) until he had consulted his partner.

This closed the case for the plaintiff.

For the defence,

Alfred Samuel Fowler, the defendant, said he had been a broker since January, 1898. During that year he had put through some sales. Plaintiff spoke to witness in the street with regard to sales of hotels, and ultimately the agreement of November 21, 1898, was entered into. There was no other agreement whatever, except a projected deed of partnership drawn up about the end of May, 1899, or the beginning of June. Witness gave plaintiff a share in the brokerage of Haylett's bakery, because he had had a lot of trouble trying to arrange for the financing of the purchaser. There was no dispute between them about that brokerage. Plaintiff's story was incorrect. With regard to the Stellenbosch farm, the negotiations in connection with that were begun long before the partnership, and plaintiff had never had anything to do with it. With regard to the cottages, plaintiff had had nothing to do with the sale of these. Witness introduced plaintiff to Hennessy as his partner because the draft deed of partnership had been drawn up, and he practically looked upon him as his partner then. By that time the six months' agreement had expired. Plaintiff had made a claim for £10 in connection with Hutt's cottages, which witness had repudiated. Until October no claim was made in connection with the sales of the farm or Meyer's cottages. Witness instanced several cases of sales of hotels, which he said had been put through solely by himself, and with which plaintiff had had nothing to do.

Cross-examined: Witness did not do as good a business in 1898 as in 1899. He had passed about a dozen broker's notes in 1898 before Mr. Dunn joined him. He could not say whether or not he still had the counterfoils. In some instances witness had given the counterfoils to the lawyers. Witness had very little capital in 1898. Mr. Dunn had in one or two instances assisted him by getting matters held over. Witness was not over anxious to retain Dunn as a partner in June, 1899.

Vincent Arthur Hutt deposed that he lived in Cape Town, and was the owner of some of the cottages mentioned. He and his brother-in-law jointly owned the cottages in De Korte-street. Witness had seen the

agreement entered into between Fowler and Dunn. Witness put his property into the hands of Fowler after he had seen the agreement. Witness had nothing to do with Dunn in the matter. With regard to the document of June 12 as to a settlement, Dunn had shown it to witness and said that a settlement had been made. Witness understood at the time of the sale of his property that Dunn was to get half of the £20 paid to Fowler, as there was to be a partnership between them. Some months after that witness again saw Dunn, and the latter told him he was going to law for that £10, and he had been advised that he might as well go in for the whole lot. Witness thought he had got the £10.

Cross-examined: It could not have been much later than the end of October when he met Dunn and the latter said he was going to law. He could not fix the date. Witness's knowledge of their business was limited to what Mr. Fowler told him. Mr. Dunn had told witness over and over again that he did not think it fair that he should pay the advertisements, because he got only a share of the public-house business. That was at the time Dunn and Fowler were together. Witness was not interested in any scheme with Fowler. Witness had some months ago got out some plans from London for a new music-hall, and Mr. Fowler was associated with that. Witness did not think he was still associated with that scheme; at any rate he was sure it would come to nothing.

Re-examined: Witness had no interest in this case.

By Mr. Justice Laurence: Witness had never known Dunn to stop away from his office because he was unsteady in his habits.

This concluded the evidence in the case.

After argument by counsel on the facts,

De Villiers, C.J., said: In this case there was a written agreement between the parties, in which there is no ambiguity. The terms were perfectly clear that a partnership was entered into for the purpose of the division of brokerage and bonuses on the sale of hotels, bars, and canteens in Cape Colony, and then it is repeated that there shall be an equal division of any brokerage or bonus on the sale of hotels, bars, and canteens, whether resulting through the agency of both or either of the parties. The plaintiff, however, now says that there was a kind of verbal agreement made between them, and that under this agreement the

division of brokerage was also extended to other property. Now, it is quite clear that such evidence cannot be admitted for the purpose of invalidating this written agreement. Then, however, it is said that afterwards it was clearly understood that this agreement was to be invalidated when the dispute had arisen as to the brokerage payable for the sale of Haylett's bakery; that the plaintiff threatened to withdraw from the agreement; that he was induced by the defendant to return; and that then it was understood that for the future brokerage for the sale of all kinds of property should be divided. Now, in my opinion, that subsequent agreement has not been proved; on the contrary, I think the weight of the evidence is entirely against the existence of such an agreement. The defendant in his account says that there was a kind of agreement entered into between them to the effect that the commission on the sale of Mrs. Crum's property should be divided, and that as to other four items plaintiff should recover two items from Sedgwick and Spilhaus, and that on the other hand defendant should retain the amounts received as commission on the other two. The evidence of the defendant on this point is corroborated by the evidence of Hutt, and upon the whole I have come to the conclusion that the defendant's evidence upon this point must be accepted, and that his account ought to be accepted to that extent. The only item now remaining is the item of £10, with regard to which there is evidence that there was a special arrangement between the parties that the commission for the sale of Hutt's cottages was to be divided. Upon this point I attach considerable weight to the evidence of Mr. Hennessy. He gave his evidence very clearly, and he stated that in regard to this transaction, at all events, the defendant admitted that there was a partnership, and that the plaintiff was to share in the brokerage. Mr. Searle's contention was that this was done because at that time the parties contemplated entering into a partnership, that a written instrument had already been written, and that it only awaited the signature of the parties, and that inasmuch as that partnership never was really entered into this division of profits should not be made. In my opinion this argument can hardly hold good. I am satisfied that although the former arrangement had lapsed on May 21, yet if the plaintiff had in the interval sold

any property whatever, the defendant would have claimed his share of the brokerage. I am satisfied also that the parties would not, in the presence of Hutt and in the presence of Hennessy, have spoken of a partnership as existing between them as regards this transaction unless they clearly understood that in that interval between the lapsing of the agreement and the entering into partnership all profits on brokerage should be divided. It is only fair therefore, in regard to the £20 that had been received by the defendant for the brokerage on the sale of Hutt's cottages, that the plaintiff should share. The plaintiff himself at first seemed to have confined his claim to that amount of £10, and threatened an action in the Magistrate's Court; but when he received a letter repudiating his claim, then it struck him that he might as well sue in the Supreme Court for a share of all the brokerage. The case is certainly a most trumpery one, and I must express my regret that the Court should have to hear cases of such a trumpery nature as the present one and some others that have come before us this term. It seems to me almost impossible that the time of the Supreme Court for a whole day should be occupied in deciding this petty question as to whether the plaintiff is entitled to £10 or not, and I am of opinion that he is not entitled to costs of this Court, and that in giving judgment for this £10 he should have judgment only for Magistrate's Court costs.

Buchanan, J., concurred.

Laurence, J., said he concurred as to what had been said as to plaintiff not being entitled to Supreme Court costs. The only possible question was as to the half-share of the commission from Woods and Young. These amounts had been received, and the only ground for holding that plaintiff should not receive half would be, if the defendant had succeeded in proving it, that there was a special agreement with regard to four items. Clearly the burden of the proof was on the defendant as to whether there was this special agreement. After dealing with the evidence on this point, his lordship said that he must say that he had considerable hesitation as to whether the defendant had discharged the burden of proof as regards that agreement. But then if the plaintiff was entitled to these two items, clearly he would have to bring into account half of the £5 he had received from Spilhaus, and also the amount that would be received from

Sedgwick. Then that would bring the matter within the jurisdiction of the Magistrate's Court, and he concurred in holding that a case of that kind should not be brought before the Supreme Court. At any rate the small items he had mentioned would not affect his views as to costs.

[Plaintiff's Attorneys, Messrs. Fairbridge, Arden & Lawton; Defendant's Attorney, D. Tennant, jun.]

SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), the Hon. Mr. Justice BUCHANAN, and the Hon. Mr. Justice LAURENCE (Judge-President of the High Court of Griqualand West).]

REVIEW. { 1900.
Feb. 21st

Mr. Justice Laurence said that a case had come before him for review from the Resident Magistrate of Bredasdorp in which a prisoner was charged with the theft of a pair of boots and a bottle of Cape brandy. The Magistrate tried the case under his ordinary jurisdiction, and sentenced the prisoner to six months' imprisonment, with hard labour. The maximum sentence that the Magistrate could impose for theft under his ordinary jurisdiction was three months' imprisonment, with hard labour. In this case there were two previous convictions, and if the Magistrate thought fit he could have imposed corporal punishment. As he had not done that, the sentence must be reduced from six months to three months.

VAN NIEKERK V. VAN NOORDEN. { 1900.
Feb. 21st.
" 22nd.

Power of attorney—*Procurator in rem suam*—Conveyancer.

In consideration of advances made by the defendant, the plaintiffs gave him a power of attorney to transfer certain property, and receive the proceeds of the sales of such property. The power

purported to be irrevocable, and in rem suam until transfer was effected in favour of the purchasers, and the price paid by them, with power of substitution.

Held, that until the advances were duly paid, the defendant was entitled to appoint the conveyancer for effecting the necessary transfers, and that his refusal to appoint the conveyancer proposed by the plaintiffs was not a breach of contract entitling them, without first tendering the amounts due, to claim that all the documents of title be returned to them.

This was an action for an account and for damages.

The declaration set out that the plaintiffs were farmers in the district of the Cape, and in May, 1898, they sold certain portions of their farms in lots, there being a bond over the farm of £35,0 0, and the mortgagees had consented to the transfer of these lots, provided that £1,000 was paid off the bond. Six hundred pounds was paid off the bond, but owing to the money for the purchase price not coming in rapidly enough the plaintiffs were compelled to seek some assistance, and they therefore entered into an agreement with the defendant that he should advance them £200, that he should receive a cession of the various purchase amounts of these lots that were sold, that the £400 of the bond was to be paid off, and that the defendant should also pay £197 odd which was due to the auctioneers, who had sold this property in lots. It was further agreed that as there were certain other lots to be sold, the defendant should be the auctioneer and should have the selling of these lots, and he agreed that upon the sale of these lots, he being employed, he would discount the conditions of sale—that was that he would advance the amount which these lots would realise, less discount. The second sales were held, and it was agreed that the conveyancer's fees and the surveyor's fees should all be made payable at the offices of the defendant. The declaration went on to state that the defendant, though he held the sale, did not discount the conditions of sale, and did not pay the amounts he agreed to pay to Messrs. Lindenberg & De Villiers, the auctioneers, and in

consequence of that the plaintiffs were sued by the holders of the bond, and they were sued by the auctioneers for the money. In consequence of that they sustained loss, and were compelled to enter into a further agreement with the defendant. That agreement practically amounted to this: There was to be a cession to him of all the moneys coming from the lots that had been sold by Messrs. Lindenberg & De Villiers; he was to get the cession of all the lots he had sold, and a cession of a thousand paid-up shares in a certain mineral company, and he was to raise a sum of £3,000 in order to pay off the bond or take it over himself. He was to pay himself the indebtedness due to him (£200); he was to reduce the bond to £2,700, and he was to pay certain other debts on account of the plaintiffs. The declaration went on to say that the plaintiffs granted a power of attorney to their attorney and conveyancer, Mr. Du Preez, to pass transfer of the bond. The defendant took cession of the bond to himself without the knowledge of the plaintiffs, and at the request of the defendant the plaintiffs signed blank powers of attorney for the purpose of the defendant filling up all the particulars, so that transfer might be passed to the purchasers by the conveyancer. The defendant had from time to time received moneys from the various purchasers of these lots, including the surveyor's and conveyancer's fees, but he refused to render any account of what moneys he had received; and would not hand up any of the documents necessary to pass transfer of these lots. In addition to that he induced the plaintiffs to pass a blank power of attorney which was for the purpose of passing a bond to him of £3, 00. The plaintiffs now asked for a full account of the transactions, a debate of the account, and they tendered to pay the defendant whatever might be found to be due. They wanted the defendant to deliver up all the documents in connection with these sales in order that they might pass transfer, and they claimed £300 damages by reason of the defendant's breach of contract.

The defendant, in his plea, admitted the first agreement. He said that the reason why he did not pay the amount to Lindenberg & De Villiers was that it was conditional on the papers being in order, and that the papers were not in order, and transfer could not be passed. He said that subsequently an agreement was made,

which was embodied in a power of attorney. He said that he had rendered an account showing what had been done, and upon that account there was a sum due to him of £469. The plaintiffs prohibited him from using the blank powers of attorney, and prevented him from getting in the moneys, and defendant admitted that he refused to hand over the documents which he had in his possession. He claimed in reconvention the £469 due to him, the amount of the bond £2,900, and £300 damages.

Mr. Searle Q.C. (with him Mr. Upington), for the plaintiffs.

Mr. Innes, Q.C. (with him Mr. McGregor), for the defendant.

Marthinus van Niekerk, one of the plaintiffs said he was one of the owners of the farm Sandgat, a portion of which was sold in lots by Mr. Van Noorden. There had been a previous sale by Messrs. Lindenberg & De Villiers, the instalments on which were due in May, 1899. In the sale held by Mr. Van Noorden all the instalments were due in March this year. When they gave the sale to Mr. Van Noorden there was an agreement that he should discount the conditions of sale. He had not done so, and had given no particular reason for not doing so. He was to get 2½ per cent. for discounting the conditions of sale. Witness had given a promissory note for £200, receiving from him £175. Witness had also signed a promissory note for £225 for the purpose of paying Lindenberg & De Villiers, who had been paid £195. Witness knew his brother paid £10 to Van Noorden when they signed the note. Witness thought that was for costs. Witness had not seen the vendue roll, and did not know what prices the land realised. Witness was willing, if the account was debated, to pay off all that was owing to Van Noorden. With regard to the bond for £2,900, witness would not have ceded these amounts coming from sales to Mr. Van Noorden if he had had to pay up the bond at once. Witness did not know how much money he had to come from these purchase amounts. He had had to borrow money elsewhere owing to his not being able to get the money from Mr. Van Noorden.

The Chief Justice asked what the balance between the £175 the plaintiff received and the promissory note for £200 they gave was for.

Mr. Innes said that was Mr. Van Noorden's commission for just over three months.

Cross-examined: At the time they could not give transfer owing to the title deeds being lost. After notice of intention to apply for fresh title deeds had been given, the title deeds were found at Messrs. Tredgold, McIntyre & Bisset's. Witness did not know how they got there.

Mr. Innes said they were held there in connection with a certain mineral water company.

Cross-examination continued: Witness always understood, notwithstanding the power of attorney, that Mr. Van Noorden was to collect the purchase amounts, but Mr. Du Preez was to act as conveyancer. Witness had passed a second bond to Mrs. Du Preez for £1,800. That was a covering bond. It gave the mortgagees the right to collect certain of the purchase amount.

Re-examined: It was intended to pay what was due to Van Noorden with the money obtained from the bond, and then they would have the right to cede these purchase amounts.

Hercules du Preez, plaintiff's attorney throughout the sales and subsequent proceeding, deposed as to the first agreement. He told witness with regard to the second sale that he would discount the conditions. In return for that he was to get 2½ per cent. He did not discount the sales, although payment was due before it was mooted that he would not pay owing to the title deed being missing. It would have taken fourteen days to get a new title deed. On the day of the sale it was arranged that the surveyor's and conveyancer's fees could be paid at Van Noorden's office at the same time as the purchase amount, but that was just to suit the convenience of purchasers. It was intended that witness should pass transfer, defendant, of course, receiving the purchase money; witness, of course, being merely conveyancer. Witness first heard on July 1 about defendant wanting to appoint his own conveyancer, when defendant said he would have nothing further to do with witness owing to his having furnished him with an incorrect statement as to the remaining extent of the farm. The statement mentioned was incorrect, but witness had given it as he received it from the surveyor's office. With regard to the bond for £1,800, witness said it was intended to release plaintiffs from their indebtedness to defendant, and then the documents, &c., could be released from the hands of defendant, and witness could collect the purchase amounts on behalf of his wife.

Cross-examined : Defendant had never taken up the position from the first that he would not work with witness as conveyancer. Witness had an arrangement with defendant whereby he was to receive half of the latter's commission of 2½ per cent., and they were to share the conveyancer's fees.

Re-examined : The plaintiffs had full knowledge of that arrangement.

Jacob van Renen van Niekerk, another of the plaintiffs, generally corroborated the evidence of Marthinus van Niekerk.

This closed the case for the plaintiff.

For the defence,

Emile Henry van Noorden, the defendant, said that the plaintiffs first approached him in January, 1898, and he advanced them £200. They gave him a promissory note for £200 and he gave them £175. The £25 was as commission. They also agreed to place the sale of certain lots of ground in his hands, and they were sold by the firm trading in witness's name, whose business was now carried on by witness's son and son-in-law. Nothing was then said about paying Lindenberg & De Villiers' account, but witness arranged to do so later on. Proceeding, witness gave evidence in support of his plea. Before the sale was arranged it was agreed that all the surveyor's and conveyancer's fees should be paid to witness. Du Preez and one of the Van Niekerks had been supplied with a list of the first buyers by Mr. Holmes. Witness had given instructions that the list of the buyers at the second and third sales should not be given to Du Preez or the plaintiffs, as it had come to his knowledge that certain of the purchasers had paid the purchase-money to Du Preez. Witness first raised the question about having his own conveyancer before the power of June 21 was signed. He told Du Preez when he took that that he (Du Preez) had nothing further to do with the matter. He made it clear to Du Preez that he wanted to have nothing further to do with him. Witness then gave evidence in detail as to his attempts to raise the mortgage according to the agreement, ending in his taking over the mortgage himself.

Frederick Charles Holmes, son-in-law of the defendant, gave evidence as to the sales of the land by his firm. After the first sale witness had given Mr. Du Preez a list of the buyers, but did not do so with regard to subsequent sales, in consequence of instructions he had received from the defendant.

Theodore W. Bell said that last year he was in the office of Mr. Marsais, surveyor, when Mr. Du Preez came to him to ascertain the remaining extent of the plaintiff's farm. Witness gave him that, but the same day found out that he had made a mistake in his calculation and given too much as remaining. He wrote a letter giving the correct figures, and took it himself to Mr. Du Preez's office. Mr. Du Preez was not in, and witness gave the letter to the office boy.

R. A. McIntyre said that the title deeds, which were supposed to be lost, had been in the possession of his firm at the time in connection with the embodiment thereon of a ceded servitude as to water, &c., on behalf of the South African Mineral Water Company. After the advertisement concerning the missing deeds had appeared, they were given to Mr. Du Preez.

This concluded the evidence.

Sir H. Juta, for the plaintiffs, was heard on the facts.

Postea (February 22nd).

De Villiers, C.J. : The only point on which the Court wishes to hear Mr. Innes is with regard to the £150 claimed by defendant in his claim in reconvention for commission in connection with the raising and guaranteeing the loan. Is he prepared to allow that to be reduced to £75? As to the £75, if the defendant called up the bond as he seems to have done, will it be fair that he should have any part of that guarantee commission?

Mr. Innes said he was quite prepared to support the guarantee commission, but his client in view of what the Court had said would not press that point.

After hearing Sir Henry Juta in reply,

De Villiers, C.J., said : The plaintiffs are the owners of the farm Glen Lily, on which there was a bond of £3,500 in favour of the General Estate and Orphan Chamber. It appeared that in May, 1898, the plaintiffs had a portion of the land subdivided and sold in lots by the auctioneers, Messrs. Lindenberg & De Villiers. When the interest became due in 1899 the plaintiffs appear to have been in considerable difficulties. They were sued by the mortgagors for the interest due, and they applied to the defendant for assistance. A verbal agreement was first entered into as to the terms upon which that assistance would be given, but for some reason or other the verbal arrangement fell to the ground, and a written instrument was executed, by which certain powers were given to the defendant. Before, however, that instrument

was executed it would appear that the defendant was dissatisfied with the action of Mr. Du Preez, who was the attorney acting for the plaintiffs, and a letter was written by the defendant on June 7, 1899, in which he stated that it had come to his notice that Du Preez had received some of the purchase money and had informed several of the purchasers that money owing in connection with the sale of the lots, and even the auctioneer's fees should be paid to him, although the defendant had agreed to advance money upon the purchase price of that land. He naturally objected to this action of Mr. Du Preez, and accordingly an arrangement was made under which a very stringent power of attorney was given to the defendant, and under which very large powers were given to him. By that power the plaintiffs appointed the defendant specially, irrevocably, and *in rem suam*, until transfer was effected in favour of the purchasers of the land sold by them and the purchase price paid, with power of substitution, to be their lawful attorney and agent in their name, place, and stead, to appear whenever and wherever necessary, and to pass in due and customary form all transfers and deeds of conveyance to the several purchasers, and to make and sign all necessary declarations, powers, and other documents, and so on. I shall refer to the remaining portion of the power presently, but to show what construction the plaintiffs placed upon the power, I need only quote a portion of the letter to defendant by plaintiffs' attorney, and confirmed by the plaintiffs themselves, as follows: "Dear Sir,—With reference to the above (the power of attorney to Van Noorden), I beg to state that it was distinctly understood that the general power granted to me shall in no way affect the powers granted by my principals to you, it being also understood that by virtue of the powers granted to you you shall have the right to summons all purchasers who may fail to pay the purchase price of the ground sold to them by Messrs. Van Niekerk." This is signed by Du Preez and confirmed by the Van Niekerks. It appears to me an important point on the case that this power was given for the protection of the defendant. He incurred considerable risk in assisting the plaintiffs, and in consideration of that risk he stipulated for the powers of a *procurator in rem suam*, so that he might protect himself until the debt owing to him was repaid, and it

was for that purpose that an irrevocable power was given. It is not necessary now to state any authorities as to the meaning of those terms in the power of attorney. They mean no more and no less than this. Unless coupled with an interest the power of attorney would be irrevocable at any time; coupled with such an interest the power was not only irrevocable, but it entitled the defendant to treat the transaction as his transaction. The person under the power shall be entitled to treat the transaction as his own transaction, he shall be the dominating power, and anything requiring to be done in the matter shall be by his direction, and if any conveyancer is to be appointed he would naturally enough be doing his duty by consulting the plaintiffs, whose land was in question, but the defendant was not bound to accept a conveyancer appointed by the plaintiffs, but had himself a right to appoint such. It appears, however, that the plaintiffs insisted upon Mr. Du Preez being appointed conveyancer, and this really is the origin of the whole matter. I am satisfied there would have been no action at all but for this dispute as to who was to be the person appointed for the purpose of passing transfer of the lots which had been sold. That being my view on this part of the case I think that the defendant was quite justified in refusing to accept Mr. Du Preez as conveyancer if he himself thought that his own interests would not be served by the appointment of Mr. Du Preez. Accordingly it is impossible to hold that that refusal to appoint Du Preez constituted a breach on the part of the defendant of this contract. Other questions have been raised in this case as to the accounts, but the items which have been objected to are very few. The main item is that of £150, which is charged by the defendant as commission of 5 per cent. on the sum of £3,000 under sub-section (b) of the power of attorney. I think there is some doubt as to whether anything more than the guarantee commission could be charged, and as Mr. Innes, on behalf of his client, has consented to reduce this claim to 2½ per cent., I will say no more about it. As regards that 2½ per cent., there does not appear to me to have been sufficient consideration for the plaintiffs, but the risk incurred by the defendant on his part and the benefit to the plaintiffs cannot be lost sight of. The plaintiffs had been pressed by the mortgagees for the

payment of their claim. and by means of this assistance given, a sale in execution was prevented. The consideration may not have been much, and the Court may not approve of the terms—the hard terms—exactd by the defendant from the plaintiffs, but he has got the law on his side, and has fortified himself by this power of attorney, and so long as he is within his legal rights, the Court is bound to give judgment in accordance with the legal rights established in his favour. The commission, therefore, of £ 50 will be reduced to £ 75 in accordance with consent. The only other item is £ 7 7s., which I understand the defendant consents shall be deducted. Then there is the claim in reconvention, or rather two claims—the one for £ 176 18s. 4d., and the other for the amount of the bond. This first claim in reconvention consists mainly of two promissory notes—one for £ 200, and the other for £ 225. Some attempt was made to show that these notes were not due, and no doubt a very heavy interest was charged by the defendant on these promissory notes, but beyond that there is no allegation that in any other way the promissory notes could be objected to. There would therefore be due by the plaintiffs £ 176 18s. 4d., less the sums of £ 75, £ 7 7s. 6d., and the sums amounting to £ 49 10s. since received as part of the purchase prices for the lots. The balance will therefore be £ 345 0s. 10d. with regard to the first claim. Then the defendant further claims payment of this bond. Well, in my opinion he is entitled to that now. He has given legal notice, and even if that notice had not been given, seeing that the plaintiffs had insisted upon acting contrary to his power of attorney, the defendant would have been justified in saying now that the bond should be paid, but the Court is of opinion that it would be extremely inadvisable that there should be execution at once upon the bond. We are of opinion that execution should be stayed until 21st June next, just twelve months from the date of the granting of the power of attorney, and meanwhile the defendant will be entitled to act under his power of attorney. There has been a great deal of argument as to whether this power is revocable or not, but my idea is that it is revocable to this extent, that the plaintiffs could at any time by paying the whole amount of the debt due to defendant claim that the power given should be revoked, but so long as the debt remains it is really irrevocable. I am

R

of opinion, therefore, that until the amount of the bond is paid the defendant will be entitled to proceed under his power of attorney to protect his interests. Costs must be paid by the plaintiffs.

Buchanan, J. and Laurence, J., concurred.

Sir Henry Juta asked that the stay of execution apply to the costs also, as it would be hard on the plaintiffs to have to pay them now, seeing that defendant was to continue receiving all their moneys.

After hearing Mr. Innes on this point,

The Court made an order as follows: Judgment for the defendant on the claim in convention; judgment for the defendant on his first claim in reconvention for £ 345 0s. 10d., and also on his second claim for £ 2,900 due on the bond, with interest; plaintiffs to pay costs; execution on judgment and costs to be stayed until June 21.

The Chief Justice, in making that order, said that the Court was of opinion, seeing that the defendant was well protected and that it might be a great hardship for the plaintiffs to pay the costs now, that it would be better to have a stay of execution on judgment and costs until June 21.

[Plaintiffs' Attorney, H. P du Preez; Defendant's Attorneys, Messrs. Fairbridge, Arderne & Lawton.]

ADMISSION. } 1900.
} Feb. 22nd.

Robert Reid Dower was admitted as an attorney and notary of the Supreme Court.

PROVISIONAL LIST.

BERNSTEIN V. FERREIRA.

Mr. P. Jones moved for provisional judgment for the sum of £ 500, due on a mortgage bond. The bond had become due by reason of the non-payment of interest. It was also asked that the property specially hypothecated be declared executable.

Granted.

DEMPEZ V. ABDOL RAHIM.

Mr. Molteno moved for provisional sentence for £ 300 on a mortgage bond, with interest at the rate of 6 per cent. from January 10, 1899. The original bond had been for £ 350, but £ 50 had been paid off. The bond had become due by reason of the non-payment of interest. It was also asked that the property specially hypothecated be declared executable.

Granted.

VAN RENSBURG V. VAN DER SPUY.

Mr. P. Jones moved for provisional sentence for £200 on a mortgage bond, with 5 per cent. interest from February 1, 1891. It was also asked that the property specially hypothecated be declared executable.

The defendant appeared in person and said that he had left Britstown, where the property is situated, on March 1, 1898. The persons to whom he had given power to collect the rents due (£4 10s. per month) to him there had not paid him the money. The rents had lately been collected by Mr. Cillie, who, defendant alleged, was the local attorney for the plaintiff in the present case. Defendant alleged that he had received no account of those moneys from Mr. Cillie, although he had been written to last year. Defendant now resided in Worcester.

The Chief Justice said that judgment would be given for the amount claimed, but execution would be stayed for three months, so that defendant might have an opportunity of paying the amount of interest due (£20).

LOMBARD AND ANOTHER V. YOUNG.

Insolvency—Compulsory sequestration—Practice.

A petition for compulsory sequestration should be framed in terms of the section of the Statute upon which it is based.

Mr. Buchanan moved for the final adjudication of the estate of Ernest Albert Young, watchmaker and jeweller, Malmesbury.

Mr. Molteno appeared for the defendant.

The petition on which the provisional order had been granted showed that Young was indebted to the petitioners in sums of £150, £168, and £125, and had offered a compromise, which had been refused. It was also said that he had admitted his inability to pay, and further, that he had secured certain promissory notes due to one James Hodges by a mortgage bond.

Mr. Molteno read an affidavit by the defendant, in which he admitted that he owed the money to applicants, but he denied his inability to pay, and said that payment of the debt had never been demanded. He submitted a statement showing that his assets were £3,050, being £411 7s 6d. more than his liabilities.

A number of affidavits on the point as to whether defendant was solvent or not were read.

Mr. Molteno: The application is made under the fourth section of Ordinance 6, 1843. The acts of insolvency alleged are: (1) That defendant offered a compromise, which is not an act of insolvency; and (2) that Young has passed a bond to one Hodges. The Court must be satisfied that the estate is insolvent. But defendant produces a schedule showing that his assets are £411 above his liabilities. The landed property is put in at the Divisional Council valuation. There is no allegation that the estate is insolvent.

Mr. Buchanan: The summons says that there is an act of insolvency, and that it is for the benefit of creditors.

Mr. Justice Buchanan: Can you go behind the summons?

Mr. Buchanan: The petition is as much before the Court as the summons. The summons is only to bring the defendant before the Court. But in any case an act of insolvency has been committed. He passed a bond when he was being pressed by his creditors.

The Chief Justice: It is not often that the Court has decreed sequestration on such statements, because the creditor is not heard, and the Court would seem to pre-judge his case. Should not the proof be more clear?

Mr. Buchanan: I submit it is quite clear. The mortgage bond was passed in security for two overdue promissory notes. The Court has always held that this is not the proper course of business.

De Villiers, C.J.: I think in future petitions for the compulsory sequestration of estates should be more carefully drawn than they have been lately. It has become quite a habit not to put the exact words of the section of the Act in cases of this kind. In my opinion it is highly desirable that this should be done. It is no small matter that a person's estate should be sequestered, and one could expect at least as much care in drawing up a petition as a summons in any case. In the present case there are two charges of acts of insolvency. The first is the passing of the bond to Hodges for the purpose of giving an undue preference, and the second is insolvency. As to the first charge, I will confess I would prefer not to decide upon this at this stage if it could possibly be avoided, as it does seem unfair that the

Court should hear and express a *prima facie* opinion that it was an undue preference. As to the second charge, that of being insolvent, that is not specifically stated in the petition, but facts are stated that lead to the fair inference that he is insolvent, and moreover, the affidavits that have been filed for the applicant go to establish that. Under the circumstances, if the Court was now to discharge this summons the result would be that an application would immediately be made again, and the petition amended by the addition of the words that the defendant is insolvent, and upon the facts stated the Court would grant the order. No possible benefit could accrue to the defendant if the Court were to discharge this order. It is reasonably clear that the man is insolvent; that he is unable to pay his debts, and that by offering a compromise and other ways he has shown that he is insolvent. Under all the circumstances the Court will allow amendment of the summons by the insertion of the words that the defendant is insolvent. That amendment will be supported by affidavits, and when the amendment is made the order for sequestration will be made.

[Plaintiff's Attorneys, Messrs. Silberbauer, Wahl & Fuller; Defendant's Attorneys, Messrs. Berrange & Son].

TRANSATLANTIC ASSURANCE COMPANY V. BORCHERT.

Mr. P. Jones moved for provisional sentence for £27 12s. 3d. on an acknowledgment of debt, with costs of suit.
Granted.

BATTENHAUSEN V. SCHNEIDER.

Mr. Bowen moved for the final adjudication of defendant's estate.
Granted.

DU TOIT V. KEYTER AND VAN EEDEN.

Mr. Nathan moved for provisional sentence on a promissory note for £100, with interest at the rate of 8 per cent., and 5 per cent. commission for collection.
Granted.

COLLIER AND OTHERS V. SIBBERT.

Mr. H. Jones moved for the final adjudication of defendant's estate.
Granted.

FAIRBRIDGE, ARDERNE AND LAWTON V. A. P. DE VILLIERS.

Mr. P. Jones moved for provisional sentence for £425 due on certain promissory notes, with interest and costs of suit.
Granted.

ILLIQUID ROLL.

CO TE, NOBLE AND CO. V. TIRAN.

Mr. Benjamin moved, under Rule 329D, for judgment for £215 la. 4d., balance of account for goods sold and delivered.
Granted.

KOOPMAN V. J. E. VIXSEBOXSE.

Mr. Molteni moved, under Rule 329D, for judgment for £25, being balance of money lent, with interest *a tempore morae* and costs of suit.
Granted.

WILEY AND CO. V. J. PEDERSEN.

Mr. Bisset moved, under Rule 329D, for judgment for the sum of £21, with interest *a tempore morae* and costs of suit.
Granted.

AURET V. PINKER.

Mr. Upington moved, under Rule 329D, for judgment for the sum of £26 for rent.
Granted.

OALLANAN V. PHILLIP.

Mr. Joubert moved, under Rule 319, for judgment for £55 5s. for work and labour done and materials supplied.
Granted.

REHABILITATION.

Mr. Buchanan moved for the rehabilitation of the insolvent estate of Hendrik Andries Erasmus under section 117 of the Ordinance.
Order granted.

GENERAL MOTIONS.

JACOB V. FREEMAN.

Mr. Innes, Q.C., moved for the reference of this matter to two arbitrators, viz., Messrs. Gibson and Naah.

Mr. Searle, Q.C., for the respondents, appeared to consent to the application.
Granted.

**SPILHAUS AND ANOTHER V. MUNTWYLER
AND DUBLER.**

Mr. Graham, Q.C., moved for leave to attach certain property to found jurisdiction in an action to be instituted by the applicants against the respondents, and also for leave to sue by edictal citation, the defendant firm carrying on business in New York.

The order was granted, and leave given to sue by edictal citation, and also to serve notice and intendit of trial at the same time; rule returnable the last day of next term.

NORTJE V. NORTJE.

Mr. Benjamin applied for the removal of this case to the Circuit Court to be held at Oudtshoorn on March 24, and also that at the day of trial an application be allowed to be made for an amendment of summons.

Order granted.

**AFRICAN BANKING CORPORATION V.
SEARELLE.**

Mr. Currey moved for an extension of the trial day in this case until May 1.

(Granted.)

**BEAUFORT WEST MUNICIPALITY V.
MADDISON.**

Mr. Graham, for the defendant in this case, applied for an order directing that the evidence be taken before the ensuing sitting of the Circuit Court at Beaufort West.

Mr. Innes, Q.C., on behalf of the respondents, opposed the application.

After hearing counsel,

The Chief Justice said that under all the circumstances the Court was of opinion that the case should proceed in the Supreme Court on the day fixed (February 27), but a commission could take evidence for either side, the Magistrate of Beaufort West being appointed commissioner.

POTGIETER V. NEW YORK MUTUAL LIFE INSURANCE SOCIETY.—VERMAAK V. NEW YORK MUTUAL LIFE INSURANCE SOCIETY. { 1900.
Feb. 22nd.
" 23rd.

Rectification of contract—Life policy
—Premium—Misrepresentation
—*Restitutio in integrum*—Mis-
take Consideration.

The agent of a Life Insurance Company, having explained to the plaintiff the conditions upon which

it would issue to him a life policy on payment of a certain annual premium, the plaintiff misunderstood the conditions, which were somewhat complicated, but accepted the policy. Several months afterwards the plaintiff discovered that the policy did not embody the terms as understood by him, and instituted an action either to have the policy rectified or to recover damages and a return of the premium.

Held, that as the agent had made no misrepresentation, the plaintiff was not entitled either to a rectification of the policy or to damages. Held further, that the plaintiff, having accepted the policy and enjoyed the advantage of having his life insured until he discovered the alleged error, was not entitled to a refund of the premium

These were two actions for declaration of rights. The pleadings being the same in both cases, they were taken together.

The plaintiff in the first case was Johan Andries Potgieter who, being a minor, was assisted by his father, Hendrik E. S. Potgieter. Plaintiff claimed a certain life policy from the company, and the declaration set forth that in October, 1898, one Abrahams, an agent of the company, induced the plaintiff's father to insure the life of the plaintiff for £500 for twenty years, on the tontine system, at a premium of £14 2s. 11d. annually. At the end of that period he was to receive the money, or on his death his heirs or representatives would receive it. In February, 1899, Potgieter received a policy which it was alleged did not contain the provisions now set forth, and was only payable on the death of the insured, who claimed £100 damages and costs.

The plea admitted the formal allegations, but alleged that the policy was to be a limited payment policy, in terms of which £500 was to be paid to the representatives of the insured at his death, and should the plaintiff be living at the end of twenty years he was to be entitled to exchange the policy for certain bonuses. Generally it was con-

tended that the policy was on what was known as the income life plan, and not an endowment policy.

Vermaak's claim was the same except that his policy was for £250, and was entered into some time later.

Mr. Upington appeared for the plaintiffs.

Mr. Innes, Q.C. (with whom was Mr. Benjamin), appeared for the defendant company.

Hendrik Edouard Potgieter, a farmer, residing as Honeyville, in the Humansdorp district, said he was the father of the plaintiff, who was a minor, eighteen years of age. In October, 1898, Abrahams came down to witness's farm. He was driven down in a cart, by one Bethlehem. He wanted to insure witness's life, but witness would not acquiesce. He then wanted to insure the life of plaintiff, and witness said he did not believe in policies payable after death. Abrahams said he could insure him so that premiums would be paid for twenty years, at the end of which time £500 with profits would be paid. In the event of death before that period, £500 would be paid. Witness's son and Bethlehem were present at the time. Witness agreed to the terms offered, paid the premium of £14 2s. 11d., and got the receipt produced. Subsequently he received a temporary policy. In February last he got his permanent policy, which he gave to his son, and it was put away. Some time afterwards certain things came to his knowledge, and he brought the policy to his attorney. He then discovered that that policy was not what was agreed upon. His attorney then wrote to the general manager of the Assurance Company stating that the policy, as well as those of others taken out through Abrahams, was not in accordance with the promises of Abrahams. No tender had been made, and no return of the premium had been offered to witness. He wanted either a policy as promised, or his money refunded.

Cross-examined: Abrahams filled in the proposal form, which stated that the policy was on the income life plan, and witness's son signed it. Witness paid the premium at once, and received a receipt from Abrahams. He afterwards got an official receipt. Afterwards at Port Elizabeth witness said, in reply to Mr. Abrahams, that he was satisfied with his policy, but at that time witness had not read it. Witness became dissatisfied with his policy when he heard that it was

not in accord with their agreement. He had not seen any other life assurance agent in the meantime. There was not much conversation between witness and Abrahams at the time he agreed to insure his son, and witness clearly understood Abrahams.

Re-examined: Witness wished to have the money after twenty years, because his son would then be between thirty and forty years of age, and it would set him up in farming. He would not have taken the policy if he had known what its terms were.

By the Chief Justice: He did not examine the policy when he received it, because he did not think a mistake would be made.

Johan Andries Potgieter, the son of the last witness and the plaintiff in the case, said he was nineteen years of age. He corroborated his father as to the agreement with regard to the policy. Witness's life was to be insured for twenty years, and after the expiration of that period witness was to receive £500 and profits, but if he died within the twenty years only £500 was to be paid. He could not remember in what language the conversation was carried on. When witness received the permanent policy he did not read it through, but just looked and saw the words "twenty years," "£500," and "premium £14 2s. 11d.," and thought it was all right. Witness did not read the proposal form when he signed it.

Gert D. Vermaak, a farmer residing at Quagga, in the Humansdorp district, said that Abrahams came down to his farm in October, 1898. He came by cart, and Mr. Bethlehem was with him. He persuaded witness to insure his life for £250, which witness was to draw at the expiration of twenty years, with payment in case of death before the expiration of that period. Witness would not have accepted a policy such as that he received.

Cross-examined: Witness did not examine his policy when he received it, and it was on hearing something that he took it to an attorney.

Re-examined: Witness took the policy to an attorney because he heard from other people that their policies were not as contracted for.

This concluded the case for the plaintiffs.

For the defence,

Archibald McCorkindale, the general manager in South Africa of the defendant company, said the company had forms of policy called the life income policy (that issued in this case), and the endowment

policy, which provided for the payment of a stipulated sum on a certain day, with or without profits. The premiums for an endowment policy were about double those for a life income policy. Agents were paid so much commission on the first premium, and consequently it was to their interest to secure endowment policies. In the case of a policy for £500 on the life-income plan, the person assuring could at the end of twenty years receive £396, or he could take £168 and have a fully paid-up policy for £500, which would be increased every year by bonuses. Or if he did not draw the cash surplus he could have a paid-up policy of £886 10s., still drawing bonuses. Or if he liked he could with the cash surplus buy an annuity of £10 2s. 8d. per year, and still have his policy, or he could use the entire policy with bonuses and take out an annuity for £22 13s. 4d. a year. Abrahams entered their service in August, 1898, and was new superintendent of the whole of their Eastern Districts business. He entered their service as an agent.

Cross-examined : On an endowment policy for £500 an insurer would, after twenty years, get £280 as well as the £500. In such a case the premium would have been £25. Abrahams had not communicated to witnesses that there were a number of people in that district dissatisfied with their policies. Witness was not aware that Abrahams had tried to settle a number of those cases. In one case witness had instructed him to write and explain to one assurer the terms of the policy. About 80 per cent. of the policies in Mr. Abrahams's district were on the life-income plan. Witness should say that not more than 10 per cent. of these policies had lapsed. Witness considered that plaintiffs were not entitled to a refund of their premiums, seeing they had had a year's insurance.

Re-examined : Ten per cent. was not a large number of policies to lapse at the present time.

J. Abrahams said he was now superintendent of the company's business throughout the Eastern Province. On October 12 he was an agent and went down to Humansdorp, driving in Mr. Bethlehem's cart. Witness saw Mr. Vermaak, who was at first averse to insuring his life. Witness explained fully to him the income life policy. Afterwards Vermaak agreed to insure under that system for £250. He read over the insurance proposal, which witness filled

up, and signed it. Witness always, whether or not he underwrote an insurance, left leaflets, such as those produced, and other insurance literature at houses he called at. After giving evidence as to forwarding of the policies, &c., witness deposed as to his visit to the Potgieters on October 15, 1898. Potgieter would not insure his own life, as he said he was too old and the premium would be too high. Witness offered to insure his son, and Potgieter said his son was too young, and he did not care about paying all his life. Witness said he had the very form of insurance to meet the case, viz., the income life policy, and explained it to him. He never said that at the end of the twenty years the assurer would get £500 and profits. Witness filled up the form, asking Potgieter's son (the plaintiff) the necessary questions. He then told Potgieter's son to read over the proposal form, and after looking at it the latter signed it. On February 14 last Potgieter saw witness in Port Elizabeth, and said he thought his son's policy was a good investment, and that he was perfectly satisfied with it. Witness offered to insure his life, and quoted a premium for £1,000 whole life policy. Potgieter said that as he was on his way up-country to visit some friends, he would call on his way back, but he did not do so. Witness did not promise plaintiffs better terms than they had got. Witness's business was to a large extent in income life policies.

Cross-examined : Witness never mentioned an endowment policy. He denied that he had asked Bethlehem to settle the matter for him in cases where there were disputes.

The witness Abrahams recalled, in reply to a question put by Mr. Innes, said that even if he had put the words life income policy on the provisional receipts he gave plaintiffs he would have had to add the period of years during which premiums had to be paid.

Elias Bethlehem, called by the Court, said, in answer to the Chief Justice, that he accompanied Abrahams to the farms of Vermaak and Potgieter. He could not remember anything of what took place between Abrahams and the plaintiffs. It was about eight months ago, and witness had to do his own business. He was in the ostrich feather line. They both saw Potgieter together, but witness's object in going was to

by feathers, and he took no notice of what took place, and did not hear what was said. It was the same with Vermaak.

The Chief Justice: On February 13 you sent a telegram: "Can settle re insurance out of court. What extent of expenditure would your company provide? They rely upon me as witness. Reply sharp." What made you send that telegram?

Witness said that on February 13, Mr. Potgieter came to his office, and mentioning the case, said he would like to go to Cape Town himself on account of his wife being sick, and then said, "Could you settle the amount out of court? Can you make any arrangement?" Witness then asked Mr. Abrahams and the latter replied "No." There had been no communication between witness and Mr. Abrahams as to settling the case previous to that. In his telegram he meant he could settle the case from Mr. Potgieter's side.

The Chief Justice: But he wired, "I am leaving here for Cape Town on Saturday. If you can accompany me, will pay all your expenses." There must have been some communication between you and him about this case previous to that?

Witness said that a long time previously, when he first heard rumours about the case, he asked Abrahams about it. The latter then asked witness if he could remember anything. Witness replied: "I can not remember anything. I do not believe it can do any good to any side to call me."

Mr. Justice Laurence: And then he offered to pay all your expenses?

In further examination by the Chief Justice, witness said after Abrahams had received a wire from the company stating that they would consent to no compromise he was informed of that. Vermaak had also told witness that he would not mind a settlement, as he did not want to leave his farm on account of his mother.

Mr. Upington: The plaintiffs have never been examined on this point. Vermaak denies point blank, and says he refused to consider the matter at all. Potgieter says that at the time his wife was sick, and a number of cattle were sick, and at the time his son could not leave the farm.

The Chief Justice said: Mr. Upington, the only thing you can urge is that the whole thing is a most complicated affair. I have read this policy three times, and now I cannot understand it, and I don't think counsel or the parties themselves understand it.

Mr. Upington: I was about to urge that. I must say that when I first saw that policy I read it several times before I could get an idea as to what it meant.

The Chief Justice: And you understand it now?

Mr. Upington: No, my lord; I cannot say I do.

The Chief Justice: The policy is a most complicated affair, and how the poor farmers can understand it I do not know, and then those leaflets make the matter even more complicated.

Mr. Upington (after argument on the facts): The policy is not in accordance with the promise. The question is, what is the remedy? I submit plaintiffs are entitled to a policy in accordance with the promise. See *Porter on Insurance* (p. 24), and *Fowler v. Scottish Equitable Insurance Company* (7 W.R., p. 5). Even if the agreement has not been proved, then the plaintiffs thought the agreement was such as they say, and there was a *bona fide* mistake.

The Chief Justice: They have had the benefit of the policy for a year, and how then can they claim a refund of the premium?

Mr. Upington: But it was not the contract which they wanted. See *Collett v. Morrison* (9, Hare, 162). With regard to the question of a person having received benefits, that is so in all cases of insurance. There is benefit as soon as the insurance begins, and so there could be no relief in case of mistake.

The Chief Justice: There could be relief if there had been timeous action. If the parties, as soon as they received the policies, had repudiated, then they might get relief.

Mr. Upington: The delay is not unreasonable in this case, and therefore the plaintiffs should recover the premium.

The Chief Justice: Mr. Innes, do you object to the point being raised as to whether the plaintiffs are entitled to the refund of premiums on the ground of mistake?

Mr. Innes: Certainly. This is a specific ground of action. The proper form of action would have been the *actio redhibitoria*, and that must be brought within six months, or else the action for *restitutio in integrum*, and in that case there must be *justus error*.

The Chief Justice: I suppose there would be no objection on the part of the company to allow the plaintiffs to continue their insurance issued to them, notwithstanding the lapse?

Mr. Innes said that technically the policies had lapsed, but the company was perfectly willing that the plaintiffs should continue their insurance. They would also be perfectly willing to issue an endowment policy, such as the plaintiffs understood they had got, if they would pay the increased premium.

Mr. Innes was not further called upon to argue the case.

De Villiers, C.J. said: This action is substantially one of contract. The plaintiff alleges a certain specific contract, and that is that his life was to be insured for a period of twenty years upon the tontine system for a sum of £500 sterling, at a yearly premium of £14 2s. 11d., and he further alleges that it was distinctly understood that at the expiration of twenty years the sum of £500 would be payable, in addition to certain profits. He claims therefore that the policy, which is based upon the agreement, should be set aside, and a fresh policy issued carrying out the terms of the agreement, or in the alternative the return of the premium and £100 damages. Now the plaintiff must prove the contract, and if it is proved that the parties did not understand the same thing then the utmost that can be said is that there was no contract and that the plaintiffs could not then claim the specific performance of a contract such as they understood. Upon the evidence I am inclined to think that the matter being so complicated, both the plaintiffs believed, probably from the explanation given to them by Abrahams, that the full amount of the policies would be payable after twenty years, but at the same time I do not believe that Abrahams ever intended to convey that idea to them. I think that his only desire was to explain what the life policy was, and that in explaining it he gave an undoubtedly wrong impression as to what the meaning of it was. The parties, therefore, did not understand the same thing, and there was no contract. The only ground therefore upon which the plaintiff could succeed in this action to recover the premium paid would be on the ground that there was a mistake of fact. Well, a mistake of fact to succeed so far as the plaintiff's case is concerned would have to be perfectly excusable, and when a plaintiff himself discovers an error he should at once seek to recover the amount which places him in the position of receiving benefit thereof. The policy of assurance was issued in the month of September, and it was then

the duty of the plaintiff to carefully examine the policy because, however unintelligible the conditions of the policy may be, one thing is quite clear from it, and that is, that the sum of £500 would not have been payable after twenty years. The full amount of the policy would not have been payable after twenty years, and it was the duty of the plaintiffs to have examined the policies when they received them, and if they had then examined the policies and found that they contained this error, I am of opinion they would have been entitled to claim at least that the premiums they had paid be returned, inasmuch as the policies did not carry out the agreement as they understood it. But instead of that, they allowed the policies issued to continue, in the case of one of them for nearly the full period for which the policy ran, that is, for which the premium paid kept the policy in force, and therefore continued to enjoy the benefit of the policies. If either of them had died before the expiration of the year his executors would have been entitled to receive the full amount of the policy. Having had that benefit, and not having immediately after the receipt of the policies objected to the terms, I am of opinion that it is too late to claim now. For these reasons I am of opinion that the judgment of the Court must be for the defendant company.

Buchanan, J., concurred, and said it was common cause that the parties entered into a contract, and that that contract was afterwards reduced to writing—firstly, the proposal made and signed by the plaintiffs, and afterwards elaborated in the written policy issued by the company. This case was not the same as those English cases quoted by Mr. Upington, in which it was clear that a different agreement was entered into than that contained in the policies, for in this case the agreement in the proposal and in the policy was identical. It would be a most dangerous thing to allow a written agreement to be set aside on the grounds alleged by the plaintiffs in this case.

Laurence, J., also concurred.

Judgment was entered for defendants in both cases.

[Plaintiff's Attorneys, Messrs. Dampers & Van Ryneveld; Defendant's Attorneys, Messrs. Van Zyl & Buissinné.]

NEUMANN V. ESTATE OF NEUMANN.

Will—Signature—Witnesses.

This was an action to have a certain will declared void. The plaintiff was Wilhelmina J. Neumann, a daughter of the testator, the late Christiaan Frederik Neumann, of Worcester, and she sued the defendant, F. L. Lindenberg, in his capacity as executor dative in the estate of her father. The ground on which it was sought to have the will declared void was that the terms of the Wills Ordinance had not been complied with, the plaintiff alleging that the said will had never been signed by her mother, although it purported to be so signed, that the witnesses did not sign in the presence of each other, and that the testator did not sign in the presence of the witnesses.

Mr. Molteno for the plaintiff.

Mr. Buchanan for the defendant.

Frederick Dienaar, said he lived at Worcester, and knew the late Mr. Neumann, who died recently at an advanced age. Some considerable time ago he came to witness's house with a paper in his pocket, which he asked him to sign as a witness. He told witness it was his will, and said the other witness had already signed it. All the other signatures were on the will when witness signed it. Witness did not see Hector sign the will. Hector's signature was on the will when witness signed it. Hector was not present at the time and was now deceased.

The evidence of Maria Christina Neumann, the widow of the testator, had been taken on commission. It was to the effect that she would be seventy-five years of age on 10th March next. She could not write, and always signed her name by making a cross. She had never signed the will dated February 15, 1897, and never asked anyone to sign her name for her. She never signed a joint will with her husband, and never saw her husband and witnesses sign a will.

It was stated that the executor appointed under the will was one Otto, but he having refused to take out letters of administration, the present defendant was appointed.

Mr. Buchanan said that the defendant put plaintiff formally to the proof of illegality, because it was necessary to come to court. Defendant, however, submitted to the judgment of the Court, and asked to be held harmless, and that costs in the case should come out of the estate.

S

An order was granted accordingly.

[Plaintiff's Attorney, V. A. van der Byl;
Defendant's Attorney, J. F. E. Barnard.]

BROOKES V. MULLER AND ISRAELSON.

Mr. Searle, Q.C., moved that a day be fixed for the trial of this case by a jury. In his petition applicant stated that probably some of his most material witnesses would not be here in a month or two, as they were only temporarily resident here.

Sir Henry Juta, Q.C., for the respondent opposed, and said that the case had not been set down for this term.

The case was set down for trial by jury on May 4.

HEYDENRYCH V. FABER AND } 1900.
OTHERS. } Feb. 23rd.
" 24th.

Pledge — Delivery — Keys — Insolvency — Preference — Fraud — Possession.

E. pledged certain goods in a store (hired by him) to the plaintiff, who was present when the goods were placed in the store, and there received the key of the same from E. Subsequently E. obtained advances from the defendant S., and fraudulently purported to pledge the same goods to S., to whom he gave a duplicate key of the store. S. obtained an assignment of the lease, but afterwards removed the goods to another store.

Held, that there was a valid delivery of the goods to the plaintiff, and that he was not deprived of his rights as a pledgee by reason of the subsequent fraudulent conduct of the pledgors and removal of the goods by S.

This was an action brought to have plaintiff's claim in the insolvent estate of Rayrs ranked as preferent, and to have a certain pledge to the plaintiff declared valid. The declaration set forth that in May June, and July, 1898, the plaintiff Heydenrych advanced £1,510 to Rayrs on the goods, and Rayrs pledged the goods, and further advances were subsequently made. There-

after the defendant Saber, to whom the goods were also pledged, removed them, and they were in his possession when Eayrs's estate was sequestrated. The goods were by arrangement sold for £1,881. The plaintiff proved as a preferent creditor, but the trustees filed an account in which they ranked him as a concurrent creditor. Saber had paid £151 into the estate, and claimed to keep the balance on the ground that Eayrs had pledged the goods to him. The plaintiff claimed that he should be ranked as preferent, that Saber should pay £1,881 into the estate, and that the accounts should be amended accordingly.

In his plea defendant stated that he had no knowledge of the advances of money alleged to have been made by the plaintiff to Eayrs, nor did he admit that the said advances were made on the security of the said goods or otherwise, but referred the Court to such proof as the plaintiff might adduce in support thereof. He denied that the goods referred to were duly and legally pledged at any time to the plaintiff. He denied that the goods were wrongfully and unlawfully removed from the store in Loop-street, but admitted that the goods were in his lawful possession when Eayrs's estate was compulsorily sequestrated on May 1, 1899. He declared that the said goods were in his possession by virtue of their having been duly pledged to him by Eayrs for certain advances of money made, and said that he had paid the rent of the store in which the goods were situated from the date of the said pledge and delivery of the goods to him; that subsequently the goods were removed by him to another store obtained by him for the purpose, and remained in his sole custody, possession, and control until the date of their sale under the arrangement referred to in the declaration. He admitted that he had not paid the sum of £1,881 (the proceeds of the sale of the goods) into the estate, but only the sum of £151, and said that he was entitled to retain the sum of £1,730 by reason of the said goods having been lawfully pledged to and delivered to him on account of the sums of money advanced to the said Eayrs, amounting, with interest, to the sum of £1,730.

Sir Henry Juta, Q.C. (with whom was Mr. Upington), for the plaintiff.

Mr. Searle, Q.C. (with whom was Mr. Bisset), for the defendant Saber.

Mr. Benjamin appeared for the trustees, to submit to judgment and ask for costs.

Benjamin Godlieb Heydenrych, the plaintiff, said that he carried on the business

of financier in Cape Town, and he knew J. B. Eayrs, who had carried on business as Eayrs & Son. Witness proceeded to give evidence of a similar tenour to that given by him in a recent criminal action, when J. B. Eayrs was charged and convicted of having stolen certain goods. The evidence was generally to the effect that he advanced money to the amount of £1,510 on the pledge of certain goods, which Eayrs represented had just arrived from England. Eayrs signed the pledge-form, the goods were placed in the store in Loop-street, and witness went there and checked them according to the invoice. He afterwards locked the door and took away the key. He always kept the key, and had never given it up. Witness made various further advances, until the total sum advanced was £2,407. Eayrs paid interest regularly on the pledge. Proceeding, witness detailed how he went to the store on April 12, and found that his key would not fit the lock, afterwards discovering that the goods had been removed. Witness proved on the insolvent estate as a preferent creditor, but the preference was not awarded, and he simply ranked as a concurrent creditor. Witness gave evidence at the trial of Eayrs with regard to these goods.

Cross-examined: Eayrs first came to witness about these goods on May 14. Witness was certain that at that time the goods in question were not in the store. Witness, however, admitted that he had never been in the store before that date, and he had only been told by Eayrs that the goods were not there then. Witness first went to the store on May 16, 1898, by which time some of the goods were in it. Witness did not see the goods, but only examined the cases.

The record of proceedings in the insolvent estate of J. B. Eayrs was put in by Cornelius J. Muller, clerk in the Master's Office.

After the records of the trial and conviction of J. B. Eayrs for the theft of these goods had been put in, the case for the plaintiff was closed.

For the defence,

Alfred Emanuel Saber, one of the defendants, said he had carried on business in Cape Town as a broker for ten or eleven years. In December, 1898, witness was carrying on business with Mr. Crawford, as Crawford & Co. Witness, about December 10, advanced Eayrs £900, with £80 as interest, on a bill secured by a pledge of certain goods in the Loop-street store. Witness had the old lock taken off that store and a Chubb lock put on. He had a number

of the cases opened and examined, and as some of the invoices did not tally, he had the stock-book produced. He took that as correct, and made young Eayrs sign it. After detailing the manner in which a further advance of £550 was made, as well as other transactions in connection with the goods, witness said that owing to the store being damp and infested with rats, he, on March 2, had the goods removed to a store in Bree-street. Witness had no knowledge whatever as to Heydenrych having any claim to the goods. Up to the day of insolvency witness thought Eayrs was going to pay him the promissory note which had fallen due.

Cross-examined: Mr. Skead mentioned to witness that there were certain other pledges on the goods, but witness would not believe that, and would not listen to him. Skead did not say anything about Heydenrych having a pledge of the goods. If witness said so in his examination-in-chief he made a mistake. Witness went to Eayrs after what he heard about other pledges, and Eayrs said there were no other pledges over the goods in Loop-street store, but Heydenrych had the goods in the Dorp-street store pledged to him. It was in February that he had the conversation with Skead.

Augustine James Burroughs Eayrs said he was a son of J. B. Eayrs, and in 1898 was in his employ. Witness had received the key of the store from Heydenrych after the goods were pledged. He had received the key for the purpose of taking out certain cases of goods which were not pledged. Witness returned the key the next day.

Cross-examined: Only the goods which were not pledged were removed. Witness knew now that there was another key, which his father held. Witness did not know that at the time.

By the Court: When Saber examined the goods in the store witness opened the door with a key given him by his father.

Re-examined: The Loop-street store was in a filthy condition, and witness had given Mr. Heydenrych chloride of lime for the purpose of driving away the rats. The goods were in the Loop-street store long before they were pledged to Heydenrych.

The plaintiff Heydenrych, recalled by the Court, said he did get chloride of lime to drive away the rats. He did not complain about the floor.

This was all the evidence in the case.

Sir H. Juta: It is not necessary to labour the point that a pledge of movables may be validly made by symbolical delivery. But the Court's attention must be called to the facts with regard to the circumstances of the alleged pledge to defendant Saber. One must animadvert strongly on the absence of Skead. Saber is a mere dummy.

The Chief Justice: How does that affect the case?

Sir H. Juta: We have a valid pledge. The second pledge took place with the knowledge of the persons who now claim to be pledgees, and it is important to show that they were not the real pledgees, but dummies.

The Chief Justice: No doubt the delivery of the keys is a symbolical delivery, but certain formalities are required to show that the pledgor intended to give possession. Has everything of the kind been done?

Sir H. Juta: Everything.

The Chief Justice: Have you any authority for the point that when the pledgor removes the goods the pledge is still in the pledgee?

Sir H. Juta: Yes.

The Chief Justice: The maxim *mobilia non habent sequelam* of Roman-Dutch Law is very strong. If the possession is taken away in any way, do the pledgee's rights of lien still remain?

Sir H. Juta: See *Matthaeus' Paroemia* (7, section 17, sub-section 2, p. 235 of the Library Edition), where he says that "if any movables are taken away by theft or force, the theft or force inculcates every possessor of such movables."

The Chief Justice: The case referred to by *Matthaeus* shows that the owner was found guilty of theft.

Sir H. Juta: Eayrs must have regained the possession, if he regained it, by theft, and in that case away goes the second pledge. See also *Matthaeus de Auctionibus* (1, 19, 74), *Voet* (20, 1, 13), and *Story on Bailments* (section 299). The English authorities are very strong on the point, and the conviction of Eayrs stands, and has not been set aside.

Mr. Searle: The question is whether the maxim *mobilia non habent sequelam* obtains in a case of this kind. All the authorities lay down that the person in possession of the goods is to be considered as the person who has the strongest *prima facie* right to the goods, and entitled to retain possession against those who claim under a similar title. See *Voet* (20, 1, 12, 13, 15). In Roman Law

there was a theft of possession (*Queen v. Fortuin*, 1 A.C., 290). In that case, and in *Queen v. Castleden* (6 Juta, 235), it was clearly shown that there was no *furtum possessionis* in our law. It does not matter what Eayrs was convicted of. It cannot affect the case, because neither Saber nor Heydenrych was party to the theft. Unless there has been a theft of possession, the person in possession is entitled to the pledge.

The Chief Justice: The case does not depend on such a technicality as that. Any fraud would vitiate the title.

Mr. Searle: No fraud short of theft of the possession would vitiate our title. Saber had physical possession of the goods. The question is whether the symbolical possession of Heydenrych, obtained without defendant's knowledge, is sufficient to oust the defendant's physical possession. This symbolical delivery must be very strictly construed. In olden days it was a very solemn matter, but nowadays it is so easy to lock things up with a padlock and give the key to another person. See *Van Leeuwen (Censura Forensis*, I. 4, 7, 6, 7) and *Grotius* (2, 48, 28, 29).

The Chief Justice: *Grotius* says the possession must have passed unlawfully.

Mr. Searle: I submit that the only way in which it can be said to have unlawfully passed is by way of theft of possession. See *Sarigny on Possession* (Perry's translation, pp. 157-159) as to symbolical delivery by means of a key. A person who takes the form of delivery loses his right if the property is afterwards passed by actual delivery to another person *bona fide*.

The Chief Justice: I could understand your argument if the key was symbolically given to Heydenrych, and Heydenrych handed it back to Eayrs. But Heydenrych kept the symbol, and so retained possession.

Mr. Searle: But the key was not retained by Heydenrych all the time. It was delivered to Eayrs when Eayrs wanted to take out goods. If the goods had been removed whilst Eayrs had the key so obtained from Heydenrych, that might have been sufficient negligence on Heydenrych's part to disentitle him to recover. See 125) *Schorer* (note 259).

The Chief Justice: I think it was held in *Beyers v. McKensie* (Foord, p. 125) that property does not pass when there has been fraud.

Mr. Searle: See *Platt v. Steynbach* (*Digest of United States Law Reports*), and *Queen v. Castleden* (6 Juta, 235). *Castleden's* case was similar to that of Eayrs.

The Chief Justice: But there was delivery of the piano, which makes the whole difference. It might be argued that the goods ought to have been removed by the pledgee.

Mr. Searle: it was the object of this symbolical delivery that the goods should not be removed, but should remain in Eayrs's store. There is no authority to show that that was sufficient to transfer the goods.

The Chief Justice (to Sir H. Juta): If Eayrs had been the owner of the house, the tendency of the decisions is that Heydenrych should have removed the goods.

Sir H. Juta: If I place goods that have been pledged in a room, and lock them and keep the key, the goods are in my possession, although the house belongs to the owner of the goods. This is more than a mere question of symbolical delivery. We saw the goods and took an inventory of them, and when Eayrs wanted any he had to come to us. *Queen v. Fortuin* and *Queen v. Castleden* do not affect the point. It was only decided there that *furtum usus* was not known to our law.

C.A.F.

Postea (February 24).

De Villiers, C.J.: The question to be determined is whether, in the distribution of the assets of Eayrs's insolvent estate, the plaintiff is entitled to a preference in respect of the proceeds of certain goods pledged to him. At the time of the alleged pledge a document was executed, which makes it clear that the money claimed by the plaintiff was duly advanced by him to Eayrs, and that it was fully understood between them that the plaintiff was to retain possession of the goods until the debt was paid. The plaintiff was present when the goods were placed in the store, he checked them, as they were so placed, from the invoices that were in his possession, and he there received from Eayrs the key of the store. The store did not belong to Eayrs, but was held by him under lease from the owner, and no assignment of the lease was made to the plaintiff. Subsequently Eayrs obtained advances from the defendant Saber, and fraudulently purported to pledge the same goods to Saber, and effected delivery by handing to Saber a duplicate key of the store. Saber obtained an assignment of the lease to himself, but he afterwards removed the goods to another store, obtained by himself for the purpose. I am satisfied that Saber was not aware of the pre-existing pledge at the time when he advanced the money, but that he knew of it at the time when the goods were removed.

he objection has been raised that the delivery was purely symbolical, and not sufficient to constitute a valid pledge. No doubt, a mere symbol is not sufficient to effect delivery; the goods must be subjected to the power of the person to whom delivery is intended to be made. That would be effectually done by giving him the key at the warehouse itself. A pledgee who is at the warehouse and has the key in his hand is in a position to exercise immediate power over the contents of the warehouse. The key is in one sense symbolical, but it is more than that, for it is the means by which the pledgee is enabled to have access to and retain control of the goods. The fact that the plaintiff did not obtain an assignment of the lease to himself does not affect the validity of the delivery. If Eayrs had been the owner of the store it it admitted that the delivery of the key at the store would have been sufficient, but if transfer of the store to plaintiff was not required in such a case, there seems no legal reason why, in the case of a lease, there should be an assignment of the lease to the pledgee. The chief objection, however, to the plaintiff's claim is that he did not retain possession of the pledged goods. That the rule of the Dutch Law, *mobilia non habent sequelam*, has been incorporated with our law has been frequently decided in this court, but even in Holland that rule was not applied to the case of theft of the goods. According to Voet (20, 1, 13), the pledgee to whom the goods have been delivered loses his preference if the goods revert to the pledgor *sine furti ritio*. Where, however, as in the present case, the pledgor fraudulently obtains access to the goods by means of a duplicate key and thus enables a third person to remove the goods, he commits a theft, which entirely vitiates his dealings with such goods. In fact, Eayrs has been convicted of theft of the goods in question, and the verdict has not been questioned. It has not been alleged that the plaintiff had so conducted himself as to lead Saber into the belief that no pledge existed; on the contrary, before Saber removed the goods he knew that the goods had been pledged to the plaintiff. I am of opinion that the plaintiff is entitled to judgment, with costs, against Saber. The costs of the trustees will be paid by the estate.

Buchanan, J., said that he agreed that the plaintiffs entered into the pledge with Eayrs in perfect *bona fides*; he had retained his lawful possession of the goods, and was en-

titled to his preference. There was fraud on the part of Eayrs in pledging the goods to Saber, but in his lordship's opinion the latter acted also in perfect *bona fides* in advancing money on the goods, and in ignorance altogether of the prior claim of Heydenrych.

Laurence, J., said that he also concurred, although he had had some doubts at first on the point whether there was such a delivery of the goods to the plaintiff as would amount to a pledge of movable property. No doubt it would have been far better if plaintiff had insisted on the goods being placed on his own premises, or in some place under his own control, or if he had taken an assignment of the lease of the store from Eayrs, but the absence on his part of all the possible precautions that might have been taken did not counterbalance the strong evidence of an actual pledge or delivery, which did certainly exist, and it was not suggested that there was any subsequent negligence or *laches* on his part which would deprive him of the right to the goods.

Judgment was given for the plaintiff in terms of the declaration.

[Plaintiff's Attorney, C. W. Herold; Attorneys for Saber, Messrs. Van Zyl & Buissinné; Attorneys for the Trustees, Messrs. Scanlen & Syfret.]

[Before the Hon. Mr. Justice BUCHANAN and a jury.]

SEARIGHT AND CO. V. THE MUNICIPALITY OF CAPE TOWN. { 1900.
Feb. 26th,
" 27th,
" 28th,
" 29th.

Damages—Flooding—Act of God.

This was an action for damages caused to the plaintiffs' property and goods by reason of their premises being flooded during the rain-storms of August last—both on the 2nd and 6th. Following on heavy rainfalls on those days, a great volume of water flowed down from the upper portions of the Municipality into Waterkant-street. The water collected above Buitengracht-street, Kloof-street, and Orange-street and ran down Queen Victoria-street, St. George's-street, and Alderley-street, and, as the plaintiffs said, by the negligent and illegal action of the Council in having raised the level of Waterkant-street too high, was there diverted on to plaintiffs' premises and did the damage. The plaintiffs alleged that the Coun-

cil's drains and watercourses were insufficient to deal with so heavy a fall of rain; that the drains in sundry places were negligently allowed to be choked with refuse; and that the inevitable effect of the raising of Waterkant-street level to three feet above plaintiffs' floors was to divert all flood-water running into the street on to the plaintiffs' property. The result of the flooding was most serious. The goods damaged by water were assessed at £3,091, and were sold by public auction for £967, leaving a sum of £2,138. Then there were sundry expenses of £144 for hire of coolies and carts, and Messrs. Searight claimed £2,000 for inconvenience and loss of business.

The defendant municipality pleaded that they had no knowledge of the person who originally constructed Waterkant-street, which was, however, now under their control. They admitted there was heavy rainfall on August 2 and 6, 1899, but pleaded that their drains and watercourses were well made and maintained, and that the flooding was due to the excessive rain, against which no reasonable precaution could have been taken, and therefore it was due to what the law styled an act of God. They said the £2,000 claim for loss of business was too remote, and refused to pay anything on that account. In the alternative, the Council stated that if there had been negligence, the plaintiffs were the negligent parties, by keeping their store below the level of Waterkant-street, and by storing goods on the low-lying portion of the premises.

Mr. Searle, Q.C., and Mr. Graham, Q.C., appeared for the plaintiffs.

Mr. Innes, Q.C., and Mr. McGregor appeared for the defendants.

J. A. S. Watson, a partner in the firm of Searight & Co., said he had been out here since 1878, and had been with the firm since 1883. They had occupied the same premises since 1860. In October, 1898, the Strand-street portion of the property was disposed of, and the counting-house was transferred to Waterkant-street, but the portion in which the damage was done had always been used for storing goods. At one time the floor of the store was level with, if not higher than the level of Waterkant-street, but now the crown of that street was about three feet above the floor. It had been raised from time to time, particularly about 1890-98. In 1890 and 1892 Lennon's Buildings were put up, and the Council gave them what he believed were wrong levels. The consequence

was that the Council had to fill up for about twenty yards at the corner of Adderley and Waterkant-streets, and there was a nasty dip towards Searight's premises. When Garglick's store was built in 1893, the whole remainder of the street was raised about two feet, but not the pavement. In October, 1898, after Searight's pavement was laid, quite six inches of macadam was put on the roadway. There had been a great amount of correspondence between the firm and the Council about the drainage, going back as far as 1888. In 1897 their cellar was flooded through the bursting of a water-pipe running in Waterkant-street and the Council paid £20 compensation. That pipe was above the level of the store, and the water flowed down. Had the road not been raised, the pipe would have been eighteen inches below floor-level. On August 2 last there was a very heavy rainfall, and their three stores were all flooded, to a height varying from 22½ inches to 40 inches. The water was distinctly not all rain-water; it was discoloured and stank. He had no doubt it was largely sewage-water. The Council's steam fire engines were used to pump the water out, and the stores were fairly clear by eight o'clock at night. On August 3 witnesses saw the Mayor and other Councillors, along with Mr. Jagger, and gave notice of the claim. The Council afterwards sent a letter repudiating legal responsibility for the damage. After the first flood on Wednesday, August 2, as witnesses' firm expected no further damage, the spoiled goods were removed, and fresh goods stored from the Docks to the value of over £1,000. On Sunday, August 6, there was another flood, and the stores were again under water to about the same height as on the Wednesday. At that time there were only two grids connected with the drains to carry off the storm-water, but since then the Council had put down a 12-inch pipe in St. George's street and connected to it at least four more large grids in Waterkant, St. George's, and Adderley streets. Again, on August 26 last, the property was flooded to a depth of two or three inches, and the Council, on being informed, expressed their regret, but added that they were surprised at plaintiffs still occupying premises so constantly liable to flooding, and therefore unsuitable for storing goods. Witness affirmed that the loss of these goods had been a serious matter for the firm; they had lost custom and had to hire other premises for storage; their sales had diminished in three months as compared with the corresponding quarter by at least

£3,000, and the staff had had so much extra work on this account that they had not been able to give due attention to the business, and on all these grounds he thought they were entitled to compensation. Most of the goods destroyed had been very well bought, and there had been loss in replacing them.

Cross-examined by Mr. Innes: The present stores were probably now below the level of the surrounding streets—as much as three feet below Waterkant-street—but in his recollection all those streets had been raised. On the plan produced the floor of their store was clearly above the level of the crown of Waterkant-street. He did not think it desirable to have floors below the level of the street, but if they raised the levels, they would lose a large amount of space.

Re-examined by Mr. Searle: The Cou ill themselves made alterations to doorways, &c., on the premises in 1894. They had an old drain from their premises running towards Adderley-street, but that was choked after the flood-water had invaded the store. Up to August, 1899, that drain had always served to clear the yard of any rainfall.

Wm. T. Olive, M.I.C.E., a consulting engineer practising in Cape Town, said he had been City Engineer for two years. Shortly after these floods he inspected the drains on the Tamboer's Kloof side: that was in September and October, but he had made an inspection of the Waterkant-street levels on August 4. The water that came down on August 2 and 6 came mainly from three sources: First, the Buitengracht-street sewer, which overflowed at Whitford-street and at Wale-street; second, mainly from Kloof-street watercourse which drained De Lorentz street and Tamboer's Kloof, which overflowed at Beckham-street, where it became a tunnel; and third, the Faure-street drain, which entered the main Orange-street drain, and ultimately came down Queen Victoria-street. The cause of the overflow in the Buitengracht-street was the condition of the watercourse at Whitford-street, where it was silted up with debris coming down from the galleys above, which must have been blocked and not cleaned out. There were obstructions in the shape of gratings placed of late in the Orange-street drain, and these in his opinion were responsible for the overflow. If the express intention had been to cause the flood, no better plan could have been adopted than by putting in this grid. At Grey's Pass there was a sliding sluice-door, which should

be raised whenever rain began. He did not consider the rainfall on the 2nd, 6th, and 16th August was excessive, and in any event it would not exceed the one inch per hour which was contemplated in the provision of storm-water drains by the Council scheme.

By Mr. Innes: What they had to look for in estimating the strain on a sewer was the intensity of the rainfall. If these grids had been kept clear or unlocked, the rainfall on August 2 and 6 could have been carried off. The sewers as laid down were adequate in capacity to carry off the rainfall of those days. From an engineering point of view it was impossible to provide against an abnormal fall; the scheme of Mr. Kirby, providing against a fall of one inch per hour, was, in his opinion, ample security. He did not know that the grids above Queen Victoria-street were choked before these floods. The slopes above there were steep, and a heavy rainfall would bring down a large quantity of debris. The bridge was taken away before the second rainfall, but the second flood took place. There were two steep slopes, from Signal Hill and Table Mountain, towards Waterkant-street, but there was a high-level sewer in Buitengracht-street to intercept any flow of surface water from the Signal Hill slopes.

Re-examined: The dropping sluice-gate at the top of Grey's Pass was fixed, around its edges, with clay, and that had to be loosened before the gate could be lifted by the windlass. The natural flow of surface-water down Adderley-street would be on the Railway-station side, assuming there were no sewers to absorb it.

By the Court: The fact of the rapid extension of building operations on the slopes which sent rain-water down more rapidly had rendered the drainage provision which might have been sufficient for ten years ago quite inadequate for the present time.

Adolphus M. Ackerman, C.E., said he had been in Cape Town since 1875, and was acquainted with the drainage system. In August last he resided in De Lorentz-street. He saw the water coming down from Mr. Skead's property, passing into a cottage belonging to Mr. Stephens, and then into Kloof-street. The breakaway of water was due to the reduction of the area of the natural sluiceway by the putting in of a 4-feet arched sewer. Lower down the sewer had been reduced to 2 feet 2 inches, and there the water rushed across Mr. Olive's tennis-court, of which there was not much left

after the storm. Twenty years ago the Kloof-street drain was quite twice the capacity to which it was now reduced. The "flap" in the drain was a great mistake, as it formed an obstruction to the free flow of water. He did not approve of the gratings that had been put in the Orange-street drain because they stopped the proper flow of the water. The sluice-gate at Grey's Pass was no doubt designed to keep the smell from emerging from the sewer lower down, but it was a piece of very bad engineering, and in the case of a storm of rain (which it was intended to cope with) he doubted whether with the mechanism they could raise the gate. In all these drainage works it was not particularly good engineering to have larger openings above and smaller openings below. In his opinion the drainage arrangements now existing were quite inadequate for the larger demands caused by the extension of buildings, roof area, and so on, which led to a quicker delivery of rain-water from a given area. Witness was the architect of the railway-station, which was built between 1876 and 1878, and in those days the natural flow of rain-water was on the east side of Adderley street. Once this storm-water got down from the slopes, the raising of Adderley-street at the upper end would turn the flow into St. George's-street.

Cross-examined by Mr Innes: He was positively certain the bridge in Kloof-street was an obstruction to the free flow of flood-water on August 2 and 6. He did not know how much, or when, the top of Adderley-street had been raised so as to cause the water to flow down St. George's-street, past the "Cape Times" Office. He did not agree with Mr. Olive that an engineer would not make provision for the highest possible rainfall, but he would provide against the highest average as shown by records of fifty years. His view was that, as a fact, the amount of rainfall on the catchment area on August 2 and 6 would have been too large for the existing sewers to carry off, if clean, and in addition to their being insufficient, they were badly constructed.

Edward B. J. Knox, O.E., lately chairman of the South African Republic branch of the Institute of Civil Engineers, said he knew Cape Town very well. From 1876 to 1886 he was Acting City Engineer, and was thoroughly acquainted with the drainage system as it was then. He had been all over the watershed-ground where

these floodings took place. In the sewer system there was no provision to take off any large and sudden flow of water.

By Mr. Innes: If he were designing a drainage system he should not regard the size of the covered drain as compared with the uncovered culvert; he would go upon the drainage area.

Wm. A. Russell, of Rosedale, South African College, said that when the walls of the college field went down in August, owing to the floods, the water was going over the little bridge. The water piled at the upper screen, or gratings, and overflowed into the field; the wall was carried away, and the water went down Queen Victoria-street in a great wave. This was the fourth time the wall had been knocked down by floods from the same cause; three times the Council had rebuilt the wall without being asked, and he dared say they would have done so again, had it been a smaller flood. The College authorities looked forward to being flooded with every heavy winter rain.

By Mr. Innes: On this occasion there was quite an exceptional flood; the damage to the College property was greater than usual. It was the heaviest rain he had yet seen there.

Robbins, who had appraised the value of the goods damaged by the water, gave evidence as to their condition.

E. S. Steytler, who accompanied Mr. Robbins, testified as to the examination of the stock and the market value of what was damaged. They recommended a sale by public auction. The prices they put on the goods were the fair market prices of the day. Chas. Johnston, of the firm of J. G. Steytler & Co., corroborated.

After other evidence the case for the plaintiffs closed.

For the defence,

Herbert Rigby, drainage engineer to the Council, said he was well acquainted with the system of drainage. In flood time all sorts of debris came down the channels, and the object of putting in the gratings was to keep the debris out of the sewers. He inspected the places the day after the first flood, and saw indisputable evidence that the sewer had been surcharged. In regard to Whitford-street, the flood-water filled the drain, lifted over the barrier, and flowed through various properties into Long-street. The sewer there was full, and the surplus by cross streets got into Queen Victoria-street. In his opinion the bridge put across the sluice

at the upper portion of Buitengracht-street would not have obstructed the free flow of any volume of water coming down from the slopes of the hill. He did not think the débris brought down would have had any effect in choking the Buitengracht-street sewer and thereby diverting the water down Wale-street. There was an abnormal amount of gravel and débris brought down from the slopes of Signal Hill, which had the effect of choking the sewers and sluits, and that, in his opinion, helped to accentuate the flood. It was not possible, speaking generally, for the sewers to deal with the rain that fell on August 2 and 6. Cape Town was a particularly difficult place to drain, with the double slope from Table Mountain and Signal Hill. In the heaviest period of flood there would be about 14,000 cubic feet of water coming down the Orange-street and Faure-street drains; the capacity of the Queen Victoria-street was about 9,200 cubic feet, so that there was a difference of about 60 per cent. in the two. The capacity of the Long-street sewer above Wale-street was 8,234 cubic feet per minute, and that was full. The upper portion of the Long-street sewer could not have taken anything like the quantity of water coming down on the 2nd August. The Buitengracht-street sewer had a capacity of over 11,000 cubic feet of water per minute, and that was running full, and burst on the 6th August, the second day of the floods. Witness had made an exhaustive examination of the requirements of the city, and recommended certain schemes of drainage, one of which was now being carried out by the Council, at a cost of £190,000. In his opinion, the rainfall of August 2 and 6 was entirely abnormal, and above the ordinary capacity of the sewers.

Cross-examined by Mr. Searle: I admit the storm-water drainage is in a very bad condition, and it is true that in my report to the Council the whole system, from an engineering point of view, is described as bad in principle. The ratepayers, in July, 1897, sanctioned the new storm-water system, and up to now about two miles of storm-water sewers had been constructed. I would not like to admit that the water which flooded Searight's premises came from Adderley-street; it would probably come from the upper side, in the Signal Hill direction. For ordinarily heavy rains the Orange-street drain was sufficient; I cannot say why the College wall was carried away eight times in four years, because I had nothing to do with the flooding previous to

1896. I admit that if the grating and the gully were stopped by débris, and the sluice-gate were not opened in time, those would be dangerous obstructions in the water-course. In connection with a new sewer, I would not put these obstructions in the watercourse. The Buitengracht-street sewer at Wale-street, when I saw it, was choked with débris. When the storm was foreseen on August 2, it would have been better to send men to open these flaps and gratings, to allow the rainfall to pass away.

O. J. Byworth, Town Clerk, gave evidence as to the working of the drainage system. In respect of these floods there had been forty-eight claims for damage, in addition to the one now before the Court. Several of those claims were from Waterkant-street, where plaintiffs' property was.

Nicholl, Superintendent of the Street-cleansing Department of the Council, said the rainfall on the 2nd August was extraordinarily heavy. There was an overflow at Grey's Pass, where the wall had been knocked down. In the early morning of August 6, as rain was falling, he made a round of the various sluits and drains, and they were all clear of débris and in good working order. When the heavy rain came on he got a staff of men to work keeping the sluits clear of blocking.

Fazaakerly, Flushing Inspector for the Council, said the sluice-gate at Grey's Pass had been lifted for at least nine days before August 2. He visited that place on August 2, and found the water in the sluit running free, and all clear. Later on he saw a block at the grid and also at the sluice-gate; the débris was composed of pieces of brush, leaves, paraffine tins, and all sorts of things brought down by the heavy flood. That was the reason of the overflow.

Adolphus E. Griffiths, of the Metropolitan Fire Brigade, produced a book showing the rainfall.

Francis Frederick Gooderham, Superintendent of Works to the Town Council, gave evidence as to the repairs to the drains in Orange-street.

John Moss Wright, C.E., produced the record of an automatic gauge, which showed the intensity of the rain. On August 2, the intensity was 1.13 inches in the hour; on the 6th, it was 1.98 inches in the hour. On that day witness was at Sea Point, and was unable to get into town, as the tram service was stopped. Quite two feet of sand, gravel, and boulders were piled on the rails. It was a storm of remarkable intensity. There

was a necessity for having the gratings across the invert sluic, to keep out floating brush-wood, but they could be made larger in area with advantage. Provision was made in the system for a normal high-level rainfall; not more,

After argument on the facts,

The jury found for the plaintiffs, and awarded them the sum of £1,694 4s. 2d. as damages.

Judgment was accordingly entered for plaintiffs for £1,694 4s. 2d. and costs.

[Plaintiff's Attorneys, Messrs. Van Zyl & Buissan ; Defendant's Attorneys, Messrs. Fairbridge, Arderne & Lawton.]

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice) and the Hon. Mr. Justice LAUENCE (Judge-President of the High Court of Griqualand West).]

PROVISIONAL LIST.

GARLICK V. H. E. RICHOLD. } 1900
Feb. 28th.

Mr. Gardiner moved for the final adjudication of defendant's estate as insolvent.
Granted.

DE SMIDT V. H. SCOTT, SIERADZKY, AND
WITTENBERG.

Mr. Nathan moved for provisional sentence upon a mortgage bond for £1,400, against Scott, as principal debtor, and also against A. Sieradzky and I. Wittenberg, as sureties. The bond had become due by reason of the non-payment of interest. It was also asked that the property specially hypothecated be declared executable.
Granted.

SLABBER V. A. P. HEYN , SEN.

Mr. Buchanan moved for provisional sentence for £282, due upon an acknowledgment of debt, also for interest from February 15, 1900, and costs of suit.

Granted.

DE WAAL AND CO. V. R. N. P. VAN ZYL.

Mr. De Waal moved for a decree of civil imprisonment against the defendant on an unsatisfied judgment. A writ had been issued and a return of *nulla bona* made.

Decree of civil imprisonment granted.

ALFORD, WILLS AND CO. V. JOHN JOHNSTON.

Mr Brown moved for the final adjudication of defendant's estate as insolvent.
Granted.

SAVAGE AND SONS V. MARCUSE AND
OTHERS.

Mr. Buchanan moved that the provisional order be discharged.
The order was discharged.

ILLIQUID ROLL.

JENKINSON AND OTHE'S V. FAIRFIELD
BRICK CO., LIMITED.

Mr. Bisset moved for judgment, under Rule 329D, for the sum of £5,046 2s. 6d., being the amount of overdraft given by the Standard Bank, together with interest on that sum from February 6, 1900.
Granted.

GENERAL MOTIONS.

ALEXANDER V. ALEXANDER.

This was an action for divorce brought by the plaintiff against his wife on the ground of her adultery.

Mr. Heydenrych appeared for the plaintiff; the defendant was in default.

David Alexander, the plaintiff, stated that he was a labourer in the employ of Mr. C. P. de Villiers. He married the defendant at Kuil's River on February 27, 1895, and they lived together as man and wife until March 24, 1899, when she deserted him and went to live with one Peter Lindeboom, also of Kuil's River. There was one child of their marriage, a girl, now aged four years.

In answer to the Chief Justice, witness said that he claimed the custody of the child, but if the Court granted that, he was willing that the child should remain with the mother until it was old enough, when he could take care of it.

Peter Bosman gave evidence in support of the allegation of defendant's adultery with Peter Lindeboom.

A decree of divorce was granted as prayed [Plaintiff's Attorney, V. A. van der Byl.]

IN THE ESTATE OF THE LATE JOHANNES
ANDRIES TRUTER.

Mr. Buchanan moved for the cancellation of a certain mortgage bond in the above estate. The farm in question was situated in the division of Malmesbury, and the mortgage was entered into on March 23, 1855. Truter had been dead a number of years, and although a diligent search had been made the bond in question could not be found. The petitioners had been managers of the farm for a considerable time before Truter's death, and they stated that they had never paid interest upon any such bond, although interest had been regularly paid on other two bonds on the farm. As far as they could recollect, the said J. A. Truter had never paid any interest on such mortgage, and they were certain that the bond must have been paid off. An order was asked for authorising the Registrar of Deeds to cancel the bond without the production of the same, as was customary in accordance with the rules and regulations of the office.

A rule *nisi* was granted calling upon all persons concerned to show cause by March 12 why an order should not be granted as prayed; the order to be published once in a Dutch newspaper circulating in the district and once in the "Government Gazette."

SEA POINT MUNICIPALITY V. PEDERSEN.

Mr. Benjamin appeared in this matter and said that a consent paper had been signed consenting to the postponement of the case *in die*, respondent to pay the costs of the court.

Postponement granted accordingly.

IN THE MATTER OF THE PETITION OF
NICHOLAS SALMON LOUW.

Mr. Buchanan moved that the rule be made absolute authorising the Registrar of Deeds to issue a certified copy of a bond, the original of which had been lost.

The rule was made absolute.

IN THE MATTER OF THE MINORS
MARINCOWITZ.

Mr. Buchanan moved for an order authorising the Master to make certain payments towards the maintenance and education of the above minors. The minors had certain inheritances due to them out of an estate, and it was desired that the Master should pay out to each minor a sum not exceeding £50 a year.

The Master's report was favourable, and the order was granted as prayed.

EPSTEIN V. KRAACHMEL.

Mr. Buchanan moved for the confirmation of a rule *nisi* calling on respondent to show cause why the rents due to him by the tenants of certain property attached under a provisional judgment, dated December 12, 1899, should not be paid over to applicant in satisfaction of the writ issued by applicant under the said judgment, and to pay the costs of this application.

Granted.

IN THE MATTER OF THE MINOR BIRKETT.

Mr. Nathan moved for an order authorising the Master to make certain payments towards the education and maintenance of the minor. The petitioner was the executor testamentary of the late G. Wilson, and in terms of the will Norman Birkett was appointed sole and universal heir. Birkett was desirous of entering college to study for the Civil Service, and there were several hundred pounds due to him out of Wilson's estate, which amount the executor would pay to the Master of the Supreme Court.

The Master's report was favourable, and an order was granted as prayed.

IN THE MATTER OF THE MINOR SMITH.

Mr. Gardiner moved for an amendment of the order granted on February 1 last, so as to give leave to mortgage the property for the benefit of any children that might yet be born of the parents of the minor.

The amendment of the order was granted as prayed.

IN THE INSOLVENT ESTATE OF NICHOLAS
GEORGE SCHNEIDER.

Mr. Brown moved for the appointment of a provisional trustee in this insolvent estate, there being a number of live-stock which needed immediate care. One of the petitioners, Carl Frederick Battenhausen, was suggested as provisional trustee.

The order was granted, and Carl Frederick Battenhausen appointed provisional trustee.

IN THE INSOLVENT ESTATE OF HENRY
ALFRED GALLOWAY.

Mr. Buchanan moved for an order authorising the Master to call a meeting for the election of a new trustee in the insolvent

estate of H. A. Galloway, of Prieska, the trustee previously appointed, Mr. T. Proudfoot, having died before finally settling matters in connection with the estate.

The Court granted an order as prayed, the Master to select the place of meeting.

SMITH V. HALL.

Mr. Buchanan moved that the rule nisi restraining the respondent from removing certain furniture be made absolute.

Mr. Benjamin said he appeared on behalf of one White and one Robinson, and asked that the matter be allowed to stand over, the interdict to stand in the meantime. It appeared that both White and Robinson were interested in the furniture in question, and having only received notice that morning, they had not had time to file affidavits.

Mr. Buchanan said that in this case Mrs. Hall, the respondent, had received notice to quit the house in which the furniture was, and that notice expired on March 1. He supposed White and Robinson claimed the furniture, which was on the hire purchase system, but the landlord had a lien on furniture when it was taken into a house with the intention of remaining there permanently. However, he was instructed not to oppose the postponement of the matter until March 12.

The matter was accordingly allowed to stand over until March 12, the question of costs also to stand over.

COLONIAL GOVERNMENT V. LOCKE.

This was an application by the Secretary for Agriculture for leave to sue by edict. The petition set forth that on the 23rd April, 1878, a proclamation was published in the "Government Gazette" in terms of Act 7 of 1865, ordering the resurvey of the area of Constantia, in the Cape Division. That the said resurvey was duly undertaken and completed. That the sum of £7 2s. 1d. is due to the Colonial Government in respect of the resurvey of lot No. 22 in the said area, which is still registered in the name of one Francis Lodewyk Locke, under deed of grant dated 28th February, 1837. That the whereabouts of the said Locke, or of his legal representatives, are unknown, and all efforts to ascertain the names of his legal representatives have been unavailing. The prayer was for an order to attach lot No. 22 *ad fundandam jurisdictionem*, for leave to sue Locke or his legal representatives by edict for recovery of the sum of £7 2s. 1d.,

and for a direction as to the mode of service of the summons, and as to the time for the appearance of the defendant.

Mr. Sheil, Q.C., appeared for the Government.

The Court granted leave, and made the citation returnable on the 12th April.

NDABAZANA NTAPO V NGUHLENI AND THE SURVEYOR-GENERAL.

This was an application on notice that the respondent Nguhleni would be required to show cause, if any, why an order should not issue from the Court authorising the Registrar of Deeds, King William's Town, to amend the title deed of a certain piece of land, being Lot No. 235, situate on the Wolf River, division of King William's Town, at present registered in the name of the first respondent, by the substitution of the name of the applicant in place of that of the respondent, the grounds of such application being that the land was purchased by the applicant and not by the respondent, and that the name of the respondent was erroneously inserted in the said title deed as the owner of the said lot.

The applicant alleged in her petition that she was married many years ago to one Ntapo according to native custom.

That thereafter Ntapo deserted her, and since his desertion she had had to provide for herself.

That in the year 1871 she purchased from the Colonial Government the piece of land in question, as per deed of grant, dated 4th December, 1871.

That she handed the money (£13 10s.) for the purchase of the land to the respondent, her brother, who was then about sixteen years old, with instructions to hand the money to the Resident Magistrate of King William's Town, and to bring her the deed of grant.

That thereafter the respondent did hand her the deed of grant, and it has remained in her possession up to the present time.

That in February, 1899, the respondent first demanded from her the delivery of the title deed, and thereafter, in March, 1899, issued a summons against petitioner for delivery of the said deed of grant in the Court of the Acting Resident Magistrate, Keiskama Hoek, which summons was dismissed through want of jurisdiction of the said Court.

That she first learned that Nguhleni's name was inserted in the said deed of grant

and not her own on receipt of the demand above mentioned, namely, in February, 1899.

That the insertion of the name of Nguhleni instead of that of the petitioner is an error, that the land was purchased by the petitioner with her own money, that she has resided thereon continuously since the said purchase, and has had possession of the deed of grant thereof.

The prayer was for an order that the name of Nguhleni should be erased from the deed of grant, and the petitioner's name inserted in its place.

The Surveyor-General filed an affidavit in which he alleged that all original grants of land in this colony are registered in the office of the Surveyor-General of the Colony, and the Registrars of Deeds have no control over such deeds.

That he was not aware of any case in which the Court had ordered the amendment of a grant made by the Crown.

That the usual course which is adopted when errors are made in grants of land is to apply to His Excellency the Governor, who, if satisfied that a *bona fide* error has been made, sanctions such amendment as may be necessary.

That in the limited time at his disposal he had been unable to trace the records of the grant in question, and therefore could not say whether the applicant had a good claim for rectification or not, seeing that the transaction took place under the Kaffrarian Land Regulations, and dates twenty-nine years back.

He submitted that it was not desirable for the Court to order the amendment of a title deed until the ordinary and usual methods of procedure had failed.

Mr. Howel Jones was heard in support of the application.

Mr. Sheil, Q.C., for the Surveyor-General.

The Court ordered the application to stand over *sine die* until application had been made to the Governor, as suggested by the Surveyor-General.

IN THE MATTER OF THE PETITION OF ELIAS KUYIS.

Mr. Buchanan moved that the rule *nisi* for the cancellation of a certain bond be made absolute.

The order was granted, subject to the production of the return of service of the notice.

QUEEN V. SOESMAN.

Mr. Sheil, Q.C., moved for the removal of the trial of defendant, who is charged with theft, to the Circuit Court at Prince Albert. Granted.

SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G.), the Hon. Mr. Justice B CHANAN, and the Hon. Mr. Justice LAURENCE.]

HUNTER V. CAPE TOWN TRAM-
WAY COMPANY. { 1900.
" 1st.
" 2nd.

New trial—Verdict of jury—Weight of evidence—Negligence—Contributory negligence.

On an application by the defendant for a new trial, on the ground that the verdict of the jury was against the weight of the evidence, Held, that as there was evidence to support the verdict, and there was not such a preponderance in favour of an opposite conclusion that it would be unreasonable and unjust to allow the verdict to stand, the application must be refused.

This was an application by the defendant company for a new trial on the ground that the verdict of the jury was against the weight of the evidence. The action was heard on February 13 last, and resulted in the jury returning a verdict for the plaintiff for £1,750 damages.

Mr. Innes, Q.C., Sir Henry Juta, Q.C., and Mr. Upington for the applicant, the Tramway Company.

Mr. Graham, Q.C., and Mr. Close for the respondent.

Sir Henry Juta: With regard to the boulders which plaintiff and Hill alleged were in the road, necessitating their crossing the tramline, no attempt was made to call other evidence to show that boulders were there such as to prevent anyone else from driving along the road. I contend that

there was not a particle of evidence given by the plaintiff of any negligence on the part of the defendant, nor to show that the motorman could have stopped the tram in the time nor in the distance. I submit that there was overwhelming evidence to show that these two men were drunk, that they were, on the whole, not fit to drive, and that it was driving negligently at the time.

The Chief Justice: Is there any authority on the point as to whether the plea of contributory negligence would be available in a case where it was the driver of the cart, and not the plaintiff, who was guilty of contributory negligence.

Sir Henry Juta: I submit that the plea would be available in a case where a person got into a vehicle knowing that the driver was drunk.

The Chief Justice suggested that before the Court decided upon the application the parties might consider whether they could not come to some agreement in the way of a reduction of the amount of damages.

Mr. Justice Buchanan pointed out that if a new trial should be granted in this case it might not mean a verdict for the defendant company. Another jury might find a greater or a lesser amount of damage.

Mr. Graham said there was no question as to the amount of damages.

The Chief Justice said that if there had been, then of course the Court could have taken a different course than a mere suggestion.

Laurence, J., said he was prepared to say that this case was very carefully gone into. The jury took a great deal of interest in the case and a great deal of pains, and he should certainly say it was an intelligent jury. Perhaps he might say that up to this stage he had avoided saying anything in the way of suggestion, but with a view to the parties coming to some understanding he would say that although the jury was certainly up to the average of intelligence, if he had tried that case without a jury he should not himself have arrived at the same conclusion as the jury did upon the evidence. Of course that was very different from saying that the verdict of the jury was an unreasonable one.

Mr. Graham: The procedure adopted by applicant is wrong. See *Sidman v. McLachlan* (Buch. 1879, p. 156). Applicant should have applied for a rule. There have been a number of cases upon the question of new trials. The most recent is *Commissioner of Railways v. Brown* (13 App. Cas., 133).

There is also *Fernie v. Bayley* (see *Annual Practice*, 1900), and *Ex parte Wright* (11 App. Cas., 152), and *Brisbane Municipality v. Martin* (App. Cas., 1894). If the verdict was reasonable the Court should not allow a new trial. It would, in fact, amount, under the circumstances, to improving the Jury Act off the Statute Book.

Sir H. Juta (in reply): Each case must be taken upon its own particular facts. The cases quoted only go to show that the verdict should not be disturbed if reasonable.

C.A.V.

Postea (March 2).

De Villiers, C.J.: The accident occurred by reason of the cart in which the plaintiff was being driven by Hill having crossed the tramway as the defendants' tramcar was approaching. There were some boulders on that side of the road on which the cart was going, and Hill says that as his horse will not stand when a tram-car is coming, he thought it best to cross the road ahead of the car. According to the plaintiff's evidence "the tram-car was coming along like an express train," and there was consequently some negligence on Hill's part in crossing at all, but on the other hand he would have run some risk either by stopping or by going along between the boulders. I am by no means satisfied that Hill was quite sober at the time, but even if there was contributory negligence on Hill's part the defendants, if guilty of negligence, would not be relieved from liability to the plaintiff, who was not responsible for Hill's negligence if any. And even if the plaintiff were so responsible the question would still remain whether the defendants' servants could not with reasonable care and skill have avoided the accident. Upon this question the evidence of the motorman who drove the tram-car would have been all-important, but he was not produced as a witness, nor is there any satisfactory explanation why he was not called. It is said that he is at Johannesburg, but if an application had been made for a postponement of the case until after the war, the Court would have granted such an application sooner than allow the case to proceed without his evidence. The plaintiff proposed to give evidence of a conversation between himself and the motorman after the latter had left the defendants' service, but the evidence was objected to by the defendants' counsel and disallowed by the Court. The Court is therefore in the dark as to what the motorman's evidence would have been if he had been here. As to the question whether the motorman could, after the cart began cross-

ing the road, have stopped the tram-car the evidence is very conflicting. Reading that evidence, without having the benefit of hearing the witnesses give it, I am inclined to think that it preponderates in favour of the defendants, but that appears not to have been the impression on the minds of the jury. By a unanimous verdict they found in favour of the plaintiff, and the Court is now asked to set aside that verdict on the ground that it is against the weight of the evidence. I am not prepared, however, to say that the verdict is so unreasonable that it would be unjust to allow it to stand. The learned judge who presided states that although he would probably, if the decision had depended upon him, have found a different verdict, yet as there was evidence to go to the jury, he is not prepared to say that the verdict was either grossly unreasonable or perverse. I take the correct rule to be that where the question is one of fact, and there is evidence to support the verdict, that verdict once found ought to stand, unless there is such a preponderance in favour of an opposite conclusion that it would be unreasonable and unjust to allow the verdict to stand. The application for a new trial must therefore be refused with costs.

Buchanan, J., said that on reading the record alone in this case one could have little hesitation in saying that the verdict was against the weight of the evidence. The condition of the parties who were driving, the condition of the plaintiff, and the incidents which took place before this accident were certainly very strong against the plaintiff in this case, and it would want under those circumstances, not much to show that the fault was not due to the Tramway Company, but to the plaintiff and his friend. He had looked at the authorities, and it seemed to him that the ground upon which the Court would grant the new trial would be that the verdict was dead against the weight of the evidence, and that it was a deliberately wrong verdict. Mr. Justice Laurence had said that if he had sat in this case without a jury he was not prepared to say he would have arrived at the same conclusion as the jury, but he had pointed out that that was altogether different from saying that the verdict was unreasonable and that it was perverse. As there was not more evidence, and as the learned judge who sat in the case was not prepared to say that this was an unreasonable verdict, he concurred, though from the record the verdict did appear to be against the weight of the evidence.

Laurence, J., also concurred, and said that as he had said the previous day, a judge might say that he would not himself have arrived at the same conclusion as the jury, but that was very different from saying that that verdict was so grossly unreasonable, according to the phrase used in some of the English cases, so distinctly perverse, that a man of ordinary intelligence could not have arrived at it. In this case there was undoubtedly some evidence to go to the jury, and I think the evidence for the plaintiff was, so to speak, negatively increased in value by the fact that the defendants were unable to produce either motorman or guard, or any passenger who witnessed the occurrence. There had been a great delay in bringing this case, but that was explained by the plaintiff as due to the nature of his injuries, and there was plenty of time since the action was commenced to enable the defendants to call those witnesses. Under all the circumstances, he considered that in this case, as stated by the Chief Justice and Mr. Justice Buchanan, and also on the general principles laid down both in the Courts of Appeal and the House of Lords, it would be going too far to say that the case must go to a new trial.

[Applicants' Attorneys, Messrs. Scanlen & Syfret; Respondent's Attorney, Guss Trollop.]

BROOKES V. MULLER AND ISRAELSON.

Mr. Searle, Q.C., with whom was Mr. Graham, Q.C., applied on behalf of the plaintiff in the action for leave to take the evidence of two witnesses, John E. Brookes and Florence Wells on commission. The affidavit of the applicant's attorney was to the effect that John E. Brookes was the husband of the applicant, but had lived apart from her for some time. He had intimated to her that he intended leaving her, and would be away before the day of the trial, May 4. There was also a danger of the other witness, who was a barmaid, leaving before the trial.

The case was to be tried by a jury, and plaintiff was anxious to have it heard during this term, or as soon afterwards as possible, but the defendants had raised the objection that fourteen days' notice of setting down the application should be given to the Registrar. If the witnesses could be obtained for the trial plaintiff undertook to have them there, and all that was now asked for was a commission *de bene esse* and that Mr. Howel Jones be appointed commissioner.

Sir H. Juta for the defendants opposed the application.

De Villiers, C.J., said: The plaintiff was very anxious to have the case tried this term, and had made an application to that effect, but it could not be set down in time. Under these circumstances it seemed only right that if the plaintiff would lose the benefit of material witnesses by reason of this postponement the Court should allow these witnesses to be examined *de bene esse*, and the attorney for the plaintiff states that these two witnesses are material witnesses, and that as they have no fixed address they would be liable to disappear, which would mean that they would be lost to the petitioner. In the interests of justice it is right that these persons should be examined, and if they are present at the time of the trial they will have to be called, inasmuch as this is a commission *de bene esse*. The Court will therefore order that a commission be issued, it being understood that if the witnesses are in the Colony at the time of the trial they will be called as witnesses. Mr. Howel Jones will be appointed commissioner, and the costs of this application will be costs in the cause. If it is not shown at the time of the trial that these witnesses are absent the evidence will not be taken.

EXECUTORS OF CHOORMAL LUCHERAM V. PHALRAINAL LUCHERAM.—PHALRAINAL LUCHERAM V. EXECUTORS OF CHOORMAL LUCHERAM.

These were two applications, which by consent of parties were heard together.

The first was for a rule *nisi*, calling upon the respondent to show cause why a certain shop and premises, situate at No. 10, Orphan-street, Cape Town, and all stock therein and all assets of the estate in his possession should not be delivered up to the applicants, to be made absolute.

The second was that a rule *nisi* obtained by the respondents to the first application calling upon the applicant to show cause why the following orders should not be granted should be made absolute: (a) An interdict restraining the executors from parting with any of the estate of the late Choormal Lucheram until an action can be brought to upset the will and have applicant's rights declared with reference to partnership goods; (b) an order appointing the Board of Executors of Cape Town to take charge of the assets of the estate pending

the result of the said action; (c) an order appointing the Board of Executors to represent the minors in the said action.

Sir Henry Juta Q.C., appeared for the executors of Choormal Lucheram.

Mr. Innes, Q.C., and Mr. Graham, Q.C. for Phalrainal Lucheram.

Several affidavits were filed, in which it was alleged for the executors that from the will of the deceased it appeared to be his desire that in the absence of his brother Pursean Lucheram the executors should carry on his business for account of his estate until the arrival of the brother, and that this business was carried on in the shop in question.

That Phalrainal Lucheram was in occupation and refused to deliver possession to them.

Phalrainal Lucheram alleged that he was a partner in the business with the deceased, and that the property in question belonged to the partnership. He alleged further that he was instituting proceedings to have the will in question upset.

After argument on the facts the Court made the following order by consent: That the secretary of the Colonial Orphan Chamber and Trust Company be and he is hereby appointed as curator to take charge of all the assets of the estate, and to carry on the business pending an action to set aside the will and determine the rights of the parties. Action to be brought next term; costs to be costs in the cause.

BARTHOLOMEW V. STANLEFORD { 1900.
Mar. 2nd.

This was an application for leave to issue execution against respondent in respect of the deficiency in his insolvent estate.

The petitioner set forth in an affidavit that the respondent's estate was sequestrated in the early part of 1897, and there were unsatisfied claims in the estate to the amount of £732, the petitioner's firm having a claim of £21 12s. 6d. judgment and costs, in respect of which he had received nothing whatever. After the date of his surrender respondent commenced trading ostensibly as the agent of various companies, but petitioner believed he was not the agent of any person or company, but that the stock was his own property.

The respondent in his affidavit gave details of the various positions in which he had been employed since the date of his insolvency, saving between that time and the month of August last £200, when he commenced busi-

ness, his wife putting £260 into the business. Of the stock in the business, goods to the value of £198 had been received from a certain firm for sale or return. In the business £30 per month, representing the main portion of the profits, was the result of his own skill and labour in repairing type-writing machines, &c. He pointed out that his insolvency had been caused by heavy lawsuits in which he was the unsuccessful litigant. He also pointed out that the applicant carried on the same line of business as he did.

Mr. Innes, Q.C., for the applicant.

Mr. Benjamin for the respondent.

After further affidavits had been read, counsel were heard in argument on the facts.

The Court granted leave to issue execution against the respondent's property for the sum of £150, but in order that the respondent's business should not be hampered the Court stayed execution pending the payment of £50 per month until the whole was paid off.

SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G.), the Hon. Mr. Justice BUCHANAN, and the Hon. Mr. Justice LAURENCE (Judge-President of the High Court of Griqualand West).]

SCIAMA V. TABLE BAY HARBOUR BOARD. 1900
Mar. 5th.
" 13th.

Carriers — Mandate — Negligence —
Privity.

The master of a tug belonging to the defendants received from the captain of a mail steamer for conveyance to the shore a case of ostrich feathers consigned to the plaintiffs. Owing to the want of great care in handling the case it fell into the water, and the feathers were damaged. It having been found by the Court that the previous course of dealing was such as to justify the inference that the captain of the steamer

acted and had authority to act on behalf of the plaintiffs in delivering the case of feathers to the master of the tug,

Held, that the plaintiffs were entitled to sue for the damage.

Held, further, that inasmuch as the defendants were not to receive any remuneration for the conveyance of the goods, they did not incur the liability of common carriers, but that, as mandatories, they were responsible for damage caused by want of great care and vigilance on the part of their servants.

This was an action for damages.

The declaration alleged that the defendant was the owner of the tug John Paterson, and the crew were the servants of the defendant; that about the 10th July, 1899, a parcel of ostrich feathers of the value of £538 11d., the property of the plaintiff, was received on board the tug John Paterson by the defendant, or its servants or agents, for the purpose of landing the same at the Cape Town Docks. It was the duty of the defendant and its servants or agents, in landing the said parcel, to use all due care, but the defendant itself, its servants or agents, so improperly, carelessly, and negligently handled the said parcel in landing it that it fell into the sea, and its contents were greatly damaged. The plaintiff claimed £125 damages.

The defendant in his plea admitted the ownership, &c., of the tug, but said that on the 11th July, 1899, it was leased to the Union Steamship Company for the sole purpose of conveying passengers and their luggage from the S.S. Guelph, then lying in Table Bay, to the Docks. It said that no contract was entered into between the Board and the plaintiff to convey the said parcel of ostrich feathers or any person or thing whatever from the said ship to the Docks. The said tug and its crew were placed at the disposal as aforesaid of the Union Steamship Company. As to how the said parcel of ostrich feathers came to be on board the tug and as to its value the defendant Board had no knowledge, and put the plaintiff to proof thereof. It admitted that the parcel fell into the sea and sustained some damage, but denied that the plaintiff had suffered any damage for which the Board was liable.

The replication denied any contract between the defendant Board and the Union Steamship Company, and that the tug and crew were placed at the disposal of that company, and said that the crew were the servants or agents of the defendant, and that they were acting within the scope of their employment and authority in receiving the said parcel. Save as above, and as to admissions the plaintiff denied the allegations in the plea, and joined issue.

Sir Henry Juta, Q.C. (with whom was Mr. Benjamin), for the plaintiff.

Mr. Innes, Q.C. (with whom was Mr. Buchanan), for the defendants.

Rufus Davis, the plaintiff, said he carried on business in Cape Town as Sciama & Co., ostrich feather dealers. On July 12, 1899, two packages of feathers were brought here. The value of these feathers was £535 11s., and there were charges to the amount of £3. It was witness's habit to bring feathers from Mossel Bay, and in case the steamer did not come into the dock it was usual to land the goods by tug. One of the packages of feathers in question was in good order, but the other was damaged by salt water and was surveyed and condemned. Witness saw the insurers, the Union Company, and the Harbour Board, and was authorised to sell the packages by public auction. The feathers were so sold and realised £413 18s. 2d. Witness therefore sustained damage to the amount of £125.

Cross-examined: Witness's insurance policy covered the risk until the goods were landed on shore, so that he was guarded against loss in any case, and really brought the action for the Insurance Company. The Harbour Board said they had no objection to the sale, but they were not liable for the damage. It was important to witness to get these goods shipped by the mailsailing after the Guelph arrived. The Guelph arrived on Monday, and the mail sailed the following Wednesday, but for that the goods would have been landed in the usual manner. It was therefore to facilitate witness's business that these goods were landed by the tug. Witness generally went to the office of the agent of the Union Steamship Company, and said he had so many cases of feathers on the intermediate steamer which he would like landed. He could not say whether he had done so in this instance. Divine, Gates & Co. were his landing agents.

Re-examined: It was quite a customary thing for feathers to be landed from

steamers by tugs. That had been the custom for years. When he said Divine, Gates & Co. were his landing agents he did not mean that they actually took the goods off the ship.

Joseph Duggan Baker said he was a clerk in the employ of Divine, Gates & Co. They were the chief landing agents for Mr. Davis. On July 12 last witness went to fetch two cases of feathers for Mr. Davis. The cases were lying on the wharf intact, but one of them was wet. Witness went to the captain of the tug and told him, and they went together to Mr. Roe, the agent of the Union Company. The captain told Mr. Roe that two of the pierhead men had turned the case over into the water. Witness received permission from Mr. Roe to remove the cases and deliver to Mr. Davis. Nothing happened to them while they were in witness's custody. It was customary up to that time to bring feathers, and also oysters, fish, baggage, &c., ashore by tugs.

Cross-examined: It was only when things were wanted in a great hurry and the ship was to lie outside for a day or two that the feathers were brought ashore in the tug. Witness had not seen the tugs bring cargo ashore.

By the Court: The captain said the two pierhead men had dropped the case into the sea while they were rolling it off the tug on to the quay.

David Scott Pargiter, manager here of the Union Steamship Company, deposed that the goods in question were sold by public auction by arrangement between the Union Company, the Insurance Company, and the Harbour Board, with the last named through the secretary to the Board.

By the Court: The trip of the tug would be paid for by the Union Company. What the charge would be would all depend upon circumstances. The tugs were there for the ships' business. It was customary to land feathers in this way. It was also customary to land in this way anything of an urgent nature, such as fish or oysters. Witness considered that the Union Company's responsibility ceased as soon as the goods were on the tug. The Harbour Board was not paid for the conveyance of the feathers, but were paid for the trip of the tug. They were not paid anything additional for the conveyance of the feathers. He did not know that it was an understood thing that the tugs should be restricted to the conveyance of passengers and their luggage. He would argue that having hired the tug from the Harbour

Board they could fill it with cargo if they wished. Of course, the Harbour Board might have remonstrated, but as regarded the actual hiring of the tug, no particular duties were specified.

Frederick W. M. Roe said he was assistant to Mr. Bishop, the Union Steamship Company's dock superintendent, and had been so for between three and four years. Part of his duties was to go on board the steamers belonging to the company when they came into this port, and when they did not come into the dock he went out to them with the tug belonging to the Harbour Board. It had been customary to bring feathers and other things off the ship by the tugs ever since witness had been there. When they were loading up the captain of the tug notified witness when he had enough on board. Witness took no control of the tug coming ashore, and took no control of the landing of the goods, which was done entirely by the Harbour Board. The pierhead men were the servants of the Harbour Board. On July 12 last witness took the tug John Paterson. He made no special arrangement, but simply asked for the tug as usual. Witness went on board the steamer and there were two cases of feathers. He told the captain when they were going out that they were bringing feathers ashore. These two cases of feathers were placed on board the tug in good order and condition, so far as witness could see. Neither of them was wet. Witness came ashore with the tug, and when they reached the dock witness landed and went to his office. About an hour afterwards the captain of the tug came to witness and informed him that in landing the cases of feathers one of the pierhead men had accidentally knocked one of the cases into the sea, through knocking against a large piece of wood on the gangway. The case would weigh about a hundredweight or a hundredweight and a half. There was no difficulty in landing these cases. It was the first accident witness knew of with them. With ordinary care there would have been no accident. There was nothing exceptional in the weather that day to witness's recollection.

Re-examined: There was a uniform charge of £5 per trip. Witness thought that if he wanted anything carried the captain was bound to take it. Witness was positive that he told the captain he was to bring feathers ashore.

Re-examined: During the last three or four years more than a hundred cases of feathers had been brought ashore by the tugs.

This closed the case for the plaintiff.

For the defence,

Frank Robb, secretary of the Table Bay Harbour Board, said the Board purchased all the tugs in October, 1898. A tariff was then fixed as far as possible, including so much per head for passengers and their baggage but as a matter of fact the general charge to the Union Company for landing passengers and baggage was £5 per trip. There was no tariff for landing cargo, as cargo was not landed from the ships by the tugs. Witness was not aware that feathers, oysters, and fish were landed by the tugs. Receipts were never given by the captain for landing cargo, because he had no authority to take cargo.

Cross-examined: Witness was not aware that periodicals were always landed by the tug. The only periodicals landed by the tugs were those which came through the post. It could not have been a very common custom to land feathers, &c., by the tugs, otherwise witness would have known about it. Such goods had no right whatever to be landed by the tugs.

John Slattery, the master of the tug John Paterson, said that Mr. Roe came to him and said there were passengers and baggage to be landed from the Guelph. He was positive that nothing was then said about feathers. When witness got to the ship he saw those feathers put on board. Mr. Roe might have been on board the tug coming back, but witness did not see him. Witness spoke to the chief officer of the Guelph about the cases of feathers, and in consequence of what the chief officer told him took them on board. He did so just to oblige the Union Company. Witness did not see the case fall into the water when it was being landed, but he heard the splash and turned round.

Cross-examined: Witness had been master of the John Paterson for two and a half years. He had once or twice before brought feathers ashore on the tug. He had landed fish from the Australian boats, but did not think he had ever done so from the coast boats. He could not remember ever having landed oysters. There were often other people besides the crew employed in landing the baggage from the tugs. The Currie Company's agent sometimes sent down a number of coolies to assist when there was a quantity of baggage coming off their ships. It was usual for the representatives of the shipping companies to go on board the ships by the tugs.

Henry B. Hanson, port boatman and pierhead man, deposed that he gave a helping

hand in landing the baggage, &c., from the John Paterson on July 12 last. The case of ostrich leathers in question was about 3 by 4 feet in size, and it was a difficult case to manage. The tug was about 4 or 5 or 6 feet below the level of the pier at the time. Witness rolled the case up the gangway, and near the top had to cant it to avoid a block of wood. He then gave it another roll, and it fell away from him and into the water. Witness had often before helped to land baggage and passengers, but had never before helped to land cargo. Even if he had been very careful he could not have avoided the accident.

Peter Daniel Dickson and Samuel Berg, also pierhead men, gave evidence corroborating that of the last witness.

Reginald August Lee said he was a master mariner and assistant dock superintendent. On the day the accident occurred he was on the pierhead when the John Paterson came in, and as there was a lot of baggage, and they wanted the tug quickly, he gave the pierhead men orders to assist in the landing of the baggage. The usual charge for a tug on such an occasion was £5 per trip, but when there was an exceptionally large number of passengers they charged according to the regulations, 2s. per head. Otherwise they would charge £5 per trip, unless the wind was blowing very hard and there was extra work for the tug. They did not land cargo except in special cases where the mail boat was lying in the Bay, and then a tug was specially chartered by the companies and brought the periodicals ashore. For that a charge of £5 was made. It was within witness's knowledge that to oblige the companies other things besides passengers and baggage had been brought ashore. That had not been done with the knowledge of the Harbour Board or with witness's permission. Witness had not raised any objection then, as it was too late. No objection had ever been raised to these things being brought ashore.

Sir H. Juta: The facts show that it was the constant practice to bring feathers and similar articles ashore. It is clear that the men were in the employ of defendant, and acting within the scope of their authority when the goods were negligently lost.

The Chief Justice: What is the privity of contract between plaintiff and defendant?

Sir H. Juta: It is not necessary for any privity to exist. Our case is that defendant's servants took our goods, used them negligently within the scope of their authority,

and so defendant is liable. The crew and pier-head men remained servants of the Harbour Board. The Union Steamship Company and its servants have not been guilty of any negligence. The steamship company could only sue defendant on the contract, as it has no interest in the goods.

The Chief Justice: Should you not have sued the Union Steamship Company?

Sir H. Juta: We could not sue them on tort as the crew and pier-headmen remained under control of the defendant, and so were their servants. See *Dalyell v. Tyrer* (28 L.J., Q.B. 52).

The Chief Justice: There the passengers made a contract, but here a box cannot make a contract. There can be no implied contract.

Sir H. Juta: That action was based on a tort arising out of a contract.

The Chief Justice: Either you should have alleged a contract and breach, which you do not, or alleged that the goods were lawfully there and have been injured, and so defendant is liable.

Sir H. Juta: We practically say as much as the latter allegation.

Mr. Justice Buchanan: You might have taken up the position that the Union Company made a contract with defendants as your agents, and so defendants are liable.

Sir H. Juta: The evidence shows this. Mr. Davis says it was for his convenience and at his wish to have them landed, and they were handed to the tug at Davis's request. Plaintiff could not sue the Union Steamship Company unless the crew and pier-headmen were agents of the Union Company *pro tem*. The evidence is against that. No control was exercised by the company. See *Fenton v. City of Dublin Steam Packet Company* 8 L.J., N.S., Q.B., 28. That is a very strong case. See also *The Quicksnip* (15 P.D., 196). The cases on the hiring of carriages come down to the same principle, that unless the whole control is taken from the owner the responsibility still lies on him. The only other question is, was there any negligence? None of the people who landed the cargo had ever been employed in landing before. Hence the accident. There was no sea, and nothing to cause an injury. Where the whole management of the doing of a thing is in the hands of the defendants, and an accident happens, that is *prima facie* evidence of their negligence.

Mr. Innes: Plaintiff must choose whether he founds on contract or on tort. The declaration is loose, but taking it in its ordin-

ary sense, it must be taken to mean that there was a contract. He cannot sue on breach of duty. There was no duty on our part to allow the case to be on the tug.

The Chief Justice: But if you removed it, were you not bound to do it safely?

Mr. Innes: Then the Court could only hold us liable for gross negligence, and the evidence is not sufficient to show that. There is no breach of duty independently of contract. If a contract is alleged then it is a mere favour done to the company by the captain of the tug. There was no consideration. The doctrine of undisclosed principal cannot apply to a case of that kind. Even if it did, the captain acted outside the scope of his duties, because the officer of the tug was not allowed by the Harbour Board to take these things. He had no authority to make a contract to carry these ostrich feathers, and the Harbour Board got nothing for it. Under their regulations of 1886, which have the force of law, the cargo and passengers are kept quite distinct. See Act 36 of 1886, section 30. Under that they have appointed agents for landing. See Regulation 31, which states that goods are only to be landed by dock agents. As to negligence, the facts are before the Court. It was a pure accident. The cases were difficult to handle, and there were no appliances for landing. If there was any negligence at all, it was very slight negligence. But even in regard to negligence the employer is only liable for that if the servant is acting within the scope of his authority (Foet, 9, 1, 4), and Regulation 31 is important in that view.

The Chief Justice: Quite independently of contract, supposing this case was lying on the pier, and the defendants' pierheadmen knocked it off, I suppose the defendants would be liable?

Mr. Innes: If it was lawfully there.

The Chief Justice: Then what difference is there from this case?

Mr. Innes: The case was not lawfully there. It could not be rightfully there unless there was a contract. In the case of goods being there unlawfully, they would be trespassers, and the Court would hold defendants liable only for gross negligence.

Sir H. Juta: Whether the goods are trespassing or not, that is no justification for the injury. The statutory regulations mean nothing more than that only certain persons shall land besides themselves. They will not allow third persons to land except those mentioned.

C.A.F.

Postea (March 13).

De Villiers, C.J.: This is an action to recover damages sustained by the plaintiffs by reason of a case of ostrich feathers belonging to them having fallen into the sea through the alleged negligence of the defendants' servants. The defendants are the owners of the tug John Paterson, which is used by them in conveying passengers from the mail boats to the shore. The owners of the mailboats pay for the hire of the tug. With the knowledge of the defendants' dock superintendent the master of the tug used to carry certain kinds of cargo, such as oysters, fish, and ostrich feathers, from the steamships to the shore. This was done, says the Dock Superintendent, to oblige the captains of the steamships. The captains on their part sent the goods by tug, instead of bringing them into dock themselves, to oblige the consignees. The plaintiffs, who deal in ostrich feathers, used to be thus obliged by the captains of the Union Steamship Company. The evidence satisfies me that the defendants left a great deal to the discretion of the Dock Superintendent and of the master of the tug, and that they knew of the practice in regard to the conveyance of ostrich feathers and such like cargo. The case of feathers now in question was brought from Mossel Bay by one of the Union Company's steamers, and handed over to the master of the tug for conveyance to the shore. On the arrival of the tug at the wharf the Dock Superintendent sent two pier-head men to assist in landing the baggage of the passengers and the cargo. In the course of being conveyed over the gangway, the case of feathers fell overboard. I am satisfied that with ordinary skill and care the accident might have been avoided, and that consequently the damage done to the feathers was occasioned by the negligence—although not gross negligence—of the defendants' servants. There was no direct contract between the plaintiffs and the defendants for the conveyance of the feathers, and the first question which arises is whether, in the absence of such a direct contract, the defendants owed any obligation to the plaintiffs to exercise diligence in the conveyance and handling of the feathers. The second question is whether, assuming such obligation to exist, the defendants failed in the degree of diligence which the law requires from them as bailees of the goods. Although there was no direct contract between the plaintiffs and defendants, the previous course of dealing between all the parties was such as to justify

the inference that the captain of the steamer acted and had authority to act on behalf of the plaintiffs in delivering the goods to the master of the tug, and that the master of the tug acted and had authority to act on behalf of the defendants in accepting the goods. In obliging the captain the master of the tug obliged the principal on whose behalf the captain was acting. No payment was to be made for the conveyance of the goods, and therefore the defendants did not incur the liability of common carriers, but they undertook a gratuitous mandate, and if they were guilty of negligence in carrying out their mandate they incurred a liability towards the owners of the goods, who are the principals on whose behalf the master of the ship acted.

As to the degree of care or diligence required from the defendants, it is clear that, if they had been common carriers, inevitable casualty would alone have freed them from liability. As gratuitous mandatories, however, they cannot be held liable except for negligence on the part of themselves or those employed by them. There was not, as I have said, gross negligence, but there was a want of great care and diligence. Under the law of England the rule seems to be that a mandatory who acts gratuitously in a case where his situation or employment does not naturally or necessarily imply any particular knowledge or professional skill, is responsible only for bad faith or gross negligence. Under our law, as was pointed out in *Thomas v. Benning* (8 Juta, 25), he incurs a wider responsibility. A person who undertakes a mandate, whether it be gratuitous or not, is considered to hold himself out as possessing the necessary skill and is liable for damages occasioned by slight negligence in the discharge of the duties of his trust. Voet (17, 1, 9) uses the terms *culpa levisima*, which would literally mean "the slightest negligence," but he does so, as some of the Roman priests did, to distinguish it from *culpa levis*, which is the degree of negligence lying midway between *culpa lata* and *culpa levisima*. The three degrees of *culpa* are *lata*, *levis*, and *levisima*, and these terms are interpreted by *Story* (on Bailments, section 88) meaning "gross," "ordinary," and "slight" respectively. There is considerable diversity of opinion on the subject among the text-writers, and *Story's* interpretation appears to me to be a fairly workable one. In the present case there was a sufficient degree of negligence to render the defendants liable. There was a want of ordinary care on the part of the

defendants' servants, and therefore the negligence was what *Story* would term "ordinary" negligence, but even if the degree of negligence was less than that, it certainly amounted to *culpa levisima* as just defined. With great care the pierhead men might have prevented the case from toppling over just as it reached the wharf. They ascribe the accident to a block of wood being in the way as the case was being rolled over, but they might have avoided the block of wood altogether by shifting the position of the gangway. The judgment of the Court must therefore be for the plaintiffs with costs.

[Plaintiffs' Attorneys, Messrs. Van Zyl and Buissonne; Defendants' Attorneys, Messrs. J. and H. Reid and Nephew.]

SUPREME COURT

[Before the Hon. Mr. Justice BUCHANAN and the Hon. Mr. Justice LAURENCE.]

MICHELL V. DE VILLIERS { 1900.
Mar. 6th.

Mortgage bond—Tender—Costs.

Where a bond has been passed to secure a loan, the debtor, on repayment of the loan, is entitled to have his bond returned to him, receipted for cancellation.

A bond passed to secure a loan contained a clause giving the bondholder a right of preemption within two years, and the debtor tendered the amount of the loan and interest to date, and asked that the bond be handed to him receipted for cancellation. The bondholder refused to do this, and returned the amount tendered, and sued for the interest. The Magistrate gave judgment against the debtor for interest and costs: Held (on appeal), that the debtor was not liable for costs.

This was an appeal from a decision of the Resident Magistrate of Stellenbosch, de-

livered by him in an action in which the appellant was sued by the respondent for the sum of £104, being interest on a certain mortgage bond. Defendant's agent excepted to the summons on two grounds; first, that as proceedings were pending in the Supreme Court for the cancellation of the bond, the Magistrate had no jurisdiction, and, secondly, that the bond itself being in dispute, the Magistrate had no jurisdiction. Both the objections were overruled, and a plea was then put in to the effect that a tender of the amount of the bond and the interest due had been made before the issue of the summons. The plaintiff excepted that the plea was bad in law, as the defendant could not deny the debt, and then say he had tendered.

From the evidence it appeared that defendant passed a bond in favour of plaintiff for £2,600, one of the conditions of the bond being that three months' notice of intention to call up the bond should be given, while another condition was as follows: "For and in consideration of the aforesaid loan the appearer's constituent further undertakes and agrees that should he be desirous or compelled to sell the aforesaid property within two years, reckoned from the 15th April, 1899, he shall be obliged and compelled first to offer it to the said mortgagee for the said sum of two thousand six hundred pounds sterling, and in the event of the mortgagee refusing to purchase the same for the said sum, the appearer's constituent shall be at liberty to sell to another." Due notice was given of the intention to call up the bond, and at the expiration of three months the defendant tendered the capital amount of the bond and interest, and asked that the bond be handed to him receipted for cancellation, but the plaintiff refused to do so, and returned the cheque. The Magistrate held that inasmuch as the tender of the amount of interest had been made subject to a condition that the bond should be cancelled, such conditional tender was not a legal tender, and judgment was recorded (upon the evidence adduced) for plaintiff for £104 and costs.

Mr. Graham, Q.C., for the appellant: There is no evidence that appellant was desirous to sell. He tendered the full amount before summons issued, and pleaded the tender. That is practically admitted. The mortgagee had full right to pay off the debt.

Mr. Burton for the respondent: The matter in issue is really the question of the tender. There was great consideration for the advance. The money was for the right

of pre-emption on the property for two years. There is no doubt that the mortgagor could pay off the principal and interest at any time, but he tendered the amount and claimed the cancellation of the bond, without securing the right of pre-emption to the mortgagee.

Mr. Justice Buchanan: But is not that clause governed by the first words "for securing"?

Mr. Burton: I submit not. The clause as to pre-emption must stand alone.

Mr. Justice Buchanan: Could you pass a bond simply to secure a right of option?

Mr. Burton: I do not think so. The point is that the bond cannot be partially cancelled. But the mortgagor could have taken a receipt from the mortgagee for the premium and interest paid, or had an endorsement made on the bond to that effect. That would have prevented a cession to an innocent party. Seeing that the right belonged to the respondent, and it had to run for about eighteen months still, he was not bound to cancel the bond. The Court will notice that the tender was not repeated in the summons.

Mr. Justice Laurence: The tender was made very shortly before summons.

Buchanan, J., said: The appellant in this case passed a bond in favour of the respondent for £2,600 sterling, and one condition of this bond is that the appellant shall be allowed and also be obliged to give three months' notice of the bond being called up. Three months' notice was given, and at the expiration of the three months a letter was sent on behalf of the defendant tendering a cheque in settlement of the capital, and interest on the bond to date, and requesting that the bond be forwarded receipted for cancellation. The same day the cheque was returned with a letter declining to accept the same or to hand over the bond receipted for cancellation. The reason of this refusal apparently is because the bond contains a clause giving the respondent a right of pre-emption should the appellant wish to sell the property within two years. The bond is, however, passed for the security of the loan only, and as soon as that obligation has been complied with, in my opinion the debtor is entitled to have his bond returned to him receipted for cancellation. This condition as to pre-emption may or may not remain after the bond is cancelled; possibly it may be a contract which may be enforced at some future date. It may be a personal contract which may or may not

continue, but it could not be registered as a charge against the property. The defendant having tendered the amount of the bond and interest the Magistrate ought to have given judgment in the Court below for the amount of the interest only, and ordered plaintiff to pay the costs. The judgment will therefore be altered to judgment for the plaintiff for the amount of interest, plaintiff to pay the costs. The appellant having succeeded on the important point he is entitled to his costs in this court also.

Laurence, J., concurred.

[Appellant's Attorney, Messrs. Fairbridge, Arderne & Lawton; Respondent's Attorney, V. A. van der Byl].

HERMAN AND ANOTHER V. HENDRICKS.

Mr. McGregor asked that this case be postponed, owing to the possibility of a material witness being unable to reach here in time, the case being set down for to-day. The application was made on behalf of the defendant in the action.

Mr. Buchanan appeared for the respondent to oppose.

The Court granted a postponement until the 7th instant.

The case was not afterwards proceeded with.

ATKINSON V. COLONIAL GOVERNMENT. { 1900.
MENT. { Mar. 6th.
Trespass—Leave and licence—Agent.

This was an action for £66 Os. 4d. damages, instituted by C. E. Atkinson against the Treasurer-General as representing the Colonial Government.

The declaration alleged that the plaintiff was the registered owner of the premises known as Atkinson's Buildings, Lower St. George's-street, Cape Town. In the month of August, 1898, the defendant by his servants or agents, without the leave of the plaintiff first had and obtained, wrongfully and unlawfully trespassed on the aforesaid premises and went on the roof thereof, and there performed certain operations in connection with certain telephone wires passing over the roof of the said premises. While so wrongfully trespassing as aforesaid the defendant by his servants or agents destroyed a large number of slates, the property of the plaintiff, on and constituting part of the said roof, and much damage then and there did.

The claim was for £66 Os. 4d., and costs.

The defendant in his plea alleged that in the month of August, 1898, it became necessary for the due working of certain lines of telephone to attach certain insulators to the roof of the plaintiff's premises in St. George's-street, Cape Town. That before the work on the said roof was begun the engineers of the Telephone Department obtained permission from the plaintiff's local agents, Messrs. Steer & Co., to go upon the roof and execute the necessary work. In carrying out the said work some few slates were accidentally broken by the workmen employed by the department. The value of the slates broken as aforesaid, together with the cost of replacing new slates of the same size and quality as those broken, does not exceed the sum of £10, which sum the defendant has duly tendered to the plaintiff, and hereby again tenders, with taxed costs to date of tender, but the plaintiff refuses to accept the said tender. Subject to the above, the defendant denied the allegations, other than those that were formal, of the declaration, and, subject to the tender, prayed that the claim might be dismissed. Issue was joined on the replication.

Mr. McGregor appeared for the plaintiff.

Mr. Shell, Q.C. (with him Mr. Ward), for the Government.

Frederick Steer, a broker and general agent carrying on business in Cape Town, said he was local agent for the plaintiff, who resided in England, and had been so since 1898. As such agent, witness supervised Atkinson's Buildings. In August, 1898, witness had numerous complaints of leakage in the roofs of the buildings. In consequence of this he sent for Mr. Moir, a plumber, and subsequently went with him on to the roof, where he found a large number of slates and a part of the parapet broken, in the neighbourhood of the telephone wires and insulators belonging to the Government. Witness presumed that the slates had been broken by the men who had put up the wire. Witness at once wrote to the Telephone Department, drawing attention to the damage done by working at the telephone wires, and saying that in consequence of the uncertainty of the weather he would have workmen started to repair the roof, and he therefore asked that someone be sent down to report, so that there could be no dispute as to liability afterwards. Then Mr. Grant, an officer of the department, came down and found the roof as witness had

described. In a conversation between Mr. Grant and witness it was agreed that the work should be done by Mr. Moir, and that the latter should apportion the amount of the damage, Mr. Grant contending that all the damage was not done by the telephone men. Mr. Moir was to decide how much the Government should pay and how much witness should pay. Later on, in reply to a communication, the Telephone Department wrote enclosing a portion of Mr. Grant's report, to the effect that there were "a very large number of slates broken over the whole roof, and Mr. Steer agreed that the telephone men could not have caused all the damage, and agreed that they should separate the account and give the slates broken near the four insulators the telephone men put up, and send it in." Witness had given no permission to the telephone people, or anyone else, to go on the roof. Witness did not remember having received any guarantee from the Telephone Department.

Cross-examined : Witness had no recollection of any officer of the department coming to him and asking permission for the men to work on the roof. He had no knowledge as to the condition of the roof before the telephone men went on it. There were really three roofs, and the work done by the telephone men was on roofs two and three. It was not possible for a person to walk in the guttering all round the roof without touching the slates.

George Moir, a plumber and sanitary engineer, deposed that he was on the roof in question and found a great many slates broken, and by the position of the roof and the insulators witness immediately put down a great measure of the breakage to the fault of the telephone operators. Witness proceeded to detail the damage done to various portions of the roof. He could not approximately divide his charge for replacing slates which had shifted owing to wind and weather and his charge for replacing the broken slates. His account for the work done was £66, and roughly speaking he would say that half the expense incurred was due to the damage done by the linemen.

Cross-examined : Witness did not think it likely that these telephone men would willfully break these slates, and he did not think that with ordinary care three or four men working half a day on the roof would break 2,700 slates.

By the Court: Witness was never asked to decide how much ought to be paid by Government and how much by Mr. Steer. His

instruction from Mr. Steer was to send in the account to him. He did not see Mr. Grant then or at any other time.

John Glennie said he had been employed by Mr. Moir for two years and some months. Witness was on the roof before Mr. Moir, and saw that it was very much damaged. There was a great deal of breakage in the neighbourhood of the wires and the narrow part of the guttering. Witness replaced all the broken slates. He did not see any slates which had shifted owing to the wind and the weather.

This closed the case for the plaintiff.

For the defence,

John Grant, a telegraph inspector, said that it was under his instructions that the Government workmen carried on work on the roof of Atkinson's Buildings. They put up eight insulators, four at one spot and four at another. Permission had been given by Mr. Steer for the carrying out of that and other work on condition that a guarantee be given to the effect that the Government would be responsible for damage done. After the work was done, towards the latter end of July or early in August, witness went with Mr. Steer on to the roof to see what damage had been done. Round where the insulators had been fixed a number of slates had been broken. Mr. Steer agreed that the telephone men could not have broken all the slates round the roof, and it was agreed that a separate account should be kept by the slater of the broken slates round about the insulators. The slater, witness believed it was Mr. Moir, was told that. The linemen who were working on the roof were steady, reliable men.

Charles Forbes, a telegraph lineman in the service of the Government, said that he was one of the men who worked on the roof of Atkinson's Buildings in July, 1898. There were four of them altogether, including the foreman, and they worked on the roof half a day. Witness described the place from which they got on to the roof. All the workmen took off their boots as soon as they got into the guttering. They had no difficulty in walking along the guttering without touching the slates. Witness broke no slates at the particular point where he had been working; but at the place where one Brennan had been working there were a few, he reckoned a little over twelve, slates broken. When witness first got on the roof he noticed that the old part was in very bad condition, and that a number of the slates were badly "bedded." Witness did not remember seeing any slates broken in

the guttering at the places mentioned, and so far as he was aware he did not break any there.

Adam Henry, a foreman lineman in the employ of the Telephone Department, said he was in charge of the work on the insulators on Atkinson's Buildings in July, 1898. He generally corroborated the last witness as to the manner in which they got on the roof and the work that was done there. It was nonsense to say witness and his men could have broken 2,700 slates. There was no horse-play or gambolling among the men on the roof.

Peter Forbes, of the firm of Forbes & McFarlane, said that last Friday he had inspected the roof of Atkinson's Buildings on Friday last, and had measured the gutterings in question. It was possible for a man with his boots off to walk right along the guttering without touching or breaking the slates. It was impossible for the men to have attended to their own work and have done all the damage alleged to have been done in half a day.

After argument on the facts,

The Court gave judgment for plaintiff for the amount tendered, £10, with costs up to the date of tender, plaintiff to pay costs incurred after that date.

Buchanan, J., in giving judgment, reviewed the evidence at length. As to the permission to go upon the roof, his lordship said: The evidence for the defence shows distinctly that an application was made for such permission, and a statement was made that they might go upon the roof and fix the telephone wires, upon giving a guarantee that Government would be responsible for any damage done, and Mr. Grant was positive he took the written guarantee to Mr. Steer's office. This, however, is immaterial, because the plaintiff does not claim any general damages for trespass, but the actual damage to the roof suffered. After dealing with the evidence on this point, his lordship said: The action now comes before us to fix what amount of damage was done by the Government workmen in fixing these telephone wires. I think Mr. P. Forbes's evidence is very reliable, he having after the work was done gone up on to the roof by the way the workmen went. He saw what work they did, and estimated that they might have damaged some fifty slates. The Government in their first tender wrote to plaintiff, giving a specified account admitting that fifty slates might have been broken, and tendering the

sum of £1 11s. and Magistrate's Court costs. This plaintiff refused, and went on with his action, and thereupon in their plea Government tendered the sum of £10—a really liberal tender, I think—and costs to date. It was in the first place for plaintiff to prove the damage done. I think he has failed to prove a specific amount of damage done, and it would be hard on their evidence alone to fix what would be a fair amount to award, but the Government tender £10 and costs up to date of tender. Under all the circumstances it seems to me that this tender fully covers the whole of the damage that could possibly have been done by the Government servants on this occasion. I think, therefore, judgment should be for the plaintiff for £10, the amount of the tender, with costs up to the date of tender, and plaintiff to pay costs after that date.

Laurence, J., concurred.

[Plaintiff's Attorney, A. W. Steer; Defendant's Attorneys, Messrs. J. & H. Reid & Nephew.]

SUPREME COURT

[Before the Hon. Mr. Justice BUCHANAN and the Hon. Mr. Justice LAURENCE.]

VAN ROOY AND CO. V. D. J. 1900.
JORDAAN. { Mar. 12th.

Mr. Jones applied for provisional sentence for £37 12s. 6d. due on a promissory note, with interest at the rate of 6 per cent. and costs of suit.

Provisional sentence granted.

BOSMAN, POWYS AND CO. V. JAMES CARTER.

Mr. De Waal applied for provisional sentence for £101 2s. 9d. due on a promissory note, with interest and costs of suit.

Provisional sentence granted.

VAN DER BYL AND CO. AND OTHERS V. HENRY BRODIE.

Mr. Bisset applied for the final adjudication of defendant's estate.
Granted.

RATHFELDER V. D. J. SLABBER.

Mr. Nathan applied for provisional sentence for £1,200 on a mortgage bond, which

had become due by reason of non-payment of interest; also that the property hypothecated be declared executable.

Provisional sentence granted; property declared executable.

SOUTH AFRICAN ASSOCIATION V. MICHAEL KING.

Mr. Jones applied for provisional sentence for £200 on an acknowledgment of debt signed by the defendant in favour of plaintiffs, and costs of suit. The principal amount had become due by reason of three months' notice given, calling upon defendant to pay the whole amount.

Granted

THE MASTER V. E. R. GIBBON.

Mr. Sheil, Q.C., applied for an order calling upon defendant to file an account in the estate of which he was an executor.

The usual order was granted.

THE MASTER V. F. W. STRONG.

Mr. Sheil, Q.C., applied for an order calling upon defendant to file an account in the estate of which he was an executor.

The usual order was granted.

RYNHOUD V. GORDON MURISON.

Mr. Moltano applied for the final adjudication of the defendant's estate.

Final sequestration granted as prayed.

SAUPE V. WESTERMANN.

Mr. Gardiner applied for provisional sentence for £150 due on a mortgage bond, together with interest at the rate of 8 per cent. from January 1, 1900; also that the property specially hypothecated be declared executable. The bond had become due by reason of notice given calling up the amount.

Granted.

MOORREES AND CO. V. J. P. VINK AND P. J. DAY.

Mr. Moltano moved for provisional sentence upon a promissory note for £161 1s. 0d., less £103 19s. 1d.; £58 of the balance and costs of protest had been paid since issue of summons. He moved further for judgment under Rule 32D, for 5 per cent. commission on collection in terms of the promissory note. The second-named defendant

was a surety on the note, and was included in the summons, but judgment was only asked for against the first-named defendant.

Provisional sentence for the balance due was given against the first-named defendant, and also judgment in the illiquid claim for 5 per cent. for collection.

ILLIQUID ROLL.

SIMKINS AND ADAMS V. SCHROEDER.

Mr. Buchanan moved, under Rule 319, in default of plea, for judgment for the sum of £787 10s., due by the defendant to the plaintiffs in connection with a share transaction, with interest *a tempore morae*, and costs of suit.

Judgment granted in terms of the declaration.

CARL LITHMAN AND CO. V. SABARDIEN SABAN.

Mr. Nathan moved, under Rule 329, for judgment for £62 19s. 6d., goods sold and delivered, with interest *a tempore morae*, and costs of suit.

Judgment granted as prayed.

NICHOLL V. P. HEYNS.

Mr. Benjamin moved, under Rule 329, for judgment for £14 19s., balance of account, with interest *a tempore morae*, and costs of suit.

Granted.

LINDENBERG AND DE VILLIERS V. HESSE.

Mr. Benjamin moved, under Rule 329D, for judgment for £14 2s. 3d. goods sold and delivered and sundry disbursements, with interest *a tempore morae* and costs of suit.

Granted.

ST. LEGER V. EDGAR H. WATKINS.

Mr. Bisset moved, under Rule 329D, for £26 rent due in respect of a certain house and premises at Kenilworth, with interest *a tempore morae* and costs of suit and an order for the ejectment of defendant from the said house and premises.

Defendant appeared in person and admitted the debt, but asked to be allowed time to pay it. He stated that he had given up occupation of the premises before summons was issued.

Judgment was given as prayed.

MILNER V. GEORGE W. BATESON. } 1900.
 } Mar. 20th.

Plea—Default—Hostilities.

Mr. Molteno moved, under Rule 319, in default of plea, upon a declaration for the payment of two sums of money, viz, £32 10s., with interest *a tempore morae*, and £38 13s. 8d., with interest *a tempore morae*. The annexed affidavit showed that notice had been properly served.

Granted.

Postea.

The matter again came before the Court in an application appearing on the list of general motions, in which the defendant applied for removal of bar and for leave to plead.

Mr. McGregor appeared for the applicant. Mr. Molteno appeared for the respondent Milner.

Mr. Justice Buchanan said that when judgment was applied for counsel had not mentioned, as he ought to have done, that there was an application for the removal of bar pending. Under these circumstances the order for judgment would be recalled for the present.

Mr. Justice Laurence said he quite agreed that it was the duty of plaintiff's counsel to call attention to this application when he was moving for judgment by default.

Mr. Molteno said that counsel for the defendant was in court at the time, and he was not aware that he would press his motion.

The affidavit in support of the application was by defendant's attorney, and stated that there was a good defence, but the defendant required more time, as he had to obtain documents from Dordrecht, which were necessary to the case, owing to his being a refugee from Dordrecht. The plaintiff would not be prejudiced in the action, as defendant intended going to trial next term.

Mr. Molteno opposed the application.

After argument by counsel, on the facts, the Court granted the application.

Buchanan, J., said: This is an application for the removal of bar, and for leave to plead. It appears that in this case the declaration was filed on the 30th of January last. After that date correspondence took place between the parties, and finally, on 9th March, the plaintiff's attorneys refused to allow further time to file a plea, and on the 10th, the next day, notice was given that an application would be made to the Court for leave to file a plea. On the same day the

case was set down for judgment by default. Both of these applications came before the Court to-day, and as a matter of form the application for judgment was made first, and in ignorance of the other application which was to come before the Court the Court made an order giving judgment. I think, as my brother Laurence pointed out, that counsel ought to have been instructed by the attorneys to mention that there was an application of this nature on the roll when he made the application for judgment. I think the two must now be considered together, and considering them together I think the defendant in this case has made out reasonable grounds of excuse showing why plea had not been filed before. The part of the Colony in which the defendant and defendant's attorney reside are or have been occupied by the enemy, and it has been impossible to communicate with them, or get the necessary documents. The affidavit sets forth that the defendant has a good defence, and the application will therefore be granted, but the defendant must file his plea before the end of the month; costs to abide by the result of the action. Judgment will not now be granted by default.

Laurence, J., concurred.

[Applicant's Attorneys, Messrs. Fairbridge, Arderne & Lawton; Respondent's Attorneys, Messrs. Dampers & Van Ryneveld.]

SMITH V. MARY HALL.

Mr. Buchanan moved, under Rule 329D, for judgment for £1 5, being rent due on a certain place called Arthur's Seat, situated at Sea Point, with interest *a tempore morae* and costs of suit.

Granted.

VAN ZYL AND BUISSINNE V. A. T. G. OLSEN.

Mr. Gardiner moved, under Rule 329D, for judgment for £34 7s. 2d., amount due for professional services rendered, with interest *a tempore morae* and costs of suit.

Granted.

DIVINE, GATES AND CO. V. HENDRICKS.

Mr. Benjamin moved, under Rule 329D, for £34, being amount paid by plaintiff to defendant for a certain horse, which sum was to be returned in certain eventualities. In accordance with this the horse had been returned, and it was now claimed that the £34 should be repaid.

Judgment granted as prayed.

GENERAL MOTIONS.

HUGHES AND RODGERS V. WHITE, HYN
AND CO.

Payment into Court Rule 332.

Where money has been paid into Court, the plaintiff is entitled to it as a matter of course, unless some good cause is shown to a judge why the money should not be paid out.

This was an application by the plaintiffs for an order directing the payment to them out of court of a sum of money paid in by defendants.

The plaintiffs had instituted an action against the defendants for a sum of £332 5s. 3d., goods sold and delivered. The defendants admitted having received goods to the value of £210 3s. 4d., and this sum they tendered to plaintiffs on condition that the latter received it in full satisfaction of their claim. Plaintiffs contended that this was a conditional, and therefore not a legal, tender, and refused to accept it, whereupon the defendants paid the £210 3s. 4d. into court, accompanied by a letter stating that it was in full satisfaction of plaintiff's claim. Plaintiffs now applied under rule of Court 332 for the payment of the money to them without prejudice to their claim.

Sir H. Juta, Q.C., for applicants: Rule 332 deals with payment into court. The plea admits liability to the amount of tender, and pays the money into court. It is not a denial plea. The rule is clear.

Mr. Innes, Q.C., for respondents: The practice hitherto has been that where a tender is made, tender is pleaded. Plaintiff says here there is an unconditional tender.

Mr. Justice Laurence: Can plaintiff not pay your costs if he fails?

Mr. Innes: I am taking the matter on the general principles of the rule, without involuntarily going into his position. The money was paid into court in full satisfaction of the debt.

Laurence, J.: Any payment into court by defendant must be according to what defendant maintains is due.

Mr. Innes: See *Gray v. Bartholomew* ((Encyc. Laws of England, vol. 9, p. 553). Applicant has not taken any action before filing his replication. Payment out of court is in the Court's discretion. Defendant did not want to pay the money except in full

satisfaction. The English rule draws a distinction between cases where there is a defence and where there is no defence. That is not so by our rule. The English rule is more in plaintiff's favour than our rule is.

Buchanan, J., said: In this case the principal action was brought by the plaintiff who claimed a certain sum of money as payment for certain goods sold and delivered. The defendants admitted receiving a certain portion of these goods, and after some correspondence they paid into court the amount stated, and under Rule 332 the plaintiffs now apply to have this money paid into court paid over to them. The part of Rule 332 bearing on this application is: "Money paid into court as aforesaid may, unless otherwise ordered by a judge, be paid out to the plaintiff or to his attorney on the written authority of the plaintiff." These words mean that unless some good cause is shown to a judge for the money not being paid out the plaintiff is entitled to it as a matter of course. In this case there is no claim in reconvention, nothing is alleged as to why the money should not be paid over, and no special circumstances shown why a judge or the Court should say this money should not be paid out of court. The subsequent part of the rule to which attention has been drawn during the course of argument, refers to a different set of circumstances. It refers to a case where the plaintiff accepts the money paid into court in full satisfaction of his claim, in which case he is at liberty to have his costs taxed, &c. No special circumstances have been shown in this case why this money should not be paid over, and I think the applicant is entitled to the prayer asked for. The application will therefore be granted, with costs.

Laurence, J., concurred.

[Applicant's Attorney, C. Brady; Respondent's Attorneys, Messrs. Findlay & Tait.]

COLONIAL GOVERNMENT V. HARTUNG.
Pleading—Striking out.

This was an application by the plaintiff for an order to strike out portion of the defendant's plea as being irrelevant.

Mr. Ward for the applicants (the Colonial Government).

Mr. Innes, Q.C., for the respondent.

In this case the Government had entered action against the defendant for £96, for the use and occupation of a farm known as Aries, in the district of Gordonia, from May 1, 1895,

to April 30, 1899. The defendant filed a plea, in which he said one Walshe leased the farm originally from a native chief, and at the time of the demarcation of British and German territory the line of demarcation was found to run through the farm, part of which was then in German territory. Walshe ceded a half interest in the lease to defendant, and he continued to occupy the part of the farm, and had made improvements of the value of £152. He admitted his refusal to pay the £96 and claimed £152 in reconviction. The Government now sought to have all the allegations of the plea except the admission of refusal to pay struck out on the ground that they were irrelevant to the matter at issue.

It was also stated that the Lands Commission had decided that the concession from the native chief was valueless.

After argument on the facts,

Luchanan, J., said: This is an application by the plaintiffs to strike out certain paragraphs of the defendant's plea. This plea was in answer to a declaration for the sum of £96, being for the use and occupation of certain landed property which, it was alleged, belonged to the plaintiffs. The real defence is that defendant went into possession of this property in good faith, and that while he was in possession of it he improved the property, and that now he can not be compelled to give up possession or to pay rent until he is compensated. The only test the Court can now apply is, are those paragraphs relevant? Under the circumstances, I think that those paragraphs do no more than state the historical facts of the case, and how defendant came into possession. I hold that they are not irrelevant, and think the application should be refused, but as it was a fair question to bring before the Court, the question of costs may stand over.

Laurence, J., concurred.

IN THE INSOLVENT ESTATE OF MICHAEL CORNELIUS VAN NIEKERK.

Mr. Close moved, on behalf of the trustees in the above insolvent estate, for the appointment of a commission to examine certain witnesses.

The application was granted, Mr. Brown being appointed commissioner.

IN THE MATTER OF THE PETITION OF THE KEEKERAD OF THE DUTCH REFORMED CHURCH AT DURBANVILLE.

Mr. Jones moved that the rule *nisi* granted under the Derelict Lands Act be made absolute.

Granted

ROBERTSE V. DIVINE, CATES AND CO.

This was an application for a commission *de bene esse* to take the evidence of certain witnesses.

Mr. Searle, Q.C., for the applicant (the plaintiff).

Mr. Innes, Q.C., for the respondents.

Mr. Searle said it was desired to take the evidence of the plaintiff Robertse and William James Chapman on commission at Mossamedes. The plaintiff was a farmer residing at Humpata, and Chapman also resided there, and communication between Humpata and Mossamedes was very uncertain. The plaintiff had intended coming to Cape Town to give evidence in this case last term, but was unable to sail owing to there being no vessel. There was no British Consul at Mossamedes, but the names of two other gentlemen qualified to act as commissioners were suggested.

Mr. Innes said that the respondents opposed the application because they knew no one at Mossamedes who could represent them at the commission.

Ultimately the Court granted an order for a commission to issue, with alternative leave to examine by means of interrogatories, as provided for by the rules of Court, the interrogatories to be submitted mutually to the attorneys on the record; costs to be costs in the cause.

LIND V. OUDTSHOORN MUNICIPALITY.

Conditions of sale - Agreement - Contempt.

This was a motion for an order for personal attachment against the members of the Municipality for contempt of court.

Mr. Innes, Q.C., for the applicant.

Sir Henry Juta, Q.C., for the respondents.

Mr. Innes said the application was for the attachment of the respondents for non-compliance with an order of the Court as to transferring certain lots of ground in the Municipality. Judgment had been given for the applicant for transfer in his favour of the said lots. The respondents sought to annex to the transfer in Lind's favour a

condition that the blocks of land should be transferred to the applicant "upon the same conditions upon which dry erven have from time to time been sold and transferred by the proprietors of the remaining extents of the farms Hartbeest River and Grobbelaars River." The respondent refused to take transfer of the property subject to the conditions referred to or any part thereof. What was really desired was a settlement of a dispute between the parties as to the meaning of a portion of the judgment, and this was the most convenient manner of bringing the matter before the Court.

After argument on the facts,

Buchanan, J., after referring to the fact of the dispute as to the judgment being the real reason of the parties coming into court, said that the conditions upon which the land was originally sold were contained in a certain agreement, one point of which was that the land should be subject to the conditions applying to dry erven in the Municipality of Oudtshoorn. The conditions of sale under which dry erven were sold were attached, and some of these conditions of sale were certainly not applicable to this case. He thought the Municipality would be sufficiently protected if the agreement between the parties was a nexus, and the conditions could always be referred to if in the future any question arose as to interpretation. This would leave it open to either party to bring these into court. It was impossible to give that interpretation now without an action to decide what was reasonable or not. The Court would therefore order transfer to be given forthwith with the original contract entered into between the parties annexed to the transfer. As neither party had really succeeded in this matter, in his opinion each party ought to pay his own costs.

Laurence, J., concurred.

[Applicant's Attorneys, Messrs. Tredgold, McIntyre & Bisset; Respondents' Attorneys, Messrs. Fairbridge, Arderne & Lawton.]

Ex parte CORMACK AND ANOTHER.
Articled clerk - *Locum tenens*—Attorney.

Where an attorney had temporarily left the Colony, entrusting his business to the charge of an attorney in his employ, as *locum tenens*, the Court refused to allow the registration of articles of clerk-

ship to the locum tenens, the intention of the applicant being that on the return of the principal in the firm, the articles should be ceded to him by the locum tenens.

This was an application for the registration of articles of clerkship.

It was stated that the applicant Cormack was acting as *locum tenens* for Mr. Herold, an attorney and notary of the Court, and the applicant himself was a duly admitted attorney and notary of the Court. Mr. Herold was at present in England, and applicant desired to have one C. H. Maasdorp articled to him as a clerk, stating that on Mr. Herold's return if the parties were agreeable the articles would be ceded to Mr. Herold. The Law Society opposed the registration on the ground that Cormack was merely in the employ of Mr. Herold and not a partner, and that no such clerk could have such control over an articled clerk as was required.

Mr. Nathan for the applicants.

Mr. Searle, Q.C., for the Law Society.

Mr. Searle, on behalf of the Law Society, said they were quite willing if Mr. Herold's consent was obtained to Cormack signing the articles on behalf of Mr. Herold.

After argument, the application was refused.

Mr. Nathan: The only requirement under Rule of Court 149, is that the person to whom the clerk is articled should himself be "duly admitted to practise in the Supreme Court." The fact that a person is admitted to practise brings him under the jurisdiction and control of the Court. The Law Society exercises a constant supervision over all attorneys. Supposing a plicant had been articled to Herold, and Herold had then gone away, applicant would have been less under the jurisdiction of the Court than he will be if articled to Cormack.

Mr. Searle: The solicitor must be in actual practice on his own account. The latter part of Rule 149 says clearly that the clerk must have been continuously employed "in the proper business, practice, or employment of such attorney." Cormack is wholly irresponsible.

Buchanan, J., in giving judgment, said: As Mr. Justice Laurence has pointed out during argument, it would be cruel to allow the applicant in this case to be articled, and then three years hence when he applies to be admitted to be informed that the re-

quirements had not been complied with. It is therefore the best thing in the interests of the applicant and of the Law Society that this rule should now be discussed as if the applicant had applied for admission. The whole object of the Rule is to secure instruction to the pupil, and as very fairly pointed out on behalf of the Law Society a person who is not in business himself either directly or as a partner can not instruct anybody. Such a person is subject to the direction of his employer, and is in no better position than any other clerk. It is very desirable that in the instruction of a pupil an attorney should be able to command his business and be able to tell the clerk to do so and so in his business. On reading the latter part of the rule in conjunction with the first part, it is clearly intended that a clerk should be articled to an attorney who was himself carrying on business. I think it is desirable to lay down this rule at once, and not have the point raised three years hence, after the clerk has served his time, when it would do him a great hardship. The objection raised by the Law Society can not be over-ruled in the present case. In conclusion, I recommend the adoption of the proposal of the Law Society as to obtaining Mr. Herold's consent, and Mr. Cormack signing on behalf of the latter.

Laurence, J., concurred.

[Applicant's Attorney, C. W. Herold.]

VAN HEERDE V. THE LIQUIDATORS OF THE CAPE OF GOOD HOPE BUILDING SOCIETY. { 1900.
Mar. 12th.

This was an application for an order declaring applicant entitled to rank as a depositor, that his name be removed from the list of subscribers, and that he be ranked as a creditor and awarded dividends on his claim.

Mr. Innes said the liquidators required more time to answer the affidavits in this case, and asked that it stand over.

The matter was postponed *sine die*.

HUNTER V. TRAMWAY COMPANY.

Sir Henry Juta (with whom was Mr. Upington) applied on behalf of the Tramway Company for leave to appeal to Her Majesty in her Privy Council.

There was no appearance for the plaintiff.

The application was granted, leave being reserved to the plaintiff to apply for execution if so advised.

CAPE DISTRICTS WATERWORKS COMPANY V. THE MUNICIPAL COUNCILS OF WOODSTOCK AND CLAREMONT.

This was an application for the arbitrators' award to be made a rule of Court.

Mr. Innes, Q.C. (with Sir Henry Juta, Q.C.), appeared for the applicant's.

Mr. Bearle, Q.C. (with Mr. Graham, Q.C.), appeared for the respondents to consent.

The award was made a rule of Court.

IN THE ESTATE OF THE LATE JOHANNES ANDRIES TAUER

Mr. Buchanan moved that the rule nisi for cancellation of a mortgage bond be made absolute.

Granted.

SMITH V. HALL.

Mr. Buchanan moved that the rule restraining the removal of certain furniture be made absolute.

Granted.

IN THE ESTATE OF THE LATE NICHOLAS WOLLESSEN MEYER.

Mr. Buchanan moved for leave to sell certain property in this estate.

Granted.

SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G.), the Hon. Mr. Justice BUCHANAN, and the Hon. Mr. Justice LAURENCE.]

TABORSKY AND CO. V. HENCKELS AND CO. { 1900.
Mar. 14th.

This was an application for an order authorising the Registrar to refund the sum of £70 13s. 9d. deposited in connection with the claim of F. L. Cramer.

It appeared that on August 11, 1899 (see 9 Sheil, p. 468) an order for the attachment of goods *ad fundandam jurisdictionem* was obtained by applicants pending an action against respondents. The invoices of the goods were in the hands of the National Bank, who held a bill of sale for the value. On October 14, (see 9 Sheil, p. 570), Cramer applied for the discharge of the writ on the

ground that he had become security for £70 to the manufacturers of the goods, and was the owner thereof. The Court then ordered the attachment to be discharged unless the plaintiffs paid £70 13s. 9d. the value of the goods, to the Registrar within seven days.

Sir Henry Juta, for applicants, explained the circumstances under which the money had been paid into court. When the matter was previously before the Court he was under the impression that the National Bank had been authorised by Cramer to appear on his behalf, but it now appeared that the bank appeared on its own behalf in connection with certain documents it had received, in which Cramer was said to be the party interested in the goods. Under the circumstances he could ask for nothing more than a rule *nisi* calling upon the respondent Cramer to show cause by May 1 why the money should not be paid over to the applicant.

Mr. Benjamin, for the National Bank, said that the position was that the bank held certain bills of exchange which had been forwarded to them by a Hamburg bank for collection, and annexed to those bills of exchange were certain bills of lading which had been endorsed over to Cramer by Henckels.

After hearing counsel on the facts,

The Court ordered that notice should be served upon Cramer personally, returnable upon May 31.

Mr. Benjamin asked for costs, as the bank had to appear, notice having been served upon them.

Sir Henry Juta contended that the bank had only itself to blame, as it appeared from the record that the bank was acting as Cramer's agent. He pointed out that nothing had been asked as against the bank.

The Court decided that the question of costs should stand over.

BOSTOFSKI V. FINKELSTEIN.

Mr. Jones moved that the respondent in this case be debarred from proceeding with an appeal noted from a decision of the Resident Magistrate of Cape Town. On September 20, 1899, the applicant had obtained judgment against the respondent for £5 10s., rent, and against this judgment the respondent had noted an appeal, but had not proceeded with the same.

The respondent appeared in person, and stated that she had not paid the rent of the premises in question because the landlord, the applicant, had promised to repair the

premises, but had neglected to do so, in consequence of which the stock she had in the shop had been damaged.

The order asked for was granted with costs.

REHABILITATION.

Mr. Benjamin moved for the rehabilitation of the insolvent estate of William Patrick Cuthbert, a woodcutter, of Knysna district. The estate had been sequestrated in 1891. In consequence of the trustee's report the insolvent was brought up before the Magistrate for preliminary examination on a charge of culpable insolvency, but the Attorney-General, after the papers had been sent to him, had declined to prosecute.

The Court refused the application, but gave leave to apply again in six months.

SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G.), the Hon. Mr. Justice BUCHANAN, and the Hon. Mr. Justice LAURENCE.]

IN THE MATTER OF THE FA R- { 1900.
FIELD BRICK AND LAND { Mar. 12th.
COMPANY, LIMITED. { „ 20th.

This was an application for an order placing the above company under liquidation, and for the appointment of a liquidator. The petition was signed by the chairman of the company on behalf of the directors, and it stated that a judgment had been obtained against the company for £5,046 2s. 6d. Application was made for a stay of the writ of execution and an order that the company be wound up, as it was unable to pay its just debts.

Mr. Searle, Q.C., appeared for petitioner.

The Court ordered the matter to stand over for further information as to whether the chairman could act in this manner, and also whether parties having sufficient interest in the concern were before the Court.

Postea (March 20th).

Mr. Searle stated that an amended petition had been filed. This petition set forth that the company was formed in March, 1898, with a paid up capital of £10,000. The assets consisted of certain land near D'Urban-road

Station and brick-making appliances, and owing to want of capital the company had not been able to pay its way for some months past. Several writs had been issued against the company, and the Sheriff had attached all the movable property. The petitioners were of opinion that under the proposed scheme of reconstruction sufficient funds might be raised to pay out creditors, while it was pointed out that it would involve a loss if the machinery was sold apart from the land where the bricks could be made, as would be the case in a sale in execution, and it was therefore desired that the property should be sold as a going concern.

Mr. Bisset appeared for the judgment creditors, who were also shareholders, and said they had had no formal notice of this application, but they did not object to the company being placed under liquidation provided that Mr. Jenkinson, one of the largest creditors and also a shareholder, and Mr. G. W. Steytler be appointed joint liquidators.

Mr. Searle said the directors could not accept Mr. Jenkinson, unless Mr. De Witt was also appointed a liquidator. Mr. Jenkinson was one of the old directors of the company, and these directors had incurred certain liabilities on behalf of the company, and had taken out execution against the company. It was therefore thought that someone should be appointed to represent the shareholders, so that they should either have three liquidators, Messrs. Steytler, Jenkinson, and De Witt, or Mr. Steytler alone.

Mr. Bisset said that in that case they would prefer Mr. Steytler alone.

The Court made an order placing the company under liquidation, and appointing Mr. Steytler as liquidator, with full powers conferred on the liquidator under the Act.

THE EASTERN AND SOUTH
AFRICAN TELEGRAPH COM-
PANY V. CAPE TOWN TRAM-
WAYS COMPANY. { 190).
Mar. 20th.

This was an application by the plaintiff for leave to appeal to Her Majesty in her Privy Council.

Mr. McGregor (with the Attorney-General, Mr. Solomon, Q.C., and Mr. Benjamin) for the applicants.

Mr. Innes, Q.C. (with Mr. Graham, Q.C.), for the respondents.

The application was granted.

With regard to the costs, Mr. Innes said that as they would be considerable, he would ask that they be paid on the respondents giving security.

The Court decided that the costs should be paid on the respondents giving security *de restituendo*. It was also ordered that this order form part of the judgment.

CAPE TOWN TRAMWAYS COMPANY V. THE
EASTERN AND SOUTH AFRICAN TELE-
GRAPH COMPANY.

Witness expenses.

This was an application by the defendants in the action for an order authorising the payment of the expenses, including the qualifying expenses of the witnesses F. Jacob and Professor Jamieson. It appeared that some time previous to the last August term of the Supreme Court they were subpoenaed to attend as witnesses, it having been agreed by the attorneys for the parties that the case should come on for trial that term. Subsequently on July 28, and before the case had been set down, the plaintiffs found that they would be unable to proceed to trial that term, and an intimation to that effect was conveyed to the defendants' attorneys, who next day sent a cable to stop the witnesses from coming, but this cable arrived too late, the witnesses having sailed on the same day. The two witnesses had returned to England, Mr. Jacob coming out again and giving evidence at the hearing of the case, but the evidence of Professor Jamieson had been taken on commission in London, he being unable to come out again.

Mr. Innes, Q.C. (with Mr. Graham, Q.C.), appeared for the applicants.

Mr. McGregor (with the Attorney-General, Mr. R. Solomon, Q.C.) and Mr. Benjamin appeared for the respondents.

For the applicants, it was contended that the evidence of these witnesses was necessary, there being no electrical engineer of sufficient standing in this country to give the evidence required.

For the respondents, it was contended that the evidence could have been taken on commission as was actually done later on in the case of Professor Jamieson. In any case it was said that they should not have been brought out here in August until it was certain that the case would come on for trial that term.

The Chief Justice pointed out that during the hearing of the case the Court had put certain questions to Mr. Jacob from which benefit was derived, and which they could not have got had the evidence been taken by written commission.

After argument on the facts.

De Villiers, C.J., said: As to the qualifying expenses of the two witnesses, Mr. Jacob and Professor Jamieson, the Court is of opinion that they should not be allowed. Mr. Jacob himself stated it was not necessary for the purpose of giving his evidence to come out to the Cape, and he made no experiments. There was no necessity for him to come out to qualify himself as a witness, and therefore that part of the application will be refused. As to Professor Jamieson's expenses we think they were unnecessary, and that he might well have been examined, as he ultimately was, on commission, and there was no necessity for his coming out to the Cape on the first occasion. Then as to Mr. Jacob, the Court finds that he was a very material and necessary witness, and that it was advisable that he should come out and give his evidence personally. It appears that after an agreement had been made between the parties that the case should be tried during the August term, an intimation was made to Mr. Jacob to come out to the Cape; that the witness left on July 29, according to the statement made, which must be verified, and that on the same day a cable was sent to him telling him not to come, but that that cable came too late, and that that cable was sent in consequence of an intimation given the previous day to defendants' attorneys. Under these circumstances we think it only fair that the travelling expenses of Mr. Jacob to the Cape on the occasion of his first visit should be allowed. The Court will therefore make an order including in the costs the travelling expenses of Mr. Jacob to the Cape on his first visit in August, 1899. No order will be made as to the costs of this application.

APPENDIX.

IN THE MATTER OF THE PRIZE { 1900.
"MASHONA." { Jan. 5th.

[Before the Supreme Court (the Right Hon. Sir J. H. DE VILLIERS, K.C.M.G., Chief Justice, Mr. Justice BUCHANAN, and Mr. Justice LAURENCE), sitting as an Admiralty Prize Court.]

The Court sat in the first instance in this matter as a Prize Court to hear an application respecting the Bucknall steamer *Mashona*, seized in Algoa Bay by H.M.S. *Partridge* for having amongst her cargo large quantities of flour and other foodstuffs consigned to the South African Republic, an enemy of the Queen, *via* Delagoa Bay.

The application was made on behalf of the owners and charterers of the S.S. *Mashona* for an order that the vessel should be appraised, and for her delivery to the claimants on proper security being given; also that the cargo claimed in the monition be unladen, inventoried, and warehoused at such port and under such conditions as the Court might decide. A consent from the solicitors for the captors to the application was read.

Mr. Buissinné (of the firm of Van Zyl & Buissinné) appeared for the owners and charterers of the vessel. Mr. Fairbridge (of the firm of Fairbridge, Arderne & Lawton) represented the captors of the vessel.

Mr. Buissinné submitted the names of Captain Milbank and Captain Stephen, the Port Captain, as appraisers, while Mr. Fairbridge submitted the name of Captain Spence.

The President said it would be better to appoint all three, as the Act did not fix the number.

Mr. Buissinné said there was some cargo not claimed as prize, and which was mostly consigned to East London, Durban, and Delagoa Bay. It would be most convenient if the claimed cargo were inventoried and warehoused at some place nearest the port of ultimate destination, as it was so stowed as to make it nearly impossible to get at it until most of the other freight not named in the monition had been discharged.

The President: The goods must remain within the jurisdiction of the Court.

The Court, by consent, ordered that the ship be appraised by Captains Milbank, Stephen, and Spence; that she be delivered up to the claimants upon security being

given for the appraised amount by the Castle Mail Packet Company; and that the cargo claimed as prize be unladen, inventoried, and warehoused in the Queen's warehouse at Port Elizabeth, on security to the satisfaction of the Marshal as to the amount and nature of such security. Costs of the day to be costs in the cause.

Postea (January 11th).

An application was made by Messrs. Ornstein & Koppel, merchants, formerly of Johannesburg and now of Durban, and the consignees of certain cargo by the Mashona for an order that the claim filed by them be increased, and amended from £719 15s., as already filed, to £873 11s. This was supported by an affidavit by Mr. Arthur Patrick Dodds, at present residing at Newland, special agent on behalf of Messrs. Ornstein & Koppel, who stated: 1. That he had filed a claim on behalf of Messrs. Ornstein & Koppel, the true, lawful, and sole owners of 1,468 light trolley rails, weighing 14 lb. per yard, 147 bundles of splices, and eight kegs of bolts, which were laden on board the steamship Mashona at the time of her capture by H.M.S. Partridge, Lieutenant A. S. Hunt, commander, and brought into Table Bay. 2. That the goods above mentioned were portion of those the forfeiture of which was claimed in the monition. 3. That since filing his claim, the Court had made an order that the goods mentioned in the monition were to be unladen and warehoused at the Queen's Warehouse at Port Elizabeth; that in consequence, his principals would suffer damage to the extent of £153 19s., being the extra costs that would be incurred in certain eventualities in conveying their goods from Port Elizabeth to their ultimate destination. 4. That he wished to increase his claim from £719 15s. as filed to £873 11s., which would include the item of £153 19s. hereinbefore mentioned.

There was a replying affidavit by Mr. William George Fairbridge, a partner in the firm of Fairbridge, Arderne & Lawton, the solicitors for the captors, in which he said the application should not be granted for the following reasons: (a) The ground on which it was sought to increase the claim was that, inasmuch as the Court had ordered the discharging and unloading of the cargo claimed as prize at Port Elizabeth, the claimants (Messrs. Ornstein & Koppel) would be put to additional expense. (b) When the application was made to release the Mashona o

bail and for discharging the cargo at Port Elizabeth, the owners and charterers of the ship were represented by Messrs. Van Zyl & Buissinné, who were the solicitors for the present applicants. No objection was put before the Court to the effect that the proposed course would occasion any additional expense or cause any extra inconvenience to the present claimants, who lay by and permitted the order to be made, but now sought to augment their claim on that account. (c) The order that was made on the 8th instant had as a fact not been acted upon, and would have to be modified, inasmuch as the Castle Mail Packet Company, who were then prepared to give security for the ship and goods, had now refused to do so, of which fact notice had been served upon his firm by Messrs. Van Zyl & Buissinné. (d) The claimants in the first instance inserted in their claim a round sum of £100 as damages for detention, and it was submitted that it was not now competent for them to increase the same without other and better cause than was now shown by them.

Mr. Innes, Q.C., for the applicants.

Mr. Searle, Q.C., for the respondents, the captors.

The Chief Justice: Why should the order not be made now, and then if the amount is shown afterwards to be not due the Court will not give judgment for it.

Mr. Searle: The applicants say that in certain eventualities—in the event of the cargo being discharged—they might sustain a loss, but that might never happen at all, because the order of the Court is only to be carried out on certain security being given, so that at present there is no ground at all for coming to the Court. That order has fallen through, and therefore the only ground upon which the applicants seek to increase their claim has fallen through.

The Chief Justice: But supposing security is given, another application will have to be made to increase the claim. Where is there any harm in allowing that now, because if the Court finds the amount is not due, judgment will not be given for it?

Mr. Searle: A round sum of £100 is claimed for detention, and surely that will be sufficient. The applicants now claim greater damages, without saying how they have been sustained—to put in another lump sum on a ground which was non-existent. The captors would not have consented to the last order of the Court if this claim had then been made.

Mr. Justice Buchanan: This application is surely merely equivalent to amending pleadings before trial.

Mr. Searle: In that case the Court will ask for the grounds for amendment.

Mr. Justice Buchanan: No, it would simply ask if the other side was prejudiced.

Mr. Innes: The applicants were compelled, according to the rules of the Prize Court, to come to court and make this application for an amendment of claim. I never thought there would be any opposition to the application.

After further argument on the facts,

The Chief Justice said: It is to be regretted that there is any opposition, because this motion cannot in any way prejudice the captors. If we find the additional money not owing, then the result will be that the amount will not be awarded, and it is a common practice of the Court to allow claims of this kind to be amended. What do you say as to costs?

Mr. Innes: I submit that the applicants are at any rate entitled to the costs of opposition.

Mr. Searle: I submit that this is really a new practice. There is nothing really definite in the rules with regard to the matter, and therefore the respondents were entitled to come and put the matter before the Court. It was not unreasonable to come before the Court and point out the grounds of opposition, and I think that costs should be costs in the cause.

The Court made an order as prayed, applicants' costs to be costs in the cause. No order as to respondents' costs.

Postea (January 25th).

An application was made by the owners for an order allowing them to file pleadings and to adduce proof as to the ship not being a good prize.

Mr. Graham, Q.C., appeared for the applicants.

Mr. Searle, Q.C., appeared for the respondents, the captors.

Mr. Graham: The defence of the owners is that they were in entire ignorance that the charterers were trading with Her Majesty's enemies, and it may be necessary for the defendants to call a considerable amount of evidence from England and elsewhere.

Mr. Justice Laurence: Would it appear that ignorance was a good defence in law?

Mr. Graham: That is another question, but of course that is only one of the grounds of defence.

Mr. Searle, Q.C.: The ground the captors take up is that the application was entirely premature. Under the rules of the Prize Court it is the Court who decides upon the first hearing whether or not further pleadings are necessary, and an application such as that made is quite out of order. It is very clear from the bills of lading that the parties who shipped these goods and the charterers knew all about the war and knew where they were going.

De Villiers, C.J.: It is clear that the Court can not decide upon the application now, although I am not sure that the initiative must be taken by the court. The matter will stand over until the first hearing, and the matter of costs of the application will also stand over.

Postea (January 30th).

The application for condemnation of the ship *Mashona*, and certain of the cargo thereon, was renewed.

The Attorney-General (with whom was Mr. Searle, Q.C.), appeared for the applicants, the captors.

Mr. Innes, Q.C. (with whom was Mr. Molteno), appeared for the charterers of the ship, the American and African Steamship Company.

Sir H. Juta, Q.C. (with whom was Mr. Graham, Q.C.), appeared for the owners.

Mr. Innes said that he also appeared to represent the interests of certain consignees of cargo, viz., Messrs. Braude & Marks, Ornstein & Koppel, Allan Wack & Co., and Arthur May & Co.

The Chief Justice asked whether there were any consignees not represented.

Counsel replied that there was a large number of consignees unrepresented.

The Attorney-General said there were some goods on board the ship claimed by the Portuguese Government, and they were prepared to release these.

Mr. Innes: I think that before the case is proceeded with, we ought to have on record the captors for whom the Attorney-General and Mr. Searle appear. I think it should appear whether these proceedings are by the Crown only or by the actual captors of the vessel. Who will be liable for damages?

The Attorney-General: We represent the captors, and the proceedings must be in the name of the Crown. The captors, I take it, were the Admiralty.

The Chief Justice asked whether there was a counter-claim.

Mr. Innes: There is not at present, but the schedules seem to contemplate a claim for damages. The Court might give us leave to apply for an amendment of their claim later on.

The Attorney-General said there would be no difficulty about that.

The Attorney-General: This is an application for the condemnation of the ship *Mashona* and certain cargo on board. The ship was captured by H.M.S. *Partridge* at Algoa Bay on 5th December last. The *Mashona* is an English ship, the property of a British subject residing in England, and carrying on business at 23, Leadenhall-street, London. On October 5, 1899, she was chartered by the American and African Steamship Company, also domiciled in London and carrying on business there, Bucknall Brothers being the managers both for the owners and charterers. At the time of her capture the *Mashona* was on a voyage from New York to Delagoa, touching at Algoa Bay and Durban *en route*. She left New York on 3rd November last, receiving cargo there from October 14 to November 2, and it is common knowledge that the ultimatum from the Transvaal to Great Britain expired on October 11 last. Condemnation of the ship is asked for on the ground that she is the property of a British subject domiciled in England, and engaged at the time of her capture in illegally trading with the enemy. Condemnation of certain cargo on that ship is asked for on the ground that the said cargo is the property of the enemy. The procedure under which the Court acts in this case is laid down in the English Prize Act of 1864, and by certain rules of Court made by Her Majesty the Queen in Council under section 3 of that Act, the Prize Act and the rules provide that there should be a first hearing, at which the only evidence before the Court should be that called at the preparatory examination and the ship's papers. The preparatory examination was taken on standing interrogatories on December 12, 13, and 14 last, and the captain, first mate, and third mate were then examined. It is not necessary to read all the evidence now, but I will refer to parts of it. (See the definition of a ship's papers as given in the Prize Act.) When the *Mashona* was captured the only papers found on her were the log. The bills of lading having reference to Algoa Bay and Durban had been taken on shore by someone at Port Elizabeth, and handed to the agents there—the Castle Packet Company.

The bills of lading referring to the Delagoa Bay cargo came out by the mail, and were delivered up by Mr. Andrew, the joint manager of the Castle Mail Packet Company here. The only evidence before the Court now is that taken at the preparatory examination along with the ship's papers—the manifest of cargo, log, charter party, and bills of lading. (See sections 20 and 21 of the Naval Prize Act of 1864.) The basis of the present application was supplied by the ship itself, by its papers, and by the evidence of its officers, and if on this evidence we can satisfy the Court beyond doubt that the ship was carrying on trade with the Queen's enemies then it can condemn the ship at the first hearing. That is a very old practice. If, however, the Court has any doubt it can direct that further evidence be taken. The bills of lading show that the owners or charterers of the ship knew they were trading with an enemy, and took the risk. As to a contention which I understand will be raised, viz., that the owners were unaware of this trading with the enemy and were not parties to it, there is a case where a ship was condemned, although the person trading with the enemy did so under the *bona fide* belief that he was entitled to trade with the enemy, showing that while the intention of the parties might be entirely innocent, still there was that contravention of the law which no innocence of intention could do away with. If the ulterior destination of the goods was an enemy's country, it does not matter whether the port at which they were landed is neutral; in other words, a ship might be going to a neutral port, but if the goods were intended to be taken to the enemy's country by another vessel or overland, the ship and goods could be confiscated. Here the evidence shows that the goods were taken on board at New York with the deliberate intention of taking them to an enemy's country after war had been declared between Her Majesty and that country. The charter party even had a clause to this effect: "In the event of the nation to which this vessel belongs becoming engaged in hostilities which affect this charter, the charterer shall have the option of taking, cancelling the charter party, &c."

Sir Henry Juta said that was nothing new, because exactly the same clause was inserted in a charter made in May last.

The Attorney-General: If that is the usual form I will not pursue that point, but at the time it struck me as odd. In the case

of 1,440 sacks of flour consigned to Edward Everett, of Pretoria, there was an important clause, viz.: "As any cargo that may be destined to the Transvaal is liable to be confiscated in Cape Colony and Natal, it is agreed upon by the shipper that the owners, charterers, &c., are released from all responsibility in respect of goods so detained." From this it is clear that they knew the ship was carrying these goods for Everett, of Pretoria, that the goods were liable to confiscation, and the master of the ship admitted that the clause was inserted for the protection of parties, whilst he also pointed out to the officers of the Partridge the goods consigned to Pretoria. In his evidence the master said: "I know that there were foodstuffs for the Transvaal. I first inferred this from Delagoa Bay being the destination. I could have found out from the marks on the cargo whether any of it was for the Transvaal. As a matter of fact, when the naval officer came aboard I consulted the manifest, and pointed out some for Pretoria and Barberton." The cargo mentioned in the monition is that which I now press should be condemned. These were in cases where no claim had been made, but the goods were clearly meant for the Transvaal. With regard to some other consignments which had not been claimed but which he was doubtful about, the Court can allow these to stand over for a year and a day, after which if they are still unclaimed, or if claimed but it is not proven to the satisfaction of the Court that they were not destined for the Transvaal, they will become, according to the prize rules, the prize of the captor. With regard to the consignees whom Mr. Innes appears to represent, unless these could prove that as soon as possible after the outbreak of the war they closed up their businesses in the Transvaal and left that place the goods must be condemned. As, however, it is contended that in most of the cases at any rate the consignees have done so, I have no objection to the Court ordering further proof on that point.

Mr. Innes: I am compelled to admit the principle which has been laid down that trading with an enemy is prohibited, and that the property of a person engaged in so trading can be confiscated, but in order to constitute trading two things are necessary, viz., there must be an act of trading to the enemy's country, and there must be the intention to trade after war had broken out. To prove trading there must be some contract

or communication between the parties, and nothing of that kind has been proved here. As a proof that there was no intention to trade, I read a letter from a special agent of the Bucknall Line stating that in future a copy of the manifest of all Bucknall boats will be submitted to the Military Director of Railways, as the company is desirous of giving every information for the assistance of the Imperial Government. Had the Mashona dropped anchor in Table Bay that would have been done, and the master said in his evidence that if he had not been stopped by the Partridge he would have gone ashore and laid the manifest before the Customs officers, who in cases of that kind had some jurisdiction in places where there was no Marshal of the Prize Court. Our position is that in the first place we hold there has been no act of trading, and if the Court holds that there was, then in the second place that there was no intention to trade. The evidence we intend to lead if the Court grants the request for a further hearing is to the effect that these people had closed up their businesses in the Transvaal and had removed from there before the war broke out. In the case of Ornstein & Koppel it is contended that the consignments were for their own use, and had nothing to do with the Transvaal.

Sir Henry Juta: Mr. Innes has practically travelled over the same ground that we stand on, and there is no need to repeat the arguments. There was no intention to trade, and as a matter of fact an agent specially sent out by Bucknall Brothers pointed out to the Military Director of Railways here that there was an engine on board one of the vessels for the Netherlands Railway Company, and that it would be a good thing to confiscate it. There have been five or six vessels of the same line in here both before and after the seizure, and in all these cases the manifest has been presented to the military authorities, and goods supposed to be for the enemy taken out, and the remainder allowed to be taken on to their destination, bonds to the amount of £10,000 being given that no goods would be landed at other than British ports. That shows a uniform conduct very contrary to any intention of dealing with the enemy. Any ship making an entry in this colony would be bound to exhibit the whole of its manifests.

Mr. Justice Buchanan asked what were the special reasons for the capture of the Mashona.

Sir Henry Juta : Nobody can tell, but it is said it was due to the anxiety and zeal to get prize money.

Attorney-General replied on the facts,

The Chief Justice said that he supposed the position of the charterers was that there was no intention to take goods to Delagoa Bay unless the Crown consented.

Mr. Innes said that was so.

The Chief Justice pointed out that the letter to the Military Director of Railways referred to Cape Town manifests only.

Mr. Innes said that was the only letter they could produce, and he could not tell why it referred to Cape Town only.

The Chief Justice then intimated that the Court would take time to consider its judgment.

Postea (February 2nd).

De Villiers, C.J., said : There are certain parties in default, and I shall first of all deal with those represented by counsel. There is No. 12, Allan Wack & Co., 1,000 bags of flour. It is now admitted, on behalf of the captors, that their claim to have this consignment confiscated cannot be supported, and the proof is wholly insufficient to justify the Court in confiscating it, and No. 12 will therefore be ordered to be released. In regard to the other claims represented by Mr. Innes, a statement has been made to the Court that the consignees are prepared to prove that within a reasonable time after the outbreak of war they had removed their persons and property as far as they could from the enemy's country. That would be a good defence to the claim for confiscation. If it was not intended that this property should be sent to them there, clearly it is a case in which the defence would hold good, and in which confiscation would not be allowed. An opportunity will, therefore, be given to those claimants represented by Mr. Innes to give further proof in support of their contention. Then there are several consignees who are not represented, but with regard to some of them it is admitted that the claims cannot be substantiated. Their numbers are 20 to 27, 36, 41, and 44. These will also be ordered to be released. Then there are some others in regard to which some doubt does exist, and others again in regard to which there is no doubt in my own mind that they are enemy's goods, and that they are therefore liable to confiscation. There are 1,000 casks of lubricating oil which, on the face of the bills of lading, were consigned to the Netherlands

Railway Company, and that we clearly know as a fact is a Transvaal company domiciled in that country, and as the casks belong to them by law, the captor is entitled to have them declared confiscated. Seeing, however, that the case will have to stand over for further consideration, the Court will now make no final order with regard to the confiscation of those casks. The same remark applies with regard to item 44, United Engineering Works, consignees. That is only one case of catalogues, which does not amount to much, but it is a case with regard to which, I think, the captors will finally succeed. The same remark applies to No. 46, consigned to Everett, of Pretoria, there being no explanation from Everett as to his being a British subject who had removed his person and property from the enemy's country within a reasonable time after the outbreak of war. Unless something else is brought before us, this item will also have to be declared confiscated. The same remark applies to other goods consigned to Barberton. I now come to the ship, with regard to which an important question has been raised as to whether the Court can order confiscation, seeing that the ship herself was destined for a neutral port. That raises a very important question, which seems never yet to have been finally decided in the English Courts, although in the American and, as it appears, in the Italian Courts it has been decided that the Court would consider the final destination of the goods and not their shipping destination. That seems to me at first sight to be a reasonable view of the matter. However, there will be no final decision upon that point until the final hearing. The important question which the Court has at present to decide is as to whether an opportunity should be given the charterers and owners of the ship to give further proof. The further proof which they wish to give is that there was no intention on their part at all to trade with the enemy; that in point of fact notice had been given to the Imperial authorities that every information would be afforded to them in regard to goods brought out by their steamers before they were sent to Delagoa Bay so that the Imperial authorities could decide whether these goods should be forwarded. Counsel has informed the Court that proof to that effect will be given on behalf of the owners and charterers, and there appears to be some *prima facie* proof that proof to that effect will be forthcoming. A letter has

been produced sent by the special travelling agent of the Bucknall Line, and addressed to the Military Director of Railways in Cape Colony. It reads as follows: "Sir,—I have the honour to inform you that in future, and during such time as the war lasts, a copy of the manifest of the cargo for Cape Town laden on board Bucknall steamers will be sent to you for your inspection, as we desire to afford any information that may be in the interests of the Imperial Government." No doubt, as pointed out by the Attorney-General, this letter refers to the port of Cape Town; but the fact that such a letter was addressed to the authorities of the port of Cape Town, goes far to disprove any intention on the part of the owners or charterers to do illegal trading with the enemy; but that, on the contrary, there was a desire not to allow any goods to enter the Transvaal without the consent of the Imperial authorities, and this view is somewhat supported by the evidence of the captain himself. Unfortunately at the preparatory examination no question could be put except those directed in the rules, and therefore it was impossible, at that stage, to obtain further information from the master. In answer to the statutory questions, the captain says: "I know that there were foodstuffs for the Transvaal. I first inferred this from Delagoa Bay being the destination. I could have found out from the cargo manifest whether any of it was for the Transvaal. As a matter of fact, when the naval officer came aboard I consulted the manifest, and pointed out some for Pretoria and Barberton. Had the officer of the Partridge been half an hour later the manifest would have been handed to the Customs authorities." These circumstances afford *prima facie* reason that the Court should consent to the application, and an order will therefore be made for further proof. The order will be as follows: The Court will grant leave to those applicants represented by Mr. Innes, except Allan Wack & Co., to file further proof that within a reasonable time from the outbreak of war they had withdrawn their persons and property from the enemy's country, and also grants leave to the owners and charterers of the ship to file further proof that they had no intention of trading with the enemy except by permission of the proper authorities. Affidavits must be filed and served on the solicitors or attorneys for the captors within a fortnight from this date, and the case will be heard a week after. It

may be necessary that the Attorney-General should have an opportunity of cross-examining the witnesses upon their affidavits, in which case he could make an application, but if no such application is made then the case will be heard upon the affidavits of the plaintiffs. As to costs, that question will stand over.

Buchanan, J., concurred, and said the present order was in the nature of an interlocutory order, and did not indicate the decision of the Court, and it was therefore unnecessary to go into the merits of the case at present.

Laurence, J., also concurred.

P. stea (February 21st).

Mr. Searle stated that number of further affidavits had been filed, in some cases in connection with new claims. He suggested that March 2 would be a suitable day for hearing the case. It might be necessary to cross-examine one of the witnesses, but he hoped there would be no cross-examination of the other witnesses. He did not think that more than one witness would be called on behalf of the captors.

Sir H. Juta, Q.C., on behalf of the owners of the ship, pointed out that the ship and the cargo were still in the hands of the captors, and was lying idle. One of their witnesses (Mr. Cluny) had to go to Natal, and the sooner the case could be heard the better, so as to decide what should be done with the ship.

Mr. Searle said that Mr. Cluny could go, as he did not wish to cross-examine him. Mr. Searle also said that he wished to take the evidence on affidavit of Mr. Honey, the Collector of Customs.

Mr. Innes, on behalf of his clients, and Sir Henry Juta, on behalf of his, said they had no objection to Mr. Honey's evidence being taken, if they had an opportunity of cross-examining him.

The further hearing was ordered to be set down for March 2nd.

Postea (March 2nd).

The Attorney-General, Mr. Solomon, Q.C. (with whom was Mr. Searle, Q.C.), appeared for the applicants, the captors.

Mr. Innes, Q.C. (with whom was Mr. Molteno), appeared for the charterers of the ship, the American and African Steamship Company, and the following consignees of cargo, viz.: Messrs. Braude & Mark, Ornstein & Koppel, Allan Wack & Co., Duncan, Arthur May & Co., Liebmann and Elsasser.

Mr. Molteno appeared the Netherlands and South African Railway Company with regard to certain goods consigned to them.

Sir H. Juta, Q.C. (with whom was Mr. Graham, Q.C.), appeared for the owners.

A number of affidavits in support of the various claims were read, those for the charterers alleging that there was no intention to trade with the enemy, but that it was intended when the steamer arrived here to place the matter in the hands of the authorities, so that no goods would be taken on to their destination without the consent of the authorities. It was also pointed out that before the capture of the Mashona vessels with cargo for Colonial ports and Delagoa Bay had been allowed to deliver the goods on signing a heavy bond to guard against goods which it was believed were intended for the enemy reaching their destination.

After argument,

C.A.V.

Postea (March 13th).

De Villiers, C.J., said: This is a suit for the condemnation of the British ship *Mashona* and a portion of her cargo as prize by reason of her having been engaged, at the time of her capture, in trading with the Queen's enemies. The cargo in question was shipped at New York for conveyance to Delagoa Bay, and was consigned to various persons resident in the South African Republic, with which State Great Britain was at war at the time of such shipment. There is no question of contraband or of the rights of neutrals, the simple question being whether at the time of her capture at Port Elizabeth the *Mashona*, which is admitted to be a British ship, was engaged in carrying cargo for and trading with the Queen's enemies. The law is clear that one of the immediate consequences of the commencement of hostilities is the interdiction of all commercial intercourse between the subjects of the States at war without the licence of their respective Governments. "There can be no doubt," says Bynkershoek (Qu. Jur. Pub., lib. 1, c. 3), "that from the nature of war itself, all commercial intercourse ceases between enemies. Although there be no special interdiction of such commerce, as is often the case, commerce is forbidden by the mere operation of the law of war." The prohibition applies to all persons domiciled within the hostile State. If a war breaks out, a foreign merchant carrying

on trade in a belligerent country has a reasonable time allowed him for transferring himself and property to another country. If he does not avail himself of the opportunity, he is treated, for the purposes of the trade, as a subject of the Power under whose dominion he carries it on, and as an enemy of those with whom that Power is at war. In the present case the bills of lading show that several of the consignments were made to persons or companies domiciled or carrying on business in the Republic. For instance, on the margin of the bill of lading relating to twenty bales of duck for Messrs. A. Johnston and Co. there appears the word "Pretoria" over a diamond, within which are the initials A.J. and Co., P. Another bill of lading shows a consignment of 1,000 cases lubricating oil direct to the Netherlands South African Railway Company. No claim has been made on behalf of that company, but the Netherlands Consul has informed the Court that the company is domiciled in the Netherlands. Seeing, however, that it owns a railway in the Transvaal, and there carries on its main business as a railway company, it would be difficult to exclude lubricating oil, apparently intended for the use of its railways, from the operation of the rule already referred to. There appears to be some arrangement between the Governments of Great Britain and the Netherlands for the delivery to the British Consul at Delagoa Bay of goods consigned to the company, and the Court will postpone judgment as to the liability of the consignment to confiscation to a future date. There is a consignment of 300 bags of flour to Pearson Goddard, and on the margin of the bill of lading is the word *Barberton* underneath a diamond enclosing the initials G.G.D.B. There are consignments of flour to the Castle Mail Packets Company or their assigns, but in the margin are the words "Notify A. May and Co., Johannesburg." Moreover, across the face of the bills of lading relating to these consignments appears the following agreement in writing: "As any cargo which may be deemed to be destined for the Transvaal and (or) Orange Free State is liable to be detained, intercepted, confiscated, and (or) otherwise restrained in the ports of Cape Colony or Natal, it is agreed by the shipper, in accepting this bill of lading, that the steamer, her owners, charterers,

and (or) agents are released from all responsibility in respect of goods so detained, intercepted, confiscated, and (or) otherwise restrained." A similar agreement appears on a bill of lading for flour consigned to the Castle Company, on the margin of which are the words "Nantisco, care of Edward Everitt, Pretoria, notify M. Leibman and Co." There is also a consignment of 513 bags of meal to Bernard Elsasser by a bill of lading, on the margin of which is the word "Barberton," underneath a square enclosing the initials "B.E." A claim has been made by Julius Leibman to the cargo consigned to M. Leibman and Co. on the ground that he had left the Transvaal towards the end of October, 1899. He says that he left with a view partly of escaping police duty and partly for the purpose of stopping a shipment of flour which was arriving for the firm by the Marie, and that he was not aware of a shipment being on board the Maahona until informed of the fact after the commencement of the present proceedings. He does not state, however, that his firm is no longer carrying on business in the Transvaal, or that his partner, Moritz Leibman, has left that country. The goods were seized while on the way to Pretoria via Delagoa Bay, and no attempt was made to divert them from their course before the capture. The same remark applies to the goods consigned to Bernard Elsasser, which are claimed on his behalf by his agent, Charles Day. Elsasser himself has made no affidavit, and is described by Day as a merchant of Barberton. It does not appear that he left the Transvaal after the outbreak of hostilities, or that he has ceased to carry on business in that country. His agent Day, however, states that he (Day) did all in his power, when the war became imminent, to stop shipments under order for his principal, but that his cabled and written instructions were too late. He further states that his instructions on leaving the Transvaal were to stop and dispose of all goods arriving at the coast; that certain goods consigned by other vessels had been so stopped and disposed of at Port Elizabeth, and that before the seizure his intention was to adopt the same course with regard to the goods shipped in the Maahona. The fact, however, remains that when the goods were seized they were the property of and on the way to a merchant carrying on his business in the

enemy's country. Clearly, therefore, the goods consigned to M. Leibman and Co. and to Elsasser are liable to confiscation. No claim has been made to the goods consigned to A. Johnston and Co., Pretoria, and as, on the face of the bills of lading, the goods were consigned to that firm, they are liable to confiscation. There is an unimportant item of one case of catalogues consigned to the United Engineering Works, Johannesburg, which must also be confiscated. As to the consignments to Pearson Goddard and to the Castle Company for A. May and Co., it would appear that the consignees left the Transvaal within a reasonable time after the outbreak of hostilities, and the Attorney-General has accordingly withdrawn the claim for the confiscation of these and several other consignments in a similar position. The only goods, therefore, which the Court will, for the present, condemn as lawful prize are those consigned to A. Johnston and Co., M. Leibman and Co., B. Elsasser, and the United Engineering Works. The remainder of the cargo not claimed, will not be condemned until a year and a day shall have lapsed from the return of the Monitor, with the exception of the lubricating oil for the Netherlands Railway Company, as to which the Court will give final judgment at a future date unless in the meanwhile a definite arrangement is arrived at between the Governments of Great Britain and the Netherlands. It has been strongly urged upon the Court that the goods are not liable to condemnation on the ground that they were consigned to a neutral port. In the case of the Jonge Pieter, however, it was held by Lord Stowell that the interposition of a prior port makes no difference. "All trade," said the learned Judge, "with the enemy is illegal; and the circumstance that the goods are first to go to a neutral port will not make it lawful." Moreover, it should be remembered that the goods are claimed as lawful prize on the simple ground that they were taken afloat and belonged to the enemy. As remarked by Halleck (2, International Law, 129), "Goods in transitu from a neutral country to a belligerent, if they are to be delivered to and become the property of a belligerent immediately on their arrival, are considered as his goods during the voyage, and subject to capture and confiscation." The question still remains whether the

ship should also be condemned as lawful prize. An opportunity was given to the owners and charterers after the first hearing to give further proof that they had no intention of trading with the enemy except with the permission of the Crown. On the 20th November Mr. Clunie, the travelling agent of the Bucknall Line, wrote to the Military Director of Railways in Cape Town informing him that in future and so long as the war might last a copy of manifests of cargo for Delagoa Bay laden on board the Bucknall steamers would be sent for his inspection, as the company were desirous of affording any information that might be in the interest of the Imperial Government. Mr. Herbert, the local agent at Cape Town of the owners, in his affidavit says: "After the arrival of the S.S. Johannesburg on 24th October, 1909, I was verbally informed by the Collector of Customs (in Cape Town) that in order to obtain the necessary clearance for the vessel it was imperative that a bond of £10,000 that the owners would land the cargo for Delagoa Bay at either Port Elizabeth, East London, or Natal, as directed by the Customs, should be entered into in favour of the Customs . . . and I was further informed that this course would have to be followed with all following steamers carrying cargo for Delagoa Bay or any cargo that might be consigned either to Port Elizabeth, East London, or Durban destined for the Transvaal or Orange Free State. Upon inquiry I was likewise informed by the Collector of Customs that he was acting upon instructions received from His Excellency the High Commissioner, through whom these orders had been communicated by the Secretary of State." It is clear from his affidavit that had the Mashona made Cape Town her first port of call the same course would have been adopted as with the Johannesburg and other ships belonging to the company. It appears further, from the affidavit of Ernest Martin, the agent for the charterers at Port Elizabeth, that the Sub-Collector of Customs there had received instructions from the Collector of Customs in Cape Town to pursue a similar course at Port Elizabeth. I am satisfied from his affidavit and that of the master that neither he nor the owners nor the charterers of the ship had any intention of trading with the enemy, but that on the contrary it was their desire to assist the British Government in preventing any

such illegal trade, and that before the seizure of the ship it was the intention of the charterers to execute a bond under taking not to land any goods at Delagoa Bay without the permission of the High Commissioner as representing Her Majesty. There is no denial of the statements made on oath on behalf of the owners and charterers, and the Court may therefore take it as established that in his previous dealings with cargo consigned to Delagoa Bay the Collector of Customs had acted with the sanction of the High Commissioner. In regard to a portion of the cargo by the Zulu, it appears that she was allowed by the High Commissioner to carry it to Delagoa Bay, although on the urgent advice of the agent of the charterers the commander of H.M.S. Barrosa was subsequently induced to order the landing of the goods at East London. Can it be held under these circumstances that there was any intention to trade with the enemy? The counsel for the captors strongly relied on the case of *The De Hoop*, which was certainly one of great hardship. The cargo in that case had been conveyed in a British ship from Rotterdam bound for a British port during war between Great Britain and Holland. The ship was captured for having been engaged in illegal trading. Condemnation of the cargo was resisted on the ground that the claimants, who had been previously engaged in an extensive trade with Holland, had before the war obtained special Orders in Council permitting them to continue their trade. They were subsequently informed by the Commissioners of Customs of Glasgow, under the opinion of the law advisers of the latter, that no further Orders in Council were necessary, and that all goods brought from the United Provinces could in future be entered without any such permit. The claimants consequently caused the goods in question to be shipped at Rotterdam for their account. Under these circumstances it was urged that the case was entitled to great indulgence, but Lord Stowell rejected the claim for restitution. "There may," said that eminent judge, "be occasions on which intercourse with the enemy may be highly expedient; but it is not for individuals to determine the expediency of such occasions, on their own notions of commerce merely, and possibly on grounds of private advantage, not very reconcilable with the general interests of the State. It is for the State alone, on more enlarged views

of policy, and of all the circumstances that may be connected with such an intercourse, to determine when it shall be permitted, and under what regulations. No principle ought to be held more sacred than that this intercourse cannot subsist on any other footing than that of the direct permission of the State." He added that in order to take the case out of the rule there must be legal distinctions, and not mere considerations of indulgence and compassion such as had been put forward in that case. Such a legal distinction was made by the same judge in the subsequent case of the *Minna*, where he appears to have decided in favour of a ship captured on a voyage from Bordeaux destined ultimately for Bremen (a hostile port), but with orders to touch at a Bristol port, from whence she was to resume her voyage, if permitted (Edwards, p. 55). In the still later case of the *Mercurius*, the same judge ordered the restitution of the ship on the ground that, although the voyage was from an enemy to a neutral port, it was the intention of the party to come to a British port in order to obtain a licence. "I cannot," said Lord Stowell, "under any view of the case bring myself to regard the voyage as a fraudulent continuous voyage; there was no act either done or to be done to found the imputation of fraud; on the contrary, there is sufficient proof of an honest intention to come to this country to procure the licence and to act conformably to it; when granted." In the same manner there appears to me sufficient proof in the present case of an honest intention to pass a bond undertaking not to take the goods to Delagoa Bay except with the permission of the proper authorities. There was no concealment on the part of the charterers or the owners or the master; on the contrary, they all acted with the utmost bona fides, and with the sincere desire to give the authorities all the information and assistance in their power. It is quite true that the Collector of Customs cannot, under ordinary circumstances, be regarded as in any way representing the Crown, but as I have already remarked, it is not denied that he represented himself as acting under instructions from the High Commissioner. It can hardly be supposed that he would have taken upon himself the responsibility of requiring the previous bonds unless he had definite instructions to that effect. Having given the previous bonds, the agents of the ship

honestly believed that a similar bond would be required and given in the case of the *Mashona*. The presumption of an intention of trading with the enemy arising from the fact that the ship was carrying enemy's goods consigned to Delagoa Bay and destined for the enemy's country, is entirely rebutted by the conduct of all the parties interested in the ship. The claim for restitution of the ship must consequently be allowed.

Buohanan, J.: This being the first occasion on which the Supreme Court has been required to act as a Prize Court, it is satisfactory to find that there is no difference of opinion as to the leading principles and rules of law which should govern our decision. But in the view I take of the special circumstances of the case, I think it necessary, even at the risk of repetition, to state the deductions which in my opinion should be drawn from the affidavits. The two issues raised in these proceedings are first, whether or not the steamer *Mashona* is liable to confiscation as a prize, on the ground of its being a British ship which was engaged without licence in trading with the enemy; and secondly, whether or not a certain portion of the cargo on board the ship is liable to capture as being the property of the enemy. As to the first question, it is a clear and well-recognised rule of international law that a subject of a belligerent is not at liberty to trade with the enemy without licence from his Sovereign. Whether or not there has, in fact and in intention, been such illegal trading is specially in dispute in this suit. The *Mashona* was chartered by the owners, the British and Colonial Steam Navigation Company (Limited), to the American and African Steamship Line. Messrs. Bucknall Bros., who are interested in both companies, are the agents for both owners and charterers, and they have been engaged for years in the trade between European, American, and South African ports, and their steamers engaged in this trade are commonly known as the Bucknall Line. The existing charter party was entered into before hostilities had broken out between our Government and the Republics. The *Mashona* had under a previous charter been engaged in the same trade. On the occasion of her last voyage, the *Mashona* was laden at New York after hostilities had commenced with a general cargo for the British Colonial ports and Delagoa Bay, the voyage to terminate at the latter

place, which is a neutral port. Most of the cargo for Lourenco Marques was by the bills of lading consigned to order, or to the ship's agents, but a few of the bills of lading indicated that though the goods were to be delivered at Lourenco Marques, their ultimate destination was the Transvaal. On most of the bills of lading, including those to order and to the ship's agents, was endorsed a clause setting forth that as any cargo which might be deemed to be destined for the Republics was liable to be detained, intercepted, confiscated, or otherwise restrained in the ports of the Cape Colony or Natal, the ship was released from liability in respect of any such cargo detained or intercepted. The Mashona was bound first for the British Colonial ports, and would have to enter and clear at these ports before proceeding to Delagoa Bay. immediately on arriving at Algoa Bay in this colony the Mashona was seized and attached as well as was such portion of her cargo as had been shipped for Lourenco Marques. Before, however, the Mashona put into port other steamers of the Bucknall Line had arrived at Table Bay, carrying among other consignments cargo for Delagoa Bay, ultimately destined for the Transvaal. By our Customs regulations the manifests of all vessels entering our ports have to be submitted to the authorities, by which means the destination of all the cargo becomes patent to the officials of the department. After hostilities had commenced the Customs authorities, at the instance of the High Commissioner, upon instructions of Her Majesty's Secretary of State, required that all vessels arriving with cargo for other ports, before being allowed their clearance, should either land so much of their cargo as was forbidden to be taken to its destination, or if that was inconvenient owing to the manner of the ship's stowage, to enter into security bonds undertaking to deliver into the custody of the British Colonial Customs authorities all goods consigned to either of the Republics, which were liable to confiscation owing to the said countries being at war with Her Majesty's Government. The agent for the Bucknall Line states, moreover, and this is not denied, that he was informed by the Collector of Customs that the same course would be adopted with all following steamers carrying cargo for Delagoa Bay destined for the Transvaal or Orange Free

State. Owing to its geographical position, Table Bay was the first Cape port usually made by steamers from Europe or America, and the procedure just described was adopted there not only with the steamers of the Bucknall Line which had arrived before the Mashona, but also with vessels belonging to other lines; and the same practice has been continued with all vessels putting into Table Bay subsequently to the date of the arrival of the Mashona, none of which vessels have been seized. It seems most probable from the affidavits that the same course would have been adopted with the Mashona itself had its first port of call been Table Bay instead of another Cape port, viz., Algoa Bay. And as far as the owners were concerned it would also have been followed in the case of the Mashona at Port Elizabeth had the naval authorities not interfered. It is beyond doubt in this case that the ship-owners and charterers have acted with perfect good faith, and that neither they nor any of their agents or the captain of the vessel intended to do anything illegal.

On the contrary, they unreservedly desired to submit to the control of the Government authorities here. It is contended, however, that no matter what bona fides existed, because of the fact of having done an act of trading without licence the ship must in law be declared forfeit. That there is a strict rule of law on the point is indisputable, but looking at the circumstances of the case, I fail to see that it forces us to a conclusion fatal to the vessel. That there was no intention on the part of the owners to trade illegally is shown by the affidavits of the captain, of the owners, and of their various agents in this colony. The captain says that the idea of trading with the Queen's enemies never entered his mind, and that such a course would not only be repulsive to his British instincts, but contrary to the standing instructions of his owners against acting illegally in any way whatever. Mr. Clunie, the special travelling agent of Messrs. Bucknall Bros., was sent out to South Africa shortly after the outbreak of hostilities generally to protect the interests of the company. He was particularly and specially instructed by his principals to give the Imperial Government all the assistance in his power, and he acted to the best of his ability upon these instructions. The Zulu, belonging to the same owners,

which had arrived here before the Mashona, had cargo on board for Delagoa Bay, as to which the Imperial authorities entertained doubts whether it was for the Transvaal Government or for a private company. The authorities at first authorised this cargo to be sent forward, and it was only on the voluntary efforts and repeated representations of Mr. Clunie that it was ultimately stopped and landed in this colony. Before the arrival of the Mashona, Mr. Clunie wrote to the military authorities as follows: "I have the honour to inform you that in future and during such time as the war lasts a copy of manifests of cargo for Delagoa Bay laden on board the Bucknall steamers arriving at this port will be sent to you for your inspection, as we are desirous of affording any information that may be in the interest of the Imperial Government." On the arrival of the Mashona there was no attempt at any concealment, and the fullest inspection of documents was given before the seizure. True, the agent's letter only mentioned Table Bay, but I do not think that the fact of the first arrival being at Algoa Bay should make any difference, there being the full intention to comply with all the restrictions which had been imposed. From the affidavit of the local agent it appears that a bond similar to that required here was taken in the case of a previous steamer which had first arrived at Algoa Bay, the Sub-Collector stating that he acted on instructions from Cape Town. There is no question raised in this case of contraband of war, either actual or constructive. The cargo was of a nature which could lawfully be laden at New York. Trading to Delagoa Bay, another neutral port, was not of itself illegal. Though a quantity of the Mashona's cargo for that port was initially attached, at the first hearing the captors abandoned their claim for confiscation as to a large proportion of it. Some of this cargo was for the Portuguese Government, some for residents at Lourenco Marques, and some, though according to the manifest destined for the Transvaal, was claimed by and abandoned to subjects who had withdrawn from the Transvaal on the outbreak of the war, and who desired that their goods should be delivered to them in Natal. The accusation of illegal trading is based on the rule of law as to continuous voyages, by which the ultimate destination of the goods and not the port of call of the

vessel is looked at. It must be taken in this case that it was known when some of the goods were taken on board at New York that their final destination was not Lourenco Marques, but the Transvaal. Against this a point might be made in favour of the vessel from the fact that the goods were not to be carried by the ship-owners beyond the neutral port, and that in any forwarding from there they were not in any way concerned. The real defence, however, is based on the contention that the goods would not in any event have been taken by the vessel even to the neutral port without the permission of the authorities first being obtained; and this intention was communicated to the shippers before the voyage was begun. The case of the *Mercurius* (Edwards, 53), is an authority for holding that it is not necessary to obtain a licence before the commencement of the voyage. There the voyage was from an enemy's port to a neutral port, but with instructions to put into a British port to obtain a licence, and the proof of such direction and consequent intention being clear, it was held not to be illegal. That was a much stronger case for the captors than this, as there the seizure was made after leaving the enemy's port, and before reaching a British port. Here the Mashona had not been to any enemy's port, and had already reached a British port. That case was decided by Sir William Scott, the soundness of whose ruling on the law of prize has been accepted without question by both English and American Courts, and who moreover in other cases would not recognise hardship or bona fides as excusing a breach of the law when an illegal act had once been committed. His lordship, in discussing the rule as to the ulterior destination of the goods determining the character of the trade, said: "Where everything was to be disclosed and referred to the discretion of the English Government, the case cannot be put on a footing with a continuous voyage framed for the mere purpose of literal evasion." The rules of law in matters of prize are founded on considerations of public policy. The policy on which the rule we are considering is founded is to prevent benefit to the enemy, and to assist the operations of the Government, and for this end to secure to the Government full control of any trading. I gather from the books that owing to the advanced requirements of commerce and a broader recognition of the rights of non-comba-

tants, licences would now be granted with greater facility than was formerly the practice. The particular mode in which the Government consent is expressed is not material (*The Charlotta*, 1 Dods., 390). Here it is not denied that instructions were given by Her Majesty's Secretary of State through the High Commissioner to the Colonial Customs authorities. It is clear, I think, that these instructions were intended to apply to the manner of trading in which this steamer was employed, and were not intended to operate as a licence to any particular vessel. Their object was to place the conveyance of goods to these ports under supervision. Upon complying with the conditions imposed, all vessels belonging as well to the owners of the Mashona as to other companies were without distinction allowed both before and after this capture to carry on their operations. It was the commerce that was intended to be legalised, not an individual licence that was granted. There was every desire and intention to comply with these conditions in the case of the Mashona. When therefore the authorities announce that a certain procedure is to be followed by all vessels engaged in a particular trade, and where the owners loyally intend to comply with these requirements and abide by the conditions imposed, to allow any one vessel to be pounced down upon and at the same time to allow others to carry on their trade, would be to permit a course of action repugnant to national good faith. (See *Uparicha v. Noble*, 13. East, 340.) Under all the circumstances of this case, in my opinion the restitution of the Mashona ought to be decreed. The next issue for consideration is as to the liability of any of the cargo to confiscation. After deducting the shipments for which no claims have been filed, and against which judgment is not at present asked, and the goods which the captors have abandoned to the owners, there remain only three consignments to which I need make any reference. As to the first of these, the 1,000 cases of oil consigned to Lourenco Marques to the Netherlands South African Railway Company, a company which has its head office in Holland, no formal claim has been filed, but the Consul-General for the Netherlands has interposed, and asked for time to obtain information and instructions. The Court considers this request reasonable, and as further time is to be given, any expression of opinion hereon

had better be postponed. The other two consignments to which I refer are those claimed by Leibman and Co. and Bernhard Elsasser. Both these parties are neutrals, and both carried on business in the Transvaal before the commencement of hostilities. In the case of Elsasser, the orders for the goods were given months before, and immediately the relations of the respective Governments became strained and war became imminent, he did all in his power to stop the goods. Certain goods which had been ordered arrived after the war commenced by the steamer Beatrice, and were delivered to the claimant at the port of East London, and sold there. Those that were forwarded by the Mashona had been actually alongside the Beatrice, but had been shut out. I gather from the affidavits that the claimant did not intend any of these goods now to reach the Transvaal, and had they come forward by the Beatrice these very goods would have been delivered to him and sold with the rest in this colony. Moreover, other consignments for the Transvaal which had arrived for the claimant since the seizure of the Mashona had been delivered to and sold by him here. As regards the claim of Messrs. Leibman and Co., one of the partners had left the Transvaal shortly after the commencement of hostilities with the object of stopping their goods from entering the Transvaal. Part of their shipment had also arrived by the Beatrice, and had been delivered to them and sold by them at East London. The cargo by the Mashona was also intended to be stopped and sold here. Other cargo received by the Marie was also delivered at Colonial ports. Both these claimants have not closed their businesses in the Transvaal, but not being British subjects, there was no obligation upon them to do so. They are not themselves enemies, but the destination of their goods to the enemy's country impressed them with a hostile character. That destination has now been changed. There has been no concealment in respect of these goods or other conduct to raise a suspicion of bad faith. It is, I think, a fair deduction from the facts that if these very goods had been on any other vessel but the Mashona they would have been delivered over to the claimants in this colony or in Natal. The policy of the law, which is to prevent goods reaching the enemy or to benefit the enemy's country, would not be contra-

vened by giving up these consignments in this colony, and on the maxim *cessante ratione legis cessat in ea lex*, I should have been prepared to decree restitution of these goods also. But my colleagues do not consider the claimants have done all they ought to have done to remove the hostile character which *prima facie* attached to their goods. The view they take of the facts, as I understand it, is briefly this, that as far as the documents show but for the action of the authorities the claimants would have allowed the goods to proceed to their destination. This is a question of fact, and if that is found against the claimants, the goods are liable to confiscation. At all events, as far as the ship is concerned we are agreed that restitution should be decreed.

Laurence, J. : The S.S. Mashona is the property of the British and Colonial Steam Navigation Company, and chartered by the American and African Company, both British companies, having their head offices at the same address in London, managed by the same agents, and apparently in close business relationship with each other. On November 3, 1899, or about three weeks after the beginning of the war between Great Britain and the South African Republic, she sailed from New York with a cargo loaded apparently after hostilities began—one of the witnesses says "it took between two and three weeks to load her"—for various South African ports, the first port of call being Algoa Bay, in this colony, and the last Delagoa Bay, in a colony of the King of Portugal. A portion of the cargo was consigned to companies, firms, and individuals residing or carrying on business at Pretoria, Johannesburg, and Barberton, in the South African Republic, to whom in the ordinary course it would have been forwarded by rail from Delagoa Bay. The ship was detained in the harbour of Algoa Bay by H.M.S. Partridge, and brought to Table Bay, and there placed in the custody of the Marshal of the Prize Court. The Court is now asked to condemn the ship as good prize on the ground that she was captured while engaged in trading with the enemy, and also to condemn certain portions of the cargo as enemy's property. Without going into unnecessary detail, I propose to make a few general observations as to the principles which must govern the decision of a British Prize Court in a case such as the present. We have, of course, strictly

speaking, to administer the municipal law of England; but that law has to be applied by Prize Courts to the adjudication of the rights and claims of both belligerents and neutrals, and is based on principles which we expect to be observed, and which, in fact, are observed, by the Prize Courts of other civilised nations in similar circumstances, and from this point of view may thus be described as falling within the sphere of public international law. The two main points which have to be dealt with in the present case are (1) the right to seize and capture the property of the enemy and his subjects and of residents in a hostile State; (2) the duty of British subjects to abstain from infringing the prohibition against carrying on trade or maintaining commercial relations or intercourse with a hostile State or its subjects. As to the second point, on general principles all intercourse or commerce in time of war between the subjects of hostile States is forbidden. As Lord Stowell pointed out in the case of the *Hoop*: "This is not a principle peculiar to the maritime law of this country; it is laid down by Bynkershoek (in a passage which he cites) as a universal principle of law." He proceeds to show that it was the law not only of England and Holland, but of the other great maritime powers, France and Spain; "and," he adds, "it may, I think, without rashness, be affirmed to have been a general principle of law in most of the countries of Europe." The same principle has been affirmed with equal precision and emphasis not only in the Admiralty Court but in the English Courts of common law, e.g., in the case of *Potts v. Bell* (8 T.R., 548), and that of *Willison v. Patteson* (7 Taunt. 439). The leading case on the subject I take to be the more recent one of *Esposito v. Bowden* (7 E. and B., 763), where it was laid down by Willes, J., delivering the judgment of the Exchequer Chamber, on an appeal heard before six judges, that "the force of a declaration of war is equal to that of an Act of Parliament, prohibiting intercourse with the enemy excepting by the Queen's licence." "Contracts of affreightment," it was added, "cannot lawfully be fulfilled"; and a passage was quoted with approval from Lord Tenterden's work on Shipping, in which he says: "If before the commencement of a voyage war or hostilities should take place between the State to which the

ship or cargo belongs and that to which they are destined, the contract for conveyance is at an end, the merchant must unlade his goods, and the owners find another employment for their ship." In this case the authorities were fully considered and reviewed, and the case itself was a strong one, for it was that of a neutral ship, with a neutral master, under charter to a British subject, who was held, by reason of the breaking out of war with Russia, to be relieved from his contract to load a cargo at the hostile port of Odessa. Having thus made a brief preliminary reference to the general principles regulating the duty of our mercantile marine when we are at war, I proceed to examine the question of the liability to seizure of the cargo in cases like the present. At a former period, when the war broke out, all property of an enemy or his subjects, whether found in his territory by an invading force, or elsewhere on land, or on the high seas, was, I take it, regarded as liable, in accordance with the rules and practice of war, to seizure and condemnation. With regard to private property on land, this harsh practice was gradually mitigated by the progress of humanity and the desire to render the consequences of war as little oppressive to innocent non-combatants as might be consistent with the effective prosecution of the objects for which war is waged. As a rule the property of such persons, it is now admitted, cannot be seized on land except when required for military purposes, in which case it can be made the subject of a requisition, or, to use the phrase in vogue in this country, "commandeered," but should be paid for at its fair value, and if this cannot be done on the spot, it should be appraised and a receipt or acknowledgment of debt given to the owner. The rigour of war, however, has not as yet been similarly mitigated by general international agreement, embodied in or adopted by the municipal law of the various Powers, with regard to the private property of subjects of the enemy found on the high seas or in a vessel in a port of the other belligerent. Such property belongs as a rule not to private individuals, but to traders; and one of the main objects of the belligerent—or, as some put it, one of the mildest methods by which a war can be brought to a successful issue—is to cripple the enemy by destroying his commerce and cutting off

his supplies. Certain exceptions, however, have been admitted in the interest of neutrals, and in order to enable them during the existence of a war to carry on their trade with as little inconvenience and molestation as possible. Accordingly those nations, including Great Britain, who were parties to the Declaration of Paris of 1856, agreed among themselves that enemy's goods, other than contraband, should not be liable to seizure if conveyed in a neutral bottom, and similarly that neutral goods of an innocent character should enjoy immunity even if conveyed in a hostile bottom. But these exceptions to the general rule leave untouched the case of the goods of an enemy, or his subjects, when conveyed in a ship belonging to either belligerent. In both cases, both ship and cargo are liable to condemnation, if both belong to the enemy, because their character is hostile and they are protected by no convention; if the goods belong to the enemy and the ship to a subject, the goods because their character is hostile and unprotected, the bottom because it is engaged in an unlawful venture. With regard to the goods, it may be here observed that the real test is the nationality or domicile of the consignee. If he is a subject of the enemy, or a neutral or a British subject, residing or carrying on business in the enemy's country, and to that extent impressed with a hostile nationality, the goods consigned to him in the country are liable to condemnation. It may be that in some cases the property has not actually passed from the consignor or would not be held to have so passed by the Courts of common law. Halleck points out that the rules of these Courts "differ in some respects from those which govern Courts of Prize," and cites various cases to illustrate this proposition. He refers to the general rule that "goods *in transitu* from a neutral country to a belligerent, if they are to be delivered to, and to become the property of, a belligerent immediately on their arrival, are considered as his goods during the voyage, *in itinere*, and subject to capture and confiscation." The exception to this rule, where, by special contract or trade usage, the risk of the voyage is on the consignor, are not "admitted in Courts of Prize for the very conclusive reason that to permit goods in time of war to be considered the property of the neutral consignor, instead of the enemy consignee, merely on the ground that the

former had assumed the risk of transportation, would at once put an end to captures of enemy's property on the high seas. . . . "Hence," says Sir William Scot, "that part of the contract laying the risk of transportation in time of war upon the neutral consignor is invalid; or rather, as the captor has all the rights which belong to the enemy, his taking possession is considered equivalent to an actual delivery to the enemy consignee." (Hallack's International Law, ed. Baker, vol. 2, 128-130; and cf. Phillimore, 2nd ed., vol. 3, 740, 741). It is therefore unnecessary to examine or ascertain the conditions, in such a case as the present, with regard to payment of freight or otherwise, of each particular consignment. Among the cargo were certain goods (No. 19), the property of the Netherlands Railway Company, which I understand is a Dutch company, but which it is admitted is a railway situated and carrying on business in the Transvaal, and which appears to have a Board of Directors at Pretoria. There is nothing in the papers before the Court to show that any arrangement made between the Foreign Office and the Dutch Government extended to any cargo on board the Mashona, or that there was any intention to deliver this oil not to the consignees but to the British Consul at Delagoa Bay. It may, however, in the circumstances be desirable to give the claimants in this case, who have applied for a postponement on the strength of certain diplomatic correspondence, which, as far as I can at present see, does not assist them, an opportunity of adducing further proof, if they can, within a brief delay. Then there is No. 1 on the manifest, 20 bales of duck, consigned to Johnson and Co. at Pretoria, marked "Transvaal under rebate," for which there is no claim, and which appears clearly liable to confiscation. "It is not now usual," says Phillimore (Vol. 3, 709, 710), "to condemn the goods for want of a claim until a year and a day (a term which was limited by the Prize Act of the Russian War in 1854 to three months) have elapsed from the time of the return of the monition, except in cases where there is a strong presumption and reasonable proof that the property actually belongs to an enemy." Such presumption and proof appear to be established in this case. No. 45 seems to be in the same position. Then there are numbers 8 and 46, 9 and 10, the property of

claimants, neutral subjects, whose businesses it is not denied are still being carried on at Pretoria and Barberton respectively. It was for the purpose of these businesses that these goods were shipped to them after hostilities had begun, and there is no proof that they would not have been conveyed thither had they not been intercepted en route. I think, therefore, that these claims for release must fail, and that the goods must be taken to be "enemy's property" in accordance with the comprehensive definition of such property applicable to such cases. I may add that I should have been inclined to take a similar view in the case of Nos. 37 and 43, on the ground that the claimant, Mr. Duncan, does not explicitly state in his affidavit that his business at Barberton has been closed, had not the Attorney-General, on behalf of the captors, abandoned this case. If then these goods are liable to condemnation on that ground, *prima facie* the condemnation of the ship, as engaged in a prohibited trade, would appear to be the necessary sequel. If she was so engaged, the existence of the charter is clearly immaterial. The action is *in rem*, and the owners are responsible for the acts of the master as their accredited agent (see Phillimore, Vol. 3, 746). That the law on this subject is very strictly enforced both in English and other prize courts appears from the facts in the leading case of the *Hoop* and other cases there cited, and those in American decisions, such as that of the *Rapid*. It is also obviously immaterial whether the trading is to or from a hostile port; but in this case there arises the question of great importance, and apparently not covered by any precisely applicable precedent in a British court, whether the rule also applies to the case of a ship sailing from one neutral port to another and conveying goods destined to be landed at the latter for consignees residing in the country of an enemy, having no port of his own, and obtaining his supplies by land carriage from the port of destination. Can it be said that a ship is not trading with an enemy consignee merely because the freight is paid not by the consignee himself in the enemy's country, but by his agent at a neutral port? The case of a neutral vessel carrying contraband goods, though not identical, is doubtless somewhat analogous. Lord Stowell, who first developed the doc-

trine of "continuous voyage," refused to apply it in such cases, and held explicitly, in the case of the *Imina*, that goods going to a neutral port could not be regarded as contraband. A similar view appears to have been taken by the Court of Common Pleas in the case of *Hobbes v. Henning* (34 L.J.C.P., 117), referred to by Mr. Innes. In the case of the *Commercen*, however, an American Court applied the doctrine of "occasional contraband" to provisions consigned to the neutral port of Bilbao, but destined for the use of the British forces in Spain; and in the more recent American cases of the *Springbok*, the *Bermuda*, the *Stephen Hart* and the *Peterhoff* the American Courts have applied the theory of "continuous voyage" to cases where it was intended to tranship goods and then convey them to a blockaded port, and also to cases where contraband goods were proved to be intended to be conveyed to the enemy from a neutral port, even when, as in the case of the *Peterhoff*, inland transportation was necessary for the purpose. I need scarcely point out that while trading with an enemy by a ship belonging to the belligerent Power, or running a blockade by a neutral ship, entails its condemnation, no such liability is involved in the carriage of contraband goods *per se* by the latter, and that this was the reason why in this case of the *Peterhoff* the ship itself was held on appeal by the Supreme Court of the United States to be free from liability. A similar view to that adopted in the United States in the cases above referred to seems to have been taken more recently by the Italian Prize Court, sitting at Rome in 1896, during the war between Italy and Abyssinia, when goods on board the *Doelwyk*, a Dutch ship trading between Rotterdam and the French port of Jibutyl, which is the port for Harrar, and situated on the Gulf of Aden, were condemned as contraband. The same principles have been laid down by modern publicists, both English and German, and are embodied in a resolution of the Institut de Droit International, a very authoritative and competent body of experts, at its congress in 1896, in the following terms: "La destination pour l'ennemi est presumee lorsque le transport va a l'un de ses ports, ou bien a un port neutre qui, d'apres des preuves evidentes et de fait incontestable, n'est qu'une etape pour l'ennemi, comme but finale de la meme

operation commerciale." It is true that Professor Holland, in his Manual of Naval Prize Law, issued by authority of the Admiralty in 1888, does not in terms include a case like the present among those in which "the commander will be justified in considering a British vessel as trading with the enemy." He refers, however, to the case in which "her real port of destination is hostile, though her immediate and apparent port of destination is neutral"; and in a note to this instance he cites Lord Stowell's decision in the case of the *Jonge Pieter*, which turned upon the ultimate destination of the cargo and the absolute prohibition of communication with the enemy "direct or indirect." There is nothing in Lord Stowell's view as to the conveyance of contraband by neutral vessels, and its limitation to hostile ports, which appears to be inconsistent with holding that a case like the present comes within the prohibition, which he so emphatically affirmed, to the subjects of a belligerent power of any communication with the enemy whether direct or indirect. The real test, according to the modern view, in both cases, appears to be whether there is clear proof of the ultimate destination, and in the present case such proof is found in the manifest and bills of lading. If, for example, this ship had been entirely loaded by the charterers at New York with a consignment of goods to be despatched through agents at Delagoa Bay to the Transvaal Government or to some firm carrying on business at Pretoria, it seems difficult to deny that such a commercial operation would come within the prohibition, which, whatever view may be entertained of its policy, undoubtedly exists; and the fact that other portions of the cargo were the property of consignees at British or neutral ports cannot affect the principle. It appears to me that, as soon as the war broke out, it became the duty of the master to decline to convey any goods which from the papers in his possession appeared to be the property of enemy consignees. His contract of affreightment could not lawfully be fulfilled, and he should have acted as laid down in the passage from Lord Tenterden's book cited above. The only point which remains is the question whether it has been established that there was no intention on the part of the master of the ship to trade with the enemy except with permission of the proper authorities. In the

circumstances, such a defence must be established by very clear proof; and although there is no reason whatever to impute any disloyal intention, or *mala fides*, to the owners, charterers, agents, or master, I have come reluctantly to the conclusion that the proof of non-liability on this ground has not been made out. Had the ship first touched at Cape Town, a course would doubtless have been adopted which, as in other cases, would have secured immunity; and it certainly seems probable, after what had happened in the case of the *Beatrice*, that a similar course would have been followed in this case, had it not been for the intervention of the Partridge at Port Elizabeth. The mere fact, however, that the master, in the ordinary routine, would have produced his manifest at the Custom-house, as provided by sections 19 and 20 of Act 10 of 1872, is not in itself sufficient. There is nothing to show that the attention of the officer would have been specifically called to the ultimate destination of any particular items in the manifest of cargo for Delagoa Bay, or that the matter would have come within his purview. There is no affidavit from the Sub-Collector there that his instructions were of such a nature that this would necessarily have happened. The local agent does not allege that he would, of his own motion, have brought the matter to the Collector's notice. In the case of the *Hoop* the claimants proved that they had obtained permission to import from the Commissioners of Customs at Glasgow, fortified by the opinion of the legal advisers of the latter; but the trade was held to be nevertheless unlawful, the permission not to be equivalent to a licence from the Crown, and the claim accordingly failed. In the case of the *Mercurius*, decided by Lord Stowell in 1808 (Edwards, 53), which is certainly the strongest case in favour of the claimants, the Court held it proved that she was, when seized, on her way to a British port for the purpose of applying for a licence to proceed from a hostile to a neutral port. That she had directions to do so was, as the Court held, "disclosed in the papers and as strongly guaranteed as any fact could be." If in this case the *Mashona* had taken a cargo at New York for Delagoa Bay only, but was proved to have touched at a British port *proprio motu*, and under directions from the charterers, for a similar purpose, the cases would have been parallel. As it is, I fear that

the parallel fails in an essential particular. In the present case, as I suggested during the argument, there seems to be an absence of proof that it was not the intention of the master to deliver these goods to the consignees unless prevented from doing so by some competent authority; and this cannot be regarded as equivalent to proof that he intended to apply for and obtain a licence before engaging in intercourse which, in the absence of such licence, was of an unlawful character. From the moment that this ship left New York harbour I think that she was liable *stricto iure*—a liability which she doubtless shared with many other vessels of the British mercantile marine—to seizure and condemnation; as she was still without a licence when seized, *stricto iure* the liability remains. At the same time, I must add that I in no way regret that my colleagues have been able to come to the conclusion that the further proof adduced by the charterers is sufficient for the discharge of the ship; since, had she been condemned, it would have been difficult to conceive a stronger case for the indulgence of the Crown.

After argument upon the question of costs, in which it was contended by counsel for the captors that to pay the costs out of the sale of the confiscated goods was virtually condemning the captors to pay their own costs, whereas it had been clearly laid down by the Privy Council in *Schalk v. Otter & Dyke* that captors must be granted their costs where probable cause for the capture was shown.

De Villiers, C.J., said: It does not follow that the ship was in no way to blame in taking this cargo on board. There does not appear to have been any actual communication between the actual captor and the High Commissioner, but there was reasonable and probable cause for seizing the ship. There was certainly carelessness in taking the cargo on board at New York, and although the intention was perhaps not to have landed it without consent of the proper authorities, still the ship had the goods on board. Under the circumstances I think that the owners and charterers should pay the costs of the captors, save and except those involved in bringing the vessel round to Algoa Bay. There will be no order against the owners of the cargo not confiscated; the goods not claimed will be sold, and the proceeds lodged with the Marshal for a year and a day from the date of the monition.

Buchanan and Laurence, J.J., concurred.

Postea (March 20th).

A further application was made for an order permitting the captors to give security for an appeal, for the sale of the goods condemned, and the storing of the goods not yet condemned.

Mr. Searle, Q.C. appeared for the applicants (the captors).

Mr. Innes Q.C., and Mr. Molteno appeared for the charterers.

Mr. Justice Buchanan asked who the captors were.

Mr. Searle said they had instructions from the Admiralty.

Mr. Justice Buchanan said he saw from the record that the plaintiff was the Attorney-General, on behalf of Her Majesty, so that it was a Crown case.

Mr. Innes suggested that the ship should be allowed to proceed to Port Elizabeth, the port she was originally bound for, under the custody of the Marshal of the Court or his nominee, and land the cargo there.

Mr. Searle said they had no objection to that.

After hearing counsel on the facts,

The Court made an order that the decree of the Court be carried out for the restitution of the ship to the charterers upon security being provided, but if no such security be given, then it was ordered by consent that the ship be allowed to proceed to Port Elizabeth under the custody of the Marshal of the Court or his nominee there to discharge the following cargo: (1) Port Elizabeth cargo; (2) condemned cargo; (3) cargo awaiting condemnation; (4) any free cargo which the consignees may desire landed at Port Elizabeth; the ship to return to Cape Town from Port Elizabeth unless released under security.

[Attorneys for the captors, Messrs. Fairbridge, Arderne & Lawton; Attorneys for the owners and charterers, Messrs. Van Zyl & Buissinné; Attorney for the owners of cargo, Gus Trollip; Attorneys for the Netherlands Railway Company, Messrs. Sauer & Standen].

"Cape Times" Law Reports.

CASES DECIDED IN THE SUPREME COURT, CAPE COLONY.

SUPREME COURT

[Before the Hon. Mr. Justice BUCHANAN.]

ADMISSIONS. { 1900.
 { April 12th.

Mr. Benjamin moved for the admission of Mr. Rowland Wilkinson as an advocate of the Supreme Court.

The application was granted, and the oaths administered.

Mr. Buchanan moved for the admission of Gustav Louis Alexander Donian as a conveyancer of the Supreme Court.

The application was granted, and leave was also given for the oath to be taken before the Resident Magistrate at King William's Town.

PROVISIONAL LIST.

ESTATE OF LE ROUX V. J. PHILLIPSON.

Mr. McGregor moved for the final order for the compulsory sequestration of defendant's estate.

Granted.

COOMER V. SMITH.

Mr. Jones moved that the provisional order for sequestration granted against the defendant's estate be discharged.

Provisional order discharged as prayed.

TABOYSKI AND CO. V. ABRAHAM LEVIN.

Mr. Buchanan applied for a decree of civil imprisonment on an unsatisfied judgment for £25 13s. 6d. and £7 14s. costs. A writ of execution had been issued, and a return of *nulla bona* made.

B 3

Mr. Justice Buchanan said defendant had sent in a letter to the Registrar in which he offered to pay the debt by instalments of £1 5s. monthly.

Mr. Buchanan said his client did not think that would be sufficient, as it would take a long time to pay off the debt at that rate. Counsel suggested £2 10s. per month as a reasonable rate.

Decree of civil imprisonment was granted as prayed, the decree, however, to be suspended on payment of £2 10s. per month, the first payment to be made on May 1.

OOSTHUIZEN V. GOUS AND ANOTHER.

Mr. Buchanan moved for provisional sentence for £200 upon certain conditions of sale, with interest at the rate of 5 per cent. from November 4, 1895. The sum was alleged to be due in respect of the balance of purchase price of a certain farm.

Mr. Benjamin appeared for the defendants, who alleged that in compliance with the conditions of sale a promissory note had been given for the said amount, and the same had never been presented.

On the other hand the plaintiff denied that he had ever received any such promissory note.

Mr. Justice Buchanan said that in this case the amount was due by the defendants to plaintiff, and consequently provisional sentence must be given, but the plaintiff must give a guarantee that no claim would be made on the promissory note alleged to have been given by defendants to plaintiff.

ESTATE OF SAYERS V. CORNELIUS MULLER.

Mr. Searle moved for provisional sentence for £40 on a certain mortgage bond, with interest from May 6, 1895.

Mr. Burton appeared for the defendant, who denied the authenticity of the signature on a certain power of attorney made some time ago and material to the case.

The case was postponed until May 10, for the production of proof of the signature.

BURNARD V. J. C. SNYMAN.

Mr. Jones moved for provisional sentence for £75 on a mortgage bond, with interest due thereon, and also that the property specially hypothecated be declared executable.

Granted.

LAWRENCE AND CO. V. WALSH.

Mr. Benjamin moved for provisional sentence for £13, balance of amount due on a promissory note, with interest and costs of suit.

Granted.

COLONIAL ORPHAN CHAMBER V. G. F. JACKSON.

Mr. Nathan moved for provisional sentence for £3,000 upon a mortgage bond with interest due, and also that the property specially hypothecated be declared executable. The bond had become due by reason of the non-payment of interest.

Granted.

WILL V. C. J. S. VAN DER WALT.

Mr. Jones moved for provisional sentence for £100 upon a mortgage bond, with interest and costs of suit, and further that the property specially hypothecated be declared executable.

Granted.

WEBER V. DU PLESSIS.

Mr. Benjamin moved for a decree of civil imprisonment upon an unsatisfied judgment for £179 17s. and taxed costs amounting to £11 10s. 2d. A writ of execution had been issued, and a return of *nulla bona* made.

Granted.

TURNER V. C. R. BROWN.

Mr. Burton, for plaintiff, asked that this matter be postponed until May 1.

Mr. Benjamin, for the defendant, consented, and the case was postponed accordingly.

ALBERTYN V. SOLOMON UDWIN.

Mr. Nathan moved that the provisional order for the compulsory sequestration of defendant's estate be discharged.

The order was discharged accordingly.

ESTATE OF KOORTS V. J. J. NEL.

Mr. Nathan moved for provisional sentence for £172 2s. 6d. on a mortgage bond, with interest from March, 1890, less £15 paid on account, and also that the property specially hypothecated be declared executable.

Granted.

VORSTER V. JONKERS.

Mr. Buchanan moved for provisional sentence for £58 on a mortgage bond, together with interest at the rate of 9 per cent. from January 1, 1899, and also that the property specially hypothecated be declared executable. The bond had become due by reason of the non-payment of interest, and also by reason of notice given.

Granted.

SIMKINS AND ADAMS V. H. W. SCHROEDER.

Mr. Buchanan applied for a decree of civil imprisonment against defendant on an unsatisfied judgment and taxed costs amounting together to £304. A writ of execution had been issued, and a return of *nulla bona* been made.

Decree granted as prayed.

CHANDLER V. STEENKAMP.

Mr. Buchanan moved for provisional sentence for £400 on a mortgage bond, with interest at the rate of 8 per cent. from July 1, 1899, and further that the property specially hypothecated be declared executable. The bond had become due by reason of the non-payment of the interest.

Granted.

RUSHTON V. JORDAAN.

Mr. Buchanan moved for provisional sentence for £100 on a mortgage bond, with interest from July 1, 1899, and further, that the property specially hypothecated be declared executable. The bond had become due by reason of the non-payment of interest.

Granted.

DEMPERS AND ANOTHER V. LOUIS.

Mr. Benjamin moved for provisional sentence for £150 on a mortgage bond, with interest at the rate of 7 per cent. from May 9, 1899, and further, that the property specially hypothecated be declared executable. The bond had become due by reason of the non-payment of interest.

Granted.

BRINK V. BOMBERG.

Mr. Buchanan moved for provisional sentence for £60 on a mortgage bond, with interest from March 1, 1899, on the ground of the non-payment of interest, and further, that the property specially hypothecated be declared executable.

Mr. Justice Buchanan pointed out that the bond did not contain the usual clause providing for it becoming due by reason of the non-payment of interest. The application was therefore refused.

MASTER OF THE SUPREME COURT V. KANNEMEYER.

Mr. Sheil, Q.C., moved for the usual order calling upon defendant to file an account as executor.

Granted.

DE VILLIERS V. MUIL.

Mr. Jones moved for provisional sentence for the sum of £190, less £62 paid on account, due under certain conditions of sale signed by defendant.

Granted.

CABRITA V. DU PREEZ.

Mr. Jones moved for provisional sentence for £143 on a promissory note.

Mr. Buchanan appeared for the defendant to oppose, and stated that there was a question of accounts between the parties, and that a statement of accounts made by an accountant showed a balance in favour of defendant of £408 18s. 1d.

In the course of argument, it was shown that there was another action pending between the parties as to the account between them.

In giving judgment for the plaintiff, Mr. Justice Buchanan said that the promissory note was a liquid document, and under the circumstances provisional judgment must be granted, although there was nothing to

prevent the defendant raising the question of the amount said to be due to him in the principal case.

ILLIQUID ROLL.

KLEYN V. THEUNISSEN.

Mr. Jones moved for judgment, under Rule 329D, for the sum of £100 11s. 9d., balance of account owing by defendant, with interest *a tempore morae* and costs of suit.

Granted.

VAN BLERCK AND CRAWFORD V. A. VAN NIEKERK.

Mr. Burton moved for judgment, under Rule 329D, for the sum of £5 0s. 8d., with interest *a tempore morae*, and costs of suit.

Granted.

PHILIP'S TOWN MUNICIPALITY V. PIETERS.

Mr. Burton moved for judgment, under Rule 329D, for the sum of £4, rates due.

Granted, but with Magistrate's Court costs only.

PHILIP'S TOWN MUNICIPALITY V. DANIELL.

Mr. Burton moved for judgment, under Rule 329D, for the sum of £8 rates due.

Granted, with Magistrate's Court costs only.

HALL BROTHERS V. GOTT.

Mr. Jones moved, under Rule 329D, for the sum of £63, being rent of certain premises in Cape Town, with interest *a tempore morae* and costs of suit.

Granted.

ROOME V. BROWN AND CO.

Mr. Jones moved, under Rule 329D, for judgment for £133 5s., goods sold and delivered.

Granted.

CLEGHORN AND HARRIS V. TAYLOR.

Mr. Jones moved, under Rule 329D, for judgment for the sum of £37 8s. 11d., goods sold and delivered, less £35 paid on account, with interest *a tempore morae* and costs of suit.

Granted.

VAN RYNEVELD V. J. VAN DER RIET.

Mr. Buchanan moved, under Rule 329D, for an order calling upon defendant to file an account in the estate of his late wife.

The usual order was granted.

WIENER AND CO., LIMITED V. E. COHEN.

Mr. McGregor moved for judgment under Rule 329D, for £50.

Granted.

TRANSATLANTIC FIRE ASSURANCE COMPANY V. BOBCHERT.

Mr. Jones moved for judgment, under Rule 329D, for the sum of £857 12s. 3d., being the amount due under a certain suretyship.

Granted.

REHABILITATIONS.

Mr. Jones moved for the rehabilitation of the estates of Bartholomew Hendrik Schonken and Frederick Wilhelm Modernman Schonken (trading together as Schonken Bros.). Counsel stated that the estate was compulsorily surrendered on October 31, 1883. The preferent creditors had been paid in full, while concurrent creditors received a dividend of 6s. 8d. in the £.

The application was granted.

Mr. Jones made a similar application with regard to David Reich, which was also granted.

Mr. Benjamin moved, under the 106th section of the Insolvency Ordinance, for the discharge of the insolvent estate of Floris Pieter Rowan, a composition having been accepted by the creditors.

Granted.

IN THE ESTATE OF THE LATE HERMAN WILHELM REMY.

Mr. Jones moved that the rule authorising the Master to pay to the widow certain moneys be made absolute.

Granted.

**COLEMAN AND CO. V. ATKINS { 1900.
AND THE STANDARD BANK. { April 12th.**

This was an application for an order declaring applicants entitled to certain cases of rabbits, and for delivery of the bill of lading and other documents relating thereto.

From the affidavits it appeared that the applicants ordered fifty cases of rabbits through their agent in Australia, who pur-

chased them from Messrs. Bartman & Co., whose South African agent was the respondent Atkins. The bills of lading and a draft on the Standard Bank were forwarded, but on the bank presenting the draft to the applicants, the latter not having received the invoice or particulars did not take it up, but requested that it be kept over until the following mail, which was expected in about a week. In consequence of a letter sent by the bank to Atkins, the latter understood that the draft had been dishonoured, and disposed of the rabbits to Messrs. Lawrence & Co.

Mr. Searle, Q.C., for the applicants.

Mr. McGregor for the respondent Atkins.

After argument,

Buchanan, J., said: In this case the plaintiffs apply to be put in possession of certain documents, so as to enable them to take possession of the cases of rabbits. It appears that the applicants purchased from Bartman fifty cases of rabbits, which were shipped on board the steamer *Afrikaner*. The bills of lading and the draft covering the bills of lading were sent through the Standard Bank to be presented, with instructions that Bartman's agent in Cape Town was to hand over the documents on acceptance of the draft. The draft, &c., apparently came here before any advice was received by the applicants, and the latter requested the bank to hold the draft over until the arrival of the next mail. Bartman's agent being informed by the bank that the applicants had not accepted the draft, took the documents and disposed of the goods elsewhere. Atkins might have secured himself by getting a refusal to accept the draft on the part of the applicants, but it is now undesirable to go into that part of the case, because the question is: Are the goods the property of the applicants or not? The bills of lading never having been handed over, it is impossible to declare that the applicants are the owners of these goods. They may have an action against Bartman for wrongful action but in the present case I must hold that the goods are not the property of the applicants, and I cannot therefore order them to be handed over. The application is therefore refused, with costs.

Mr. Searle wished the question of costs to be held over pending an action to be brought, but his lordship pointed out that the costs could be claimed in that action.

[Applicants' Attorneys, Messrs. Silberbauer, Wahl & Fuller; Attorneys for Respondent Atkins, W. E. Moore & Son.]

IN THE MATTER OF THE PETITION OF
FRANCIS HERMAN.

Mr. Jones moved that the rule *nisi* granted under the Derelict Lands Act be made absolute.

Granted.

HARRIS V. LEVY.

Mr. Buchanan moved that a certain award of arbitrators be made a rule of Court.

Granted.

IN THE ESTATE OF THE LATE GEORGE G. J.
BACHMAN.

Mr. Jones moved for leave to the executor dative in the above estate to mortgage certain property.

The Master's report being in favour of the application, it was granted.

IN THE MATTER OF THE MINORS PHILLIPS.

Mr. Buchanan moved for leave to the executors testamentary in the estate of the late Samuel Phillips to sell certain property in which the above minors were interested, and with the proceeds to pay off certain bonds, improve the property left, and deposit the remainder of the purchase amount in the Guardians' Fund.

The Master's report being favourable, the application was granted.

HEATLIE V. STEPHAN.

Mr. Buchanan moved that the rule for attachment of a certain inheritance be made absolute.

Granted.

STRYDOM V. DIVISIONAL COUNCIL OF
OUDTSHOORN.

This was an application for special leave to sue for damages, the requisite notice not having been given to the Council within fourteen days after the accident out of which the action arose.

Mr. McGregor appeared for the applicant.

Mr. Searle, Q.C., appeared for the respondents.

After hearing counsel, the Court granted the application, holding that the respondents

would not be prejudiced thereby. At the same time his lordship suggested that the pleadings should be filed in this Court and the case then removed to the Circuit Court at Oudtshoorn.

HAYDENRYCH V. VAN DRIEL.

This was an application by the defendant Van Driel for an extension of time within which to plead.

Mr. McGregor for the applicant.

Mr. Nathan, for the respondent, objected to the motion, owing to forty-eight hours' notice not having been given.

The matter was ordered to stand over until the first day of next term.

IN THE MATTER OF THE MINOR JAN VAN
KERKEN HAARHOFF.

Mr. Buchanan moved for leave to sell certain property.

The Master's report stated that it would be for the benefit of the minor, and the application was accordingly granted.

IN THE ESTATE OF THE LATE CATHARINE
MARIA DOROTHEA SCOTT.

Mr. Benjamin moved for leave to mortgage certain property.

Order granted.

IN THE MATTER OF THE PETITION OF
RICHARD STUTTAFORD.

Mr. Jones moved that the rule *nisi* granted under the Derelict Lands Act be made absolute.

Rule made absolute.

IN THE MATTER OF THE PETITION OF JOHN
LOWNE FROST.

Mr. Benjamin moved that the rule *nisi* granted under the Derelict Lands Act be made absolute.

Rule made absolute.

DE WIT AND OTHERS V. VAN TONDER AND
OTHER.

This was an application for an award to be made a rule of Court.

Mr. Searle, Q.C., appeared for the applicants.

Mr. McGregor appeared for the respondents.

The validity of the award was denied upon the ground alleged that the umpire having

given his award subsequently became annoyed at some remark as to the cleansing of certain sluits not being provided for, got possession of his first award, and signed the award of the opposite arbitrator. This, however, was denied by the umpire Van Tonder, who said that what was alleged to be his first award was merely an expression of opinion on certain points.

Mr. Justice Buchanan pointed out that the deed of submission did not contain a clause as to making the award a rule of Court, and unless both parties agreed to read that into the deed, the Court had, so to speak, no *locus standi*.

The matter was postponed *sine die* so that the parties might be consulted on that point

IN THE MATTER OF THE FRESH FISH SUPPLY CO. IN LIQUIDATION.

Mr. Burton presented the further report of the official liquidator.

The usual order as to publication was made.

IN THE MATTER OF THE SOUTH AFRICAN BRICK AND LIME COMPANY IN LIQUIDATION.

This was an application on behalf of the surviving trustee to transfer certain property in the estate, which had been overlooked when the other assets were disposed of.

Granted.

CROWDER V. WHELAN.

Mr. Buchanan moved for an order interdicting Messrs. Moore & Son from paying over to Whelan certain moneys, the purchase price of the Silver Cloud Hotel, Constitution-street, sold by Whelan to the S.A. Breweries Company, until applicant's claim for £368 15s. for brokerage was satisfied.

The Court granted a rule *nisi* operating as an interdict, interdicting the sum of £368 15s. in the hands of Messrs. Moore & Son, pending an action to be instituted; leave being reserved to Messrs. Moore & Son, on due notice given, to move for the discharge of the rule.

REGINA V. FOURIE. { 1900.
 { April 12th.

This was an application by the prisoner Fourie, who was now undergoing a term of imprisonment passed by a court-martial, for

an order calling upon the Attorney-General to show by what authority he (Fourie) was detained in custody, and in default of lawful authority for an order to be issued for his immediate release.

Mr. Burton appeared for the applicant

The Attorney-General (Mr. E. Solomon Q.C.) appeared on behalf of the Crown.

The Attorney-General said he appeared to show cause why the applicant should be detained, but as shown in the petition itself prisoner was tried by a court-martial in a district where martial law was prevailing, and sentenced by that court-martial, and therefore notice of the application ought to have been served on the military authorities. It was true that the prisoner was in the gaol at Hope Town, but that gaol was situated within a district where martial law prevailed. He contended that notice should be given to the military authorities, as in the case of Michau. He did not wish to place any obstacles in the way, and he would endeavour to see that the proper military authorities received the notice, and he was sure they would not put any obstacles in the way.

Mr. Burton said this case was on an entirely different footing from that of Michau. As to the contention of the Attorney-General that the military authorities should have notice, he was not instructed to consent or otherwise to that, but he would point out that the gaol in which Fourie was confined was under the administration of the Attorney-General.

The Attorney-General said that was so, but he had been received there under an order from the court-martial.

Mr. Burton said he presumed the Attorney-General had control over this gaol and the gaolers there, and therefore notice had been served upon him. However, he did not wish to oppose the application provided the matter was brought before the Court at an early date. With regard to the case of Michau, he was actually in the custody of the military authorities.

The Attorney-General said he was quite prepared to show cause why Fourie's application should not be granted, but he thought the Court would see that it was necessary to give notice of the application to the military authorities.

Mr. Justice Buchanan said that the Attorney-General applied in this case that notice should be given to the military authorities. A very important question was raised, and it would be very advisable that a case like

this should come before a full Court. The case would therefore be postponed until the first day of next month, and in the meantime notice must be given to the military authorities.

REGINA V. VERMOOTEN.

This was an application by the accused for his release on bail.

Mr. Sheil, Q.C., appeared for the Crown, and said that notice of this application was only served on the Attorney-General at one o'clock the previous day, so that he had not had time to consider the matter. He therefore asked that this matter might stand over until the first day of next month, or sooner should the full Court sit before then.

Mr. Burton said that under the circumstances he could not object to the application, but as the case was to be heard on May 10, it was very little use to accused if he was not released on bail before May 1.

The application for postponement was granted.

SUPREME COURT

[Before the Hon. Mr. Justice BUCHANAN (Acting Chief Justice), the Hon. Mr. Justice MAASDORP, and the Hon. Mr. Justice SOLOMON]

PROVISIONAL ROLL.

RINEVELD V. DAVID JORDAAN. { 1900.
May 1st.

Mr. Buchanan asked for provisional sentence upon a judgment for £42 12s. 6d. obtained in the Magistrate's Court, Steynsburg. A writ had been issued, and a sum of £11 2s. 6d. made. Provisional sentence was therefore asked for the balance, £31 10s., and for £2 2s. 10d. taxed costs. It was also asked that a certain one-half share of a farm situated in the Steynsburg division be declared executable.

Provisional sentence granted as prayed, and the property declared executable.

GENIS V. DAVID JORDAAN.

Mr. Buchanan moved for provisional sentence upon a Magistrate's Court judgment for £25. After the writ of execution issued a sum of £6 17s. 1d. was made, and provisional sentence was therefore asked for £18 2s. 11d. and £1 13s. 7d. taxed costs. Application was also made that the half-share of a certain farm be declared executable.

Provisional sentence was granted as prayed, and the property declared executable.

HERTZOG V. HENDRICKS.

Mr. Buchanan moved for provisional sentence for £275 upon a mortgage bond, with interest at the rate of 6 per cent. from August 12, 1898, and also that the property specially hypothecated be declared executable. The bond had become due by reason of non-payment of interest.

Provisional sentence granted as prayed, and property declared executable.

OOSTHUIZEN V. OOSTHUIZEN.

Mr. McGregor moved for provisional sentence on certain promissory notes, the first for £70, the second for £125, the third for £100, the fourth for £205 16s., and the fifth for £441.

Provisional judgment was granted as prayed, subject to the production of sworn translations of the notes, which were in Dutch, and the payment of a fine of £1, owing to the note for £441 being unstamped.

LONDON LOAN AND DISCOUNT COMPANY V. PETER G. HERMAN.

Mr. Upington applied for provisional sentence for £32 and costs, upon an acknowledgment of debt, which had become due by reason of the non-payment of certain instalments.

Provisional sentence granted as prayed.

PROVISIONAL ROLL.

G. V. C. TURNER V. C. E. H. BROWN. { 1900.
May 1st.

This was an application for provisional sentence on a mortgage bond for the sum of £1,350 with interest and costs, the bond being due by reason of three months' notice calling up the bond.

The defence raised was that there was an agreement between the parties that the bond should be cancelled, and that two promissory notes covering the amount of the bond and interest should be substituted. One of these notes was now due but unpaid, the other being not yet due.

Plaintiff, in reply, said that the notes were not substituted for the bond, but were only given as a collateral security. They were signed by defendant when the notice on the bond was still running. If the first note were not paid when due, as it now was, the notice would stand, and the plaintiff could sue on the bond.

Mr. Burton appeared for plaintiff, and moved for provisional sentence.

Mr. McGregor, for the defendant: We are not trying to vary a written document by a merely oral agreement; the notes are written evidence of the agreement. The parties did not contemplate, when these notes were made, the calling up of the bond; the notes were given as revocation of the bond, and any action instituted would have had to be founded on the notes.

The defence is one of *pactum de non petendo*, and not novation, and that this is a good defence is shown in *Malan and Van der Merwe v. Secretan and Boyle* (Ford, p. 101); *Searight v. Lawton* (1 Menzies, 305); see also *Sampson v. Frank and Nicholls*, reported in 2 E.D.C., p. 195. The bond should not have been sued on until the notes were due and payable. The second note will not be due until 27th June, 1900. The plaintiff should either have sued on the notes, leaving the security of the bond untouched, or he should give fresh notice.

Mr. Burton was not heard in reply.

Before proceeding to give judgment a fine of £1 was imposed on plaintiff's attorneys, owing to the fact that one of the promissory notes were not stamped. The Court held that the note should have been stamped, and the fine would be imposed even though the note was not sued upon, but merely produced in Court.

Buchanan, A.C.J., said: Provisional sentence is now claimed upon a mortgage bond which is payable upon three months' notice. The giving of this notice and the debt are both admitted by the defendant, but he alleges that in June last year he entered into an agreement with

plaintiff, giving him additional security in the promissory notes, which he says the plaintiff took in place of the bond. The plaintiff admits receiving the notes, but maintains that they were given only as collateral security. If, as seems likely in this case, action on the notice calling up the bond was only stayed to see whether the defendant would pay the promissory notes or not, then as soon as this first note was dishonoured the notice revived. The note became due on December 29 last, four months ago, and has not yet been paid. I think, under all the circumstances, as this is a clear debt and clear notice has been given calling up the debt, that the plaintiff is entitled to provisional sentence with interest, in accordance with the terms of the bond, at 6 per cent. on one portion and 7 per cent. on the other portion; interest, however, only to be paid from May 31, 1899, as it is clear it has been paid up to date.

Maasdorp and Solomon, J.J., concurred.

ILLIQUID ROLL.

TRUSTEES OF THE ESTATE OF FALCONER V. M. L. LAW.

Mr. Buchanan moved, under Rule 329d, for an order calling upon defendant to transfer certain landed property, a portion of Lot No. 38, situated at Zonnebloem, being ground sold by defendant to Falconer for the sum of £5, of which £2 had been paid on account, and the remaining £3 was tendered.

An order was granted as prayed.

HAVENGA AND DICKINSON V. M. VAN NIEKERK.

Mr. Maskew moved, under Rule 329d, for judgment for the sum of £105 10s., being purchase price of three carts sold by the plaintiffs to defendant, with interest *a tempore morae* and costs of suit.

ADMISSION.

Mr. Buchanan moved for the admission of Mr. Pirrie as an attorney of the Court. Petitioner was an enrolled law agent or solicitor in Scotland, and proof of admission in Scotland and endorsement by the Scottish Law Department were produced.

The Law Society was satisfied that petitioner was a solicitor, but the Registrar had objected to the petition, as the supporting affidavits did not state the place where they were sworn.

After hearing counsel, the Court decided that the application must stand over, but that it could be renewed when the affidavits were in order.

GENERAL MOTIONS.

Ex parte FLEETWOOD WATERMEYER.

Mr. Buchanan moved in the matter of the petition of Henry Fleetwood Watermeyer, as executor testamentary of the estate of the late Leah Anderson, widow of William Anderson, that the rule nisi granted under the Derelict Lands Act be made absolute.

The rule was made absolute.

Ex parte BEYERS.

Mr. Burton applied that a rule nisi granted under the Derelict Lands Act be made absolute.

Granted.

GILLIS V. KLEYN.

This was an application for an order authorising the Registrar of Deeds to transfer certain property.

Mr. Innes, Q.C., appeared for the petitioner.

Mr. Buchanan appeared for the respondent.

The petition showed that Gillis purchased certain land in George from one of the heirs in the estate of one Kleyn, paying £1,010 for the same. Included in this land were two pieces of which the Registrar of Deeds refused to pass transfer on the ground that under the will there was a *fidei-commissum* attached to the land.

After argument by counsel, the Court intimated that everything depended on the interpretation of the will, and as the executors and the minors, who would have a contingent interest in certain eventualities, were not before the Court, the will could not be interpreted. It was therefore directed that the matter stand over until May 17, so that notice could be given to the executors.

[Applicant's Attorney, Gus Trollip; Respondent's Attorneys, Messrs. Fairbridge, Arderne and Lawton.]

DE WET AND OTHERS V. VAN TONDER AND OTHERS.

Arbitration—Umpire—Award.

This was an application for a certain award to be made a rule of Court.

The matter has been before the Court on the 12th April, when Mr. Justice Buchanan had pointed out that the deed of submission did not contain a clause as to making the award a rule of Court, and that unless both parties agreed to read such a clause into the deed, the Court had no jurisdiction in the matter.

Mr. Searle now stated that the parties had agreed that a clause as suggested should be read into the deed, so that the award could be made a rule of Court.

It appeared from the petition and affidavits filed that two arbitrators, Nel and Leuwrens, were appointed by the parties to divide the water on the farm Waterval among the different owners, and as they could not agree, Van Tonder was appointed umpire. It was alleged by the petitioners that Van Tonder gave first one decision, and then being annoyed at some remark as to the cleansing of certain sluits not being provided for, got possession of his first award, and repudiated it, although it had been submitted by him to all the co-owners, together with his charges in connection therewith, and then signed as his final award the decision of one of the arbitrators (Nel). This, however, was denied by the umpire, Van Tonder, who said what was alleged to be his first award was merely an expression of opinion on certain points.

The applicants now sought to have the second award, which they held was irregular, declared null and void, and that the first award be made a rule of Court; or, in the alternative, that another umpire be appointed in the place of Van Tonder.

Mr. Searle, Q.C., for the applicants: There has been great irregularity; the first award was no mere opinion; umpires do not usually give opinions on the matters submitted to them for decision and attach to the opinion the charges connected with the arbitration. These charges have been paid

Further, the umpire has exercised no discretion; his decision to sign Nel's award was come to without any consideration. A fresh arbitration is necessary, owing to gross irregularity.

Mr. McGregor, for the respondents: The so-called first award is merely a suggestion or opinion. There was no irregularity. Even if there were any irregularity the parties can waive their objection of irregularity; this has been done here. An umpire may consult the parties; he can adopt his own procedure, so long as he is not guilty of gross irregularity or partiality. There is nothing to prevent the umpire from adopting the decision of either of the arbitrators. The umpire did exercise discretion in inspecting the waters. No corrupt motive has been alleged; and this must be alleged before the second award can be set aside.

Buchanan, A.C.J., said: The applicants and the last-named respondents were originally joint owners of the farm Waterval. The farm has since been sub-divided, but at the time of the sub-division no provision was made for the distribution of the water between the co-proprietors. The divisional transfers gave four owners of the farm, and they agreed to appoint Louwrens and Nel as arbitrators to divide the water between them, with Van Tonder as umpire in case the arbitrators disagreed. The arbitrators could not agree, and consequently the umpire was called in to give his decision. The umpire, after going over the property, wrote out a document which he sent to each of the co-proprietors. The question now is whether this document which he sent to each of the co-proprietors is an award or not. I think the umpire clearly intended it to be an award, for in each case he charged the co-proprietors 10s. for that document. One of the parties pointed out that this decision of the umpire was incomplete, as it did not deal with the cleaning of the sluic, and he asked the umpire to make his award complete. This seems to have given some offence to the umpire, and he took back the document he had given to the parties and signed the awards given by Nel. The respondents say that the only award given by the umpire was the endorsing of Nel's views, and that that must be the award in this case, while the applicant, on the contrary, ap-

plies to have that award set aside and the umpire's first award made a rule of Court, or in the alternative, that another umpire be appointed in the place of Van Tonder. Well, the document Van Tonder signed in the first place was so incomplete, uncertain, and insufficient that it cannot by itself be supported as an award to decide the rights of the parties. As to Nel's award, Van Tonder having once given an award, it was not competent for him to make a second award, which is, therefore, no award at all. The Court cannot, therefore, order either of the awards to be made a rule of Court, and as to the third prayer for the appointment of an arbitrator, that is not a matter for the Court. The Court will make no order, and the respondent De Villiers must pay the costs of the motion. I do not think costs should be asked against an umpire unless there are special circumstances, showing *mala fides*.

[Applicants' Attorneys, Messrs. Tredgold, McIntyre and Bisset; Respondents' Attorneys, Messrs. Walker and Jacobsohn.]

IN THE MATTER OF THE FAIRFIELD BRICK AND LAND COMPANY, IN LIQUIDATION.

Mr. Searle, Q.C., presented the report of the liquidator. He suggested, in view of the terms of the report, which stated that the creditors were all to be paid out and the company reconstructed, that it should be dealt with under section 143 of the Companies Act, so as to save further expense.

The Court decided that the usual order as to the report being open for inspection must be published, but the inspection would be for seven days only instead of fourteen as usual.

IN THE ESTATE OF THE LATE JAMES WILLIAM CANNON

Mr. Buchanan moved for leave to the executor testamentary to transfer certain property in the above estate. The Master's report was favourable.

Order granted in terms of the Master's report

Ex parte LOCKHART.—*In re* } 1900.
JERVIS. } May 1st.

This was an application for an order releasing the applicant from his position as trustee under a certain deed, by which certain property had been settled by Jarvis during his lifetime on his children.

Mr. Graham, Q.C., for the applicant, moved.

Mr. Searle, Q.C., appeared for the children, and said that he had been instructed to oppose the application as at first made, but seeing that now it was only desired that Mr. Lockhart should be released from the office of trustee he would not oppose, as he knew it was difficult for Mr. Lockhart to act. He suggested that William Francois Marshall, attorney, of East London, and Annie Christina Jarvis be appointed trustees.

The Court granted the order as prayed, costs to come out of the trust funds, Lockhart having as trustee only acted in a fiduciary capacity.

ESTATE OF GREEFF V. ESTATE OF FOURIE
AND ANOTHER.

Mr. Close moved that a certain inheritance of £25, devolving upon the insolvent's wife, be declared executable. The application was made under section 127 of Act 6 of 1848. The inheritance had vested after sequestration. (See *Smith v. Kotze*: Buchanan, 1878, p. 137.)

The application was granted, but the Acting Chief Justice pointed out that the inheritance would all be swallowed up in costs, and they might as well have let the insolvent have it. Execution was ordered against the inheritance only, and not against the insolvent.

HAYES V. HAYES.

Mr. Buchanan moved for an extension of the return day in this action, which was for restitution of conjugal rights.

The Court granted an extension as prayed, defendant being ordered to return to or receive his wife on or before June 12, failing compliance, to show cause by August 1 why a decree of divorce should not be granted. Personal service of the amended order to be made.

VAN DRIEL V. HEYDENAYCH.

This was an application by defendant on notice, calling upon the plaintiff in the case to show cause why the defendant should not be allowed an extension of the time within which to plead, and why the plaintiff (now respondent) should not pay the costs of this application.

From the affidavits of the applicant it appeared that the debt sued upon was some fourteen years old, and although, while residing in the Transvaal, he had been here year after year for the last five years, it was only now, when he had had to leave the Transvaal in a somewhat involuntary and hasty way, that he had been summoned on his arrival here in Cape Town. This was very prejudicial to him, as he required for his defence to refer to the records of the High Court at Pretoria, which it was impossible for him to do at present.

Mr. MacGregor appeared for the applicant (defendant in the action).

Mr. Nathan appeared for the respondent (plaintiff in the action).

Buchanan, A.C.J., said the claim was an old one, incurred at least fourteen or fifteen years ago. The transactions in dispute were entered into between the parties in the Transvaal. It was impossible to communicate with the Transvaal at the present time. The application would be granted, but the plea must be filed before the end of the August term; costs to be costs in the cause.

STEYTLER V. GREEN AND SEA POINT
MUNICIPALITY.

This was an application that a rule nisi calling upon the defendant Council to abate a nuisance committed by its servants, and interdicting the Council from depositing on the foreshore street-sweepings, garbage, &c., be made absolute.

The petition of Mr. Steytler set forth that the Council had used as a depositing ground for street-sweepings, household refuse, and garbage, the foreshore in front of Rocklands, and that there was an intolerable stench emanating from the deposit. The place was a very central one, and many of the buildings, including petitioner's own, had been in existence for many years before the Municipality began depositing rubbish and street-sweepings there. In consequence of the Council's action the value of landed property there had fallen

considerably. The Municipality had during the previous week offered to pay the costs to date and give an undertaking that in future the scavenging arrangements would be carried out in such a manner as to cause no nuisance, but the petitioner considered that nothing short of an order of Court would suffice.

Mr. Innes, Q.C., appeared for the applicant.

Mr. Searle, Q.C., appeared for the respondents.

After argument,

Buchanan, A.C.J., said: It is not seriously contested now that this deposit did cause a nuisance, but since the service of the rule *nisi* the Council have taken steps to mitigate and abate the nuisance. The rule, however, I think ought to be made absolute, with the addition of the words at the end "in such manner as to create a nuisance." We are not prepared to say, this ground being municipal property, that the Municipality should be interdicted entirely from depositing on their own property street-sweepings and refuse, but if they do so they must do it in such a way as not to create a nuisance. The rule will therefore be made absolute with the addition of the words "in such a way as to cause a nuisance," and with costs.

[Applicant's Attorneys, Messrs. Silberbauer, Wahl and Fuller; Respondents' Attorneys, Messrs. Van Zyl and Buissine.]

REGINA V. CILLIE.

Appeal — Assault — Provocation — Justification.

Where at the request of a station-master a military picket had been provided to keep the platform free, when military trains arrived, and, on the arrival of one of these trains, accused had, on refusal to leave the platform, been forcibly ejected therefrom by one of the members of the picket.

Held, on appeal, that such ejection without any excessive violence was no justification for a serious assault on that member of the picket, committed by the accused.

This was an appeal from the conviction of the appellant by the Assistant Resident Magistrate at Wellington. The appellant was charged with assault, and being found guilty, fined £5, or in default of payment one month's imprisonment. While a train conveying troops to the north was standing at Wellington Station on March 6 the appellant attempted to go on the platform, although no civilians, except those connected with the railway, were allowed on the platform at such times. Captain Robertson, who was in charge of a detachment of the Cape Town Highlanders, stationed at Wellington, advised him not to try to force his way in, but as he persisted in doing so the captain called the picket of three men on duty at the station and had Cillie removed. While they were removing Cillie the latter struck one of the soldiers, Campbell, a severe blow. This constituted the assault for which Cillie was found guilty. The picket had orders to use no more force than necessary.

Mr. McGregor appeared for the appellant.

Mr. Ward appeared for the Crown.

Mr. McGregor, in support of the appeal: The complainant Campbell, not being a constable appointed by His Excellency the Governor, directly or indirectly, had no authority to act as a constable. He was not even a railway official, since he was not appointed or authorised by the Colonial Government. Therefore any act, which would be an assault in law when committed by a private person, would be an assault when committed by the complainant. Here there was an assault in law by complainant.

[Buchanan, A.C.J.: Had not the station-master appointed Campbell, and was not the stationmaster the party to control the station?]

Yes. But he had no power to make any appointment of a policeman. He had only authority within the limits of his public duties. "*Delegatus non potest delegare.*" It would be a dangerous doctrine to hold that he had an inherent right to make appointments. If necessary, he could summon the assistance of the ordinary guardians of the peace. His Excellency the Governor could have appointed special constables if necessary. If there was a precedent assault in law, then the Roman-Dutch principle of "*compensatio*" applied. *Voet*, 47, 10, 12. True, the provoked assault was more severe, but allowance must be made for the mental

agitation and provocation. *Voet*, 48, 8, 12, and Nobe to De Villiers' Translation of *Voet*, p. 213. Ethically, in cold blood one might not justify the actual force used; but in law the precedent unlawful act was such that the principle of "compensation" should apply, and either produce an acquittal or reduce the offence to a technical one. In favour of an acquittal see *Queen v. Rosa Roscoe*, 1, p. 100), a very strong case. Anyway, the Magistrate clearly had assumed that complainant was a policeman, and this assumption vitiated his finding; consequently appellant was entitled to come to Court against such finding.

Mr. Ward was not called upon.

Buchanan, A.C.J., said: In this case at Wellington Station the stationmaster requested that there should be a picket on the platform to assist him at times when the military trains arrived at the station. In accordance with that request, Campbell and two other soldiers were on picket duty at the station on the day in question. They were there at the stationmaster's request, and their orders were to keep the platform free while the military train was there. The defendant Cillie had been at the station before this day, and knew all about these orders, and that he could not go on the platform while a military train was at the station. On this occasion he went to the station, having arrived by a train which had not yet drawn up at the platform, and he insisted on going on the platform. He was told he could not do so, Captain Robertson civilly requesting him to go round the other way if he wished to see the stationmaster. He refused to pay any attention to the request, and the captain then told the picket to do their duty without any excessive violence. Cillie appears to have lost his temper and assaulted Campbell. In my opinion Campbell had a perfect right, acting under the stationmaster's orders, to keep the platform clear, and Cillie had no right to assault him in the way he did. Nothing, in my opinion, can amount to justification for this most serious and violent assault, and even the authorities Mr. McGregor has quoted go against him. The learned counsel for the appellant now wishes the Magistrate's decision set aside on the ground that there was provocation. In my opinion the as-

sault was an unprovoked one, and the penalty, under the circumstances, was a most lenient one. The appeal must be dismissed.

Maasdorp, J., concurred.

Solomon, J., concurred, and said: It seems to me wholly unnecessary to express any opinion as to whether or not Mr. Cillie had any right on the platform. If he thought he had any right surely it was not a proper way to test that right to assault a person who had been told by the stationmaster to keep the platform clear. If Mr. Cillie wished to test a question of that sort the proper way would be to have demanded admittance and then when they touched him to keep him off to have charged them with assault. There was no justification that I can see for the assault committed by Cillie.

[Appellant's Attorney, V. A. van der Byl; Respondent's Attorneys, Messrs. J. and H. Reid and Nephew.

[Before the Hon Mr. Justice BUCHANAN, (Acting Chief Justice), the Hon. Mr. Justice MAASDORP, and the Hon. Mr. Justice SOLOMON.]

REGINA V FOURIE. { 1900.
{ May 2nd.

Invasion by enemy — Rebellion —
Martial law—Military tribunal.

Where a district of the colony had been invaded by the enemy, and there had been rebellion among the inhabitants, and in consequence martial law had been proclaimed, and the district was in the occupation of the military force engaged in defending it and restoring peace and order therein, the Court refused to interfere where one of the inhabitants had been imprisoned within the district by a military tribunal, as a punishment for enlisting in the forces of the enemy.

This was an application upon notice given to the Attorney-General in the following terms: "Be pleased to take notice that in terms of the petition enclosed, application

will be made to the Honourable the Supreme Court on behalf of the above-mentioned applicant, at which time you will be required to show by what authority the applicant is detained in Her Majesty's prison at Hope Town, and in default of lawful authority, to show cause why an order shall not issue from this Court compelling the discharge of the applicant." The motion was originally set down for the 12th of April, but on the application of the Attorney-General a postponement was granted, so that notice might be given to the military authorities, and it was understood that the Attorney-General now represented them. The petitioner stated that he was a British subject, domiciled at the farm Zoutfontein, in the district of Herbert, about nine miles from Belmont Railway-station. On December 5, 1899, the petitioner was arrested by certain of Her Majesty's troops at his house, and removed as a prisoner of war to Belmont, where he was detained in custody. On or about December 29 he was summarily tried on the charge of enlisting and engaging in the military forces of the enemy by a court-martial, consisting of three British officers, and was sentenced to one year's imprisonment with hard labour. The petitioner was at present undergoing the said term of imprisonment, and was confined as a convict in Her Majesty's gaol at Hope Town. Petitioner declared that he had never taken up arms against Her Majesty's Government, nor behaved otherwise than as a loyal British subject, and he said that he was not detained under any lawful warrant.

In reply was read the affidavit of Colonel James Sinclair, Deputy Judge-Advocate of the Army in South Africa, sworn to on April 11, in which he stated that martial law was proclaimed in the district of Herbert on October 16, 1899, and still prevailed there; Witteputs and Belmont were both situated in that district.

The affidavit of John Philip de Beer, Resident Magistrate of Hope Town, dated April 20, stated that on January 25, 1900, the petitioner and five other European prisoners were brought there from De Aar under military escort. He (deponent) received a letter from the Assistant Resident Magistrate at De Aar enclosing a warrant of removal and the punishment warrant. He accordingly instructed the gaoler to receive the prisoners, and he asked the military authorities whether the prisoners could be removed to Cape Town, as the accommodation at Hope

Town was insufficient. In reply to this, a telegram was received from the Chief Staff Officer, dated January 26, as follows: "Please retain European prisoners." George Dirk Rainier, Acting Resident Magistrate at De Aar, stated in his affidavit that on January 2 Jan Fourie was brought to De Aar lock-up under military escort. He was tried by field court-martial on December 29, and sentenced to twelve months' imprisonment with hard labour. He was detained until January 24, when, on instructions received from the Camp Commandant, he was removed to the gaol at Hope Town.

Mr. Burton appeared for the applicant.

Mr. Solomon, Q.C., A.-G., for the Crown.

Mr. Burton: There is no doubt that the application raises a question of the most important and far-reaching character; indeed, it might be doubted whether a more important application has ever been made to the Supreme Court. The petition of the applicant is a request to the Court for the vindication of his rights as a British subject for his personal liberty. With the exception of the statement that the applicant had been found guilty by a court-martial, there is nothing to controvert the allegations in the petition as to petitioner never having taken up arms against Her Majesty's Government. With regard to the merits of the application, it does not matter what manner of man the applicant is. It does not matter, for the purposes of this application, whether he is the greatest criminal alive, nor even if he has committed the offence with which he was charged. The sole question is whether he is under the circumstances, being a British subject, entitled to ask the Court to release him from the custody in which he was at present held. As to the liberty of the subject see *Stephen's Commentaries*, 8th edition, vol. 1, p. 143, *et seq.*; *Queen v. Adam Kok and Nathaniel Balie*, Buch., 1879, p. 45, *et seq.* It is quite clear that under ordinary circumstances the petitioner, if he has been tried and sentenced by order of a tribunal not recognised by the law of this land, is entitled to come to the Supreme Court and demand his release; to demand in the first place that his body should be produced and a reason given for his detention. Now, the military authorities come into court and give their explanation for the detention of the petitioner, and therefore if the Court grants an order in favour of the petitioner it can only be for his release. The answer made by the Crown is

that martial law is proclaimed, and that the petitioner is a military prisoner. This is no answer to the application. The proclamation of martial law is of no legal effect whatever, as a British subject's right of personal liberty cannot be curtailed, except by Act of Parliament. It cannot be curtailed, even for the highest reasons of State by any Governor; it can only be curtailed in the manner the law of the land recognises, viz., by an Act of the Imperial Parliament or by an Act passed by the Legislature of the Cape Colony. From the point of view of law, the proclamation has no effect whatever. Martial law is unknown in England. *Stephen's Commentaries*, 8th edition, Vol. I., pp. 145, 146, etc.; *Stephen's Commentaries*, 8th edition, Vol. II., p. 593; *Dicey's Constitution*, 3rd edition, pp. 265, 266, *et seqq.* The Crown has the right by common law to repress force by force, to resist invasion, and to take all measures that might be absolutely necessary for repressing invasion or for the suppression of insurrection or riot. That we can't contradict. Military law, as executed by court-martial, is illegal. There is no such thing as martial law. It is unknown to the law of England. *Forsyth's Constitutional Law*, pp. 51, *et seq.*

The officers of the Crown may destroy life and property to any extent in order to effect their purpose provided no excessive cruelty is done. But when the insurrection has been suppressed no punishment for past offences can be meted out by them because all necessity for such action has passed. The right of the Crown to act outside of the law is a common law right limited by the necessity of suppressing rebellion. A mere proclamation by the Governor cannot suspend our constitution.

[Solomon, J.: Is not one of the most effective methods of putting a stop to rebellion the prompt and summary punishment of the people taking part in the rebellion?]

A great deal depends on the circumstances prevailing at the time. I have no doubt that the argument of the Attorney-General will be based on the question of military necessity. The proclamation of the Governor is *ultra vires*.

[Solomon, J.: Do you mean to argue that the military authorities have no right to punish rebels, or that their right is limited by the necessities of the case?]

The right is limited by the necessities of the case. The military authorities have some right to punish, but it is limited by the necessity of suppressing rebellion. They can act outside the law, but that power or right is

not conferred on them by the proclamation. *Dicey's Constitution*, pp. 265, 266, etc., states that soldiers may suppress a riot or rebellion, but they have no right to inflict punishment after the rebellion. In the case of the Jamaica rebellion the rebels were hanged before the rebellion was over. No necessity justified the action taken in the case of the present applicant. Martial law in the sense of suspension of civil constitution is absolutely meaningless. It does not exist in this sense in English law.

Martial law is merely a term used for the governing of a country by military tribunals superseding to a certain extent the ordinary tribunals. The authority of the Supreme Court was not suspended in the districts where martial law was proclaimed, e.g., the case of *Uys and Du Preez*, the Sunnyside rebels, who were taken with arms in their possession. If the Court exercised jurisdiction and authority in these cases, why should it not take cognisance of this case?

Moreover there is no plea of necessity. The answer is that martial law was proclaimed.

On the question as to how far a civil court will interfere with the sentence of a military court. See *Wolf Tone's case*, reported in Howell's State Trials, Vol. 27, p. 614, *Dicey's Constitution*, p. 271.

The question was also raised in the case of *Queen v. Nelson and Brand*. As to the right of the Executive in regard to the proclamation in cases of rebellion. See Cape Hansard, 1878, where the late Sir Thomas Upington's opinion is stated to be that rebels could be shot upon the spot, but if arrested, they should not be dealt with by the military, but by the civil authorities.

[Buchanan, A.C.J.: That opinion only referred to the appointment of a special court, consisting of five commissioners, and that trial by such was illegal.]

Mr. Solomon, Q.C., Attorney-General: It is not necessary to go into the questions raised by Mr. Burton. An application for a writ of *habeas corpus* when martial law prevails must be refused. Petitioner is in custody of military authorities, although he is in a civil gaol. Military authorities can do what they like to suppress rebellion, and can consequently try and convict rebels, and need not justify their actions as being caused by necessity. Military operations cannot be satisfactorily carried out if the military authorities are to be dragged into court to justify as necessary every little thing they do. The Court will not lay down a pr-

position that they may be called upon during the existence of rebellion to justify every step they take. The Court will not interfere with them while martial law is in force. It is not necessary or essential for them to proclaim martial law; the failure to proclaim it will not affect their power of action. But the effect of their power of action. But the proclamation of martial law as long as it continues is itself evidence of necessity. As to the effect of a proclamation of martial law, see the opinions of *Edward James* and *Sir Fitz-james Stephens* at p. 561 in *Forsyth*. I do not for a moment suggest that martial law suspends the jurisdiction of Civil Courts. They have jurisdiction "de jure," but will not exercise it. Regulations are made to suppress rebellion, and punishments are prescribed if these regulations are broken. The Court does not want proof by military authorities that the proclamation is necessary. It assumes the necessity from the fact of the proclamation. (See *Finlayson's Commentary on Martial Law*, 2nd vol., p. 4, note (a), Governor Kayr's case, "London Times," 9th June, 1868.) Wolf Tone's case has no application here. He was tried in Dublin, where there were no military operations, nor martial law. A Writ of Habeas Corpus will not run in a district where martial law is proclaimed. In *Adam Kok's* case there was no rebellion, no war; therefore the Court held that the accused persons were not prisoners of war, and so granted a writ of Habeas Corpus. (See *Standen v. Godfrey*, 1 Searle, p. 161.) Where civil procedure clashes with military law, the civil procedure must give way. Martial law, it is true, does not suspend the authority of the civil powers. American authorities go further. (See *Hal-lack's International Law*, Vol. I., pp. 549, *et seq.*) Martial law allows arrest on suspicion; but if every person so arrested could apply for a writ of Habeas Corpus the value of martial law would be nil. (*Finlayson's Commentaries*, p. 203; also footnote.) Sentence by military courts will lapse when martial law is withdrawn, unless sanctioned by Parliament. The granting of the order now asked for would be risky, inasmuch as the Court would be doing something that would interfere with the military operations undertaken for the public safety.

(Solomon, J.: Do you say that the military authorities would be entitled to detain a man without trial for an indefinite time?)

As long as the military authorities think it necessary.

Mr. Burton, in reply: Having come into court to show cause, the military authorities must show the necessity for their action. This they have not done. They want the Court to assume that necessity exists for the proclamation. Mr. Justice Mason, in *Morcum v. Postmaster-General* ("Natal Witness" of 2nd April) said that this the Court would not do. Proclamation has nothing to do with the matter. The military authorities must satisfy the Court that their actions are justified by necessity if this application is to be refused. In *Morcum's* case the military authorities carried out the duty cast upon them, i.e., of showing necessity.

Curr. ad vult.

Postea (May 10),

Buchanan, A.C.J.: The petitioner states that he is a British subject domiciled in the district of Herbert, that he was arrested by Her Majesty's troops at his home on the 5th December last, and on the 29th December was summarily tried in the said district by a military court upon a charge of enlisting in the forces of the enemy, and was convicted and sentenced to a year's imprisonment with hard labour. He is now confined in the gaol at Hope Town on the authority of the Major-General in Command of the Troops in the district. This application is for an order for his release, and now comes before the Court after due notice to the Attorney-General and to the military authorities. The facts of this case are very exceptional. War had been declared, our territory had been invaded, Her Majesty's forces were actively engaged in fighting with the enemy, that portion of the Colony in which the petitioner was arrested and is now detained has been proclaimed under martial law, and it is still in the possession of armed forces, and the scene of military operations. The Attorney-General has also informed us that in the district of Herbert there is no Magistrate. What we have to determine is whether under these circumstances this Court can interfere with the action of the military authorities. The Attorney-General contended broadly that the mere fact of the existence of martial law interrupts the free exercise of civil jurisdiction. Against this view petitioner's counsel urged that the existence of martial law would not prevent the

inquiry by the Court into the cause of detention of a subject by the military, and referred to the application made last term in the case of Du Preez. It is true that in that case an order in the nature of a writ of Habeas Corpus was issued on an *ex parte* application, but the case did not thereafter come before the Court for adjudication on the merits. Here the military authorities have had notice of this application, and the officers of the Crown appear to justify the detention of the applicant. Counsel has not been able to cite any actual decision in his favour. He has relied mainly on the antagonism to the recognition of any system known as martial law shown by English authorities, and on the procedure followed under the Habeas Corpus Act. Great Britain having happily for so long been free from foreign foes, these authorities are, probably in consequence, much given to ignore the fact that war resulting from invasion and rebellion from its very nature necessitates a substitution of military for civil authority. Our Colony has unhappily during the past century frequently been invaded, and during that time martial law has repeatedly been proclaimed in various districts. Although we have no Habeas Corpus Act, it has been fully established that our Courts have ample authority in times of peace to restrain the violation of the right to personal liberty which is enjoyed by every subject of Her Majesty. But the principles which would be recognised under ordinary circumstances do not readily lend themselves to the requirements of a totally different state of affairs. Indeed, Mr. Burton did not, as I understood him, deny that martial law could exist. His objection rather was that the necessity for its existence not being specifically relied upon in the affidavits filed, there was no reason shown for refusing the application. There can be no question, however, that the proclamation of martial law in the districts in question was amply justified. The proclamation was duly made by the executive authority, and as to its necessity there is the dictum of Chief Justice Wylde that the Court will not take upon itself to question the emergency, but will presume it to justify the Governor's act (*Stander v. Godfrey*, 1 Bearly, 63). At any rate, until the

contrary is shown, the fact of the proclamation must be held sufficient evidence of necessity. Again, applicant's counsel found himself forced to admit that the military were, in the exercise of their proper functions in carrying out the duty entrusted to them of defending the country and of restoring peace and order, entitled to act summarily. But he objected that after arresting the applicant they were not entitled to hold an inquiry by means of a court-martial, and thereafter to determine upon his further detention and punishment. This objection does not appear to me to be well founded. This is not a case of using the operations of war as a means for punishing acts committed before the war; nor is it a case of arrest made after the operations are over. War is still raging, and if the arrest and punishment, whether summary or after deliberation, are in the nature of a military operation in furtherance of the very object for which martial law was proclaimed, the ground of the objection is gone. The applicant describes himself as a subject, and after inquiry the authorities have been satisfied that he had enlisted in the forces of the enemy. We are not in the position, even if we had the right, to question the conclusion arrived at. It is clear that the arrest and punishment of rebels regarded as a military operation must have a very important effect upon the suppression of insurrection. That alone might be a sufficient answer to this application. But I am prepared to go further, and to hold that in the existing state of war and consequent necessity for martial law, the proclamation must be taken to interrupt and suspend the functions of the Civil Courts in these proclaimed districts. The authorities to which we have been referred support the concise and clear exposition of the principles which should guide the Court in such circumstances, which was enunciated by Chief Justice Wylde in the case before referred to. It is after all the highest law that regard be had to the public welfare. His lordship said that "under a simple, direct, and absolute proclamation of martial law the civil judicature was stayed, as the two jurisdictions cannot work concurrently. As a law it became paramount from necessity, and,

like a state of war, foreclosed all regard to or operation of the civil judicature. Whatever took place as to criminal or civil interests would be under and subject to martial law, in whatever form of procedure, if any, that martial law for the time ordained. The civil Courts could not sustain their jurisdiction without interruption in any, and thus indeed in every case; the process of the Court would become neutralised, and the judges would no longer administer under the Royal Charter but upon the sufferance of the Commander-in-Chief." And again: "The very object of martial law is to create and justify that despatch and violence of measures which the civil law cannot tolerate, but which the public safety requires. The mode by which alone martial law can be rendered effective is necessarily illegal, and can only be compensated by indemnity ordinances; but if the civil law is at the same time in exercise it will be reduced in such submission to illegal practices as to be inoperative against that very injustice which can only be protected from legal vindication by legislative indemnity." This in no way detracts from the doctrine which has been frequently asserted in regard to martial law, viz., that the power which may be exercised by the military authorities they exercise at their own peril, and that they cannot expect the assistance of the civil Court in carrying out their objects. Though circumstances may require the civil Courts to stay their hands, the military authorities are not free from liability for any excessive exercise of power. Only this is not the proper time to inquire into their conduct. When that time comes they may be amenable for their acts. And moreover, when peace and security is again restored, and the operations required by the existence of hostilities are no longer necessary, military decrees which have not been carried out may cease to have further validity. At a future date that question may call for decision. But at the present time, in my opinion, for the reasons I have stated we can not now make any order. This application must therefore be refused.

Maasdorp, J.: It appears that the petitioner, who is a British subject, was on the 5th day of December last

year taken prisoner by the military forces in the district of Herbert, which had been invaded by the forces of the enemy, and which was then the seat of active military operations. He was brought before a field general court-martial on the 29th December at Witteputs, in the same district, upon a charge of enlisting and engaging in the forces of the enemy, and after trial was convicted and sentenced to imprisonment for one year with hard labour. On the 25th of January last he was under military warrant lodged in gaol at Hope Town, which was then and is now alleged to be occupied by large military forces. At the time of the arrest and imprisonment of the petitioner martial law, under proclamation of His Excellency the Governor, prevailed in the districts of Herbert and Hope Town, and it is still in force there. The petitioner now alleges that he is a loyal British subject, is illegally imprisoned, and prays for his immediate liberation. There can be no question of the power of this Court to compel the liberation of any person who within its jurisdiction is proved to be illegally detained in custody. The question is whether the Court should in this case exercise this power, and whether it can exercise this power under the circumstances set forth. The complaint of the petitioner is that he has been illegally tried by a military court, and not by a magistrate or judicial tribunal in due course of law. Now it is obvious to anyone acquainted with the requirements of the criminal law of our Colony that the ordinary machinery of the law could not under the circumstances have been set in motion to deal with the case. The services of the police, of a Justice of the Peace, or a Magistrate were not available in a district which was the scene of active warlike operations, and where the ordinary process of the law was rendered impossible. It seems to me the Court should take judicial cognisance of the facts that the district of Herbert was and is the theatre of insurrection and the seat of war, that the district of Hope Town is the field of active warlike operations, and that the ordinary process and procedure of the law is for the time being suspended there. But these facts are brought directly to the notice of the public and of this Court by the

proclamations of His Excellency the Governor. The Governor, who is responsible for the administration of the affairs of this colony, has in effect declared that a state of things exists in the districts of Herbert and Hope Town which renders it impossible to enforce the law through the ordinary civil authorities, and that martial law must for the time being be administered there. The result is that the duty of maintaining order is transferred to the military authorities, whose duty it has become to administer affairs in conformity with the well-known principles of law and justice. The military officers will no doubt perform their work with the full knowledge that their conduct may be called in question at such time as the ordinary legal tribunals can again perform their functions. I am not prepared to say that a proclamation of the Governor suspending the ordinary process of law, and putting martial law in force, will always in this Court be conclusive proof of the necessity of such proclamation, and that the Court will at no time test the legality of such proclamation. That question does not now arise. There is abundant proof upon the documents and from notorious facts of which the Court will take notice, that for the time being the military authorities alone can enforce order, and judge of what is necessary for the success of their operations and for the suppression of sedition in the districts in question. In the face of rebellion and invasion the public safety requires that as a matter of paramount necessity the military officers shall deal with those who disturb the order of the districts and impede the military operations. In this case the military authorities have decided that the imprisonment of a British subject proved to their satisfaction to have enlisted in the forces of the enemy is necessary, and they have decreed such imprisonment accordingly. With such an order given and executed in a district where and at a time when martial law of necessity prevails, this Court cannot now interfere. Whether such imprisonment under the order of a court-martial should continue after the necessity for martial law has ceased, or whether it can be enforced in a place outside the area where martial law prevails, are questions

which do not now arise. For the time being the power of the Court to administer justice in the districts in question has by force of circumstances been suspended, and it cannot now inquire whether the procedure of the court-martial was in all respects regular, or whether, as was contended by counsel for the applicant, the imprisonment of the petitioner is inflicted as a punishment for an offence, or as the necessary restraint of a person who has proved himself dangerous to the public welfare. I am of opinion that under the circumstances the application must be refused.

Solomon, J.: This application raises a question which, as far I know, has never before been decide in any Court of Justice either in England or in this colony, and which certainly is not met by any of the cases to which we were referred in the course of the arguments. In those arguments the whole subject of martial law was fully discussed, and some very broad propositions of law were laid down on both sides. I do not think, however, that it is necessary to deal with all the questions that were argued at the Bar, or to lay down any general rules on the subject of martial law further than is required for the decision of this particular application. Every case of this nature must rest upon its own merits; and I have no desire to bind myself now in regard to any further cases in which the facts may be entirely different from the facts of this particular application. For the subject of martial law is certainly one of considerable obscurity; one which is not regulated by statute, and the limitations of which have never been clearly defined by judicial decision. And thus it is that in the arguments in this case we have been referred mainly to the views of text-writers and to the opinions given by lawyers of eminence; opinions which unfortunately do not assist us very much, inasmuch as they vary greatly and in some instances lay down rules directly opposed to one another. But notwithstanding the absence of authority on this subject, I have no hesitation in coming to the conclusion that this is essentially a case in which the Court would not be justified in interfering. For what are the simple facts of the case? The applicant was arrested on the 5th De-

ember in a district in which martial law had been proclaimed, and in which warlike operations were actually being carried on at the time. The charge against him was that he had enlisted in the forces of the enemy, a charge which of course amounts to one of high treason. He was brought before a court-martial on the 29th of the same month, was convicted, and was sentenced to imprisonment for the term of twelve months; and he is now in custody in a district in which martial law has also been proclaimed. Now no question can possibly arise in this case as to whether or not martial law was actually in force in the districts in which the prisoner was tried and in which he is now confined. It has been argued on behalf of the applicant that a mere proclamation of martial law in itself is of no effect, and that it amounts to nothing more than a notification of the existence of a certain state of facts. It is unnecessary, however, to consider the question of whether a proclamation such as we have here, which is signed by the Governor and countersigned by the Prime Minister, should be held by the Court as conclusive evidence that such a state of things existed as justified the putting in force of martial law. For in this case, considering that the district in which the applicant was arrested had been invaded by the forces of the enemy, and that rebellion was spreading therein, it is not open to argument that martial law was properly proclaimed, not only there but also in the district in which the applicant is confined, and which is still occupied by a large military force. Now whatever the full effect of the proclamation of martial law may be, it was frankly admitted by Mr. Burton on behalf of the applicant that in such a state of things the military authorities were entitled to do everything that was necessary for the purpose of repelling invasion and suppressing rebellion to the extent even of destroying life and property; and that amongst other things, they were justified in inflicting punishment on rebels in so far as that was necessary for the paramount purpose of suppressing the rebellion. Now it seems to me that this admission on his part, which I think he was bound to make on behalf of his client, practically concludes this case in favour of the respondents. For I must say

that I can conceive of no more effective way of stamping out a rebellion, more especially in the earlier stages thereof, than the prompt and speedy punishment of persons taking part in such rebellion. And among such persons I include not only those who are taken in arms fighting against the forces of Her Majesty, but also those who may be found on investigation to have assisted the enemy in any way in carrying on war. That this was the view taken by the Governor and by the Government of this colony is clear from the terms of the proclamation, which are not necessarily binding upon us, but which, it is interesting to observe, provided amongst other things for "the more speedy trial and punishment of all persons giving information, succour, countenance, or support to the said enemy." These words could not possibly apply to trials before the ordinary Courts of Justice, but must have referred to trials before military tribunals. To say that such Courts are not legal tribunals in the ordinary acceptation of the term does not seem to me to affect the question. Granted that, as laid down by Fitzjames Stephen, such a court-martial was merely a commission of inquiry, if it honestly investigated the charge against the applicant, as we are bound to assume that it did, and came to the conclusion that he was guilty, that in the circumstances would in my opinion justify his sentence and his subsequent detention by the general in command, with whom, of course, rests the power and the responsibility in such a case. That the applicant was dealt with promptly and summarily is clear. Within a little more than three weeks after his arrest his case was investigated, and he was tried, convicted, and sentenced. Such prompt and speedy trial would of course have been impossible before the ordinary tribunals, as is exemplified in the case of the Sunnyside rebels, who were not brought to trial for 3½ months after their arrest, to say nothing of the risks incident to such a mode of trial in time of war, when material evidence may be lost at any time. It seems to me, therefore, that in the circumstances of this particular case, what was done by the military authorities was a proper and effective method of proceeding for the purpose of suppressing the rebellion, and that it was justified by the

necessities of the case. It is in fact difficult to conceive a case of detention under martial law in which the position of the military authorities would be stronger than it is in the present application. But while saying this I do not wish it to be understood that I am expressing an opinion in favour of trying rebels generally by court-martial. The circumstances of the case must decide whether it is necessary or advisable, and the limitations incident to this mode of trial must be always born in mind. It is clear that after the rebellion has been suppressed and martial law has ceased to be in force, as was admitted by the Attorney-General, there would be no further justification for trial by court-martial: while at the same time orders granted by the military authorities for the detention of prisoners would cease to be of any effect, unless of course they had been confirmed by the Legislature. This being my views upon this case, it is unnecessary for me to say anything upon the broad proposition of law laid down on behalf of the respondents that in districts where martial law is in force the writ of Habeas Corpus is suspended, and that no matter how wanton and excessive the action of the military authorities may have been, their acts cannot be challenged in a court of justice until martial law has been withdrawn. As there was in the present case nothing wanton nor excessive in the action of the military authorities, the point does not arise for decision, and I therefore prefer not to express any opinion on that point at present. Before concluding I desire to refer very shortly to the cases cited as authorities on behalf of the applicant, but which do not appear to me to assist him in any way. There is first the case of *Kok and Balie* (B. 79, p. 45), in which it was laid down that the rights of personal liberty which persons within this colony enjoy are substantially the same as those which are possessed in Great Britain, and that it was the duty of the Court to protect personal liberty wherever it was illegally infringed. In that case, however, there was no state of war; the applicants had been detained for nearly twelve months in Cape Town, where martial law was not in force; their detention was justified on the ground that they were prisoners of war; the Court found that they

were not prisoners of war, and of course ordered their discharge. That case, therefore, has no application to the present one. Then we were referred to the case of *Du Preez and others*, in which upon an *ex parte* application the Court granted a rule calling upon the military authorities, who were in charge of the applicants, who had been arrested in a district in which martial law was in force, to show by what authority they were detained in custody. Before the return day of the rule the applicants had been discharged from custody, and the matter therefore lapsed without any judicial decision upon the question of the rights of the military authorities under martial law. Lastly, we have the well-known case of *Wolfe Tone*, regrading which Dicey says "that no more splendid assertion of the supremacy of the law can be found than that then made by the Irish Bench." But what were the facts? *Wolfe Tone* was captured at sea in a French man-of-war; he was brought to Dublin, where martial law was not in force, and where the Court of King's Bench was sitting at the time; and in open defiance, as it seems to me, of that tribunal, he was tried before a court of military officers, and was sentenced to death. If in the present case the applicant had been brought from Herbert district to Cape Town, and had been here tried before a court-martial while the Supreme Court was sitting, then *Wolfe Tone's* case might have been cited as an authority, and we also might have had an opportunity of asserting the supremacy of the law. I fail, therefore, to see in any of these cases any judicial decision which supports the applicant's contention, and therefore, for reasons already stated, the application, in my opinion, must be refused.

[Applicant's Attorney, Mr. V. A. van der Byl; Respondents' Attorneys, Messrs. J. and H. Reid and Nephew.]

MOPHAIL V. HALL & CO. } 1900.
} May 2nd.

Appeal—Act 20, 1856, Section 11
— Payment by instalments —
Evidence.

Where a Magistrate had, in giving judgment in favour of a plaintiff in an action, ordered the

defendant to pay the amount of the judgment in instalments of £10 per mensem,

Held, on appeal, that as the Magistrate had no evidence before him to justify the exercise of his discretion, the case must be remitted to take such evidence.

[*Le Roux v. Hofmeister*, 8 Juta p. 42, approved.]

This was an appeal from a decision of the Resident Magistrate at Kokstad. The plaintiff (appellant) sued the defendant for the sum of £151 14s. 9d., and the Magistrate, in giving judgment in his favour, ordered the defendant to pay the amount and costs in monthly instalments of £10. The plaintiff now appealed against the form of the order of payments by instalments.

Mr. Close for appellant (plaintiff below): The question at issue is, can a Magistrate order payment by instalment without hearing witnesses as to defendant's financial position? We appeal only as to the form of the order, not on the merits.

[Maasdorp, J.: Under which rule did the Magistrate proceed?]

He proceeded under section 11 of Act 20, 1856. *Le Roux v. Hofmeister* (8 Juta, p. 42). Evidence should be taken on oath as to whether defendant could pay the above debt or not. We now ask that this case be sent back to Magistrate for judgment for full amount immediately; not merely that he take evidence.

Mr. Searle, Q.C., for respondent (defendant below). The Magistrate can use his discretion. This order was made by him after due consideration of the matter.

[Buchanan, A.C.J.: There is no evidence on record by which the Magistrate could have been induced to make this order.]

The Magistrate thought the proper course to pursue was to order payment by instalments. The most the Court will do is to remit the case to the Magistrate to take evidence as to defendants' financial position. (See 8 Juta, at p. 44.) It is equitable that payment be made by instalments.

Buchanan, Acting Chief Justice, said: The plaintiff in this case sued in the Magistrate's Court at Kokstad for the recovery of £151 odd, and after hearing the case the Magistrate gave judgment for plaintiff for the full amount claimed with costs, but

ordered that the defendants should pay the amount by instalments of £10 per month. Under section 11 of the Magistrate's Court Act a Magistrate may make an order for the payment by instalments of any debt or costs for which judgment has been obtained, but this discretion must be exercised only when some grounds for it are shown. In the case of *Le Roux v. Hofmeister* (8 Juta, p. 42), the Magistrate, on the mere statement of defendant's agent, stayed execution pending payment by instalments of the amount due, and this Court, therefore, remitted the case to the Magistrate to take evidence upon oath as to defendant's ability to pay the debt. In this case there was no evidence given as to defendant's position, but apparently some representations were made to the Magistrate that the defendant was a poor, hardworking farmer, who, if execution were issued, would be ruined. The Magistrate, however, now reports that he has been informed since the appeal was noted that defendant had two wagons at the front from which he was drawing about £4 per day. As there is no evidence on the record as to the defendant's position, that part of the judgment relating to payment by instalments must be struck out. The appeal will therefore be allowed with costs, and the case remitted to the Magistrate to take evidence as to the position of defendant, and at this further hearing the Magistrate can exercise his discretion, and he can also deal with the costs of the further hearing.

Maasdorp and Solomon, J. J., concurred. (Applicants' Attorneys, Messrs. Dempers and Van Ryneveld. Respondents' Attorneys, Messrs. Van Zyl and Buissinne.)

COLONIAL GOVERNMENT V. 1900.
HYDE. May 2nd.

Appeal—Municipality—Government Authority to collect rates—Right to sue.

Where the Government had authorised a municipality to sell certain lots situate in the municipality under the condition that the purchasers thereof "shall annually pay to such person or persons as may hereafter be authorised by the Governor to receive the same," the water rates due thereon,

Held, on appeal, that this did not deprive the Government of the right to sue for the rates due.

This was an appeal from a decision of the Resident Magistrate of Xalanga, in a case in which the Colonial Government had sued Hyde for the payment of £23, being arrears water-rates for certain building and garden lots situated at Cala. The Magistrate dismissed the case, holding that until a proper Board of Irrigation Management had been formed no suit could be brought for the money due on the water which had been supplied, and against this decision the Government appealed.

The facts appear sufficiently from the judgment.

Mr. Searle, Q.C., appeared for the appellants.

Mr. McGregor appeared for the respondent.

Mr. Searle, Q.C.: We claim now that only £6 is due. The condition (which is set out in the judgment), "The owner of this lot . . . approved by Government" does not debar the Government or its nominee from claiming the money due for water. (Mr. Searle, Q.C., was stopped by the Court.)

Mr. McGregor: Has Government any *locus standi* as plaintiff. The Municipality of Cala ought to have brought this action. The Municipality was authorised to collect the money, therefore the Municipality ought to be allowed to sue. The water fund had been handed over to the Municipality. The Council is the *dominus* of the fund. The Government had ceded their right to collect and sue for the money to the Council.

(Buchanan, A.C.J.: If the Municipal Council had sued on the letters authorising them to collect, the Magistrate would have refused to give judgment in their favour.)

The Government cannot sue for water rates without alleging that waterworks exist.

Buchanan, Acting Chief Justice said: Some garden lots or erven in the township of Cala were sold under certain conditions of sale, one of which was as follows: "The owner of this lot shall annually pay to such person or persons as may hereafter be authorised by the Governor to receive the same, the sum of 5s. sterling towards the maintenance of the waterworks." The

building lots were sold on the same conditions, only that the payment thereon was 10s. per erf. The conditions go on to say: "And shall be further subject to such rules and regulations that may be framed by any Board of Irrigation Management approved by Government." The defendant is the owner of certain of these erven, and as he has not paid the 5s. on the garden lots and 10s. on the building lots as required by the conditions, the Government have sued him for the amount. The defendant pleads that the Government has no *locus standi* to sue for this amount, on what ground he does not distinctly say, but as far as argument by counsel shows, because the Government had ceded its claim to the Municipality of Cala. He also pleads that no Board of Irrigation Management has been approved, and further, that the books of the Municipality are in such a condition that they do not show the true amount due by the owners of these erven. As to the last reason there was certainly a great deal in it, because the books of the Municipality are admitted to be incorrect and irregularly kept. But the defendant has admitted that he is liable for £6 of the £23 claimed, and Mr. Searle has said he will waive the remainder of the £23. For this amount of £6 the Magistrate ought to have given judgment if the defendant was liable. The Magistrate held that the Government had no right to sue, not having approved of any Board of Irrigation Management. But this condition as to the Board of Management only makes the owners of the erven subject to any rules or regulations which such a Board, when established, might provide. In this case the owner of the erven is not asked to abide by any rules, and it is immaterial as far as this case is concerned whether there is a Board or not. As regards the right of the Government to sue, it appears that the Government authorised the Town Clerk of Cala to receive the amount of the rates and to apply it towards the maintenance of the waterworks. The waterworks are in existence, and the defendant has from time to time received benefit from them, and there is no allegation of want of consideration for the payment of this 5s. But when the Government gave the Town Clerk the right to

collect those rates it expressly reserved to itself the right to sue. There was a distinct contract to pay 5s., and the Government authorised a person to receive it, and when the owners refused to pay such person the Government had a perfect right to go into court to recover the amount. The appeal must therefore be allowed with costs and judgment entered in the court below for the £6, which is clearly due, with costs.

(Appellants' Attorneys, Messrs. Van Zyl and Buissonne; Respondent's Attorneys, Messrs. Walker and Jacobsohn.)

SOLOMON V. HOOLE AND CO. } 1900.
May 2nd.

Appeal—Purchase—User of thing purchased—Agency—Magistrate.

Where a Magistrate had in an action given judgment against the plaintiff, holding that insufficient evidence had been adduced to establish the fact that a person alleged to be the agent of the defendant in connection with a purchase transaction was actually his agent.

Held, on appeal, that as the defendant himself had retained and used the thing purchased, his defence of want of authority on the part of his alleged agent could not be sustained.

This was an appeal from a judgment of the Assistant Resident Magistrate of Prince Albert at Laingsburg in an action in which the plaintiff claimed £20, being the value of a certain mule or re-delivery of the same. It appeared from the evidence given for the plaintiff that one Carstens had commissioned him to purchase for him mules over 13 hands high. He purchased and delivered two and was paid £50 for them. Carstens then asked him to fetch a third mule, which plaintiff had mentioned. This he did a few days later, and Carstens accepted delivery, and said he would pay £25 for it, but that the plaintiff must take back the first two mules, which he had found were too small. The plaintiff alleged that Carstens was manager of defendant's business, because he received

money on account of Hoole. He had seen the third mule pulling in defendant's wagon the day after it had been delivered. Another witness stated that he had seen Carstens and defendant standing in their shop-door looking at the wagon in which the mule was spanned in. The Court postponed the case for evidence that Carstens had the management of the defendant's business, and that the defendant was liable for contracts entered into by the former. On resuming, the defendant Benjamin Clifford Hoole was called as a witness for the plaintiff, and stated that he was the sole partner of the firm of Hoole and Co., and that Carstens did not manage his business, and had no power to endorse his bills in his absence, and no authority, verbal or otherwise, to purchase the two mules or the one in question. Carstens's letters purporting to come from Hoole and Co. and signed "Hoole and Co., J.F.C.," were signed by Carstens without witness's authority. The account attached had the printed heading of "Carstens and Hoole." In 1898, when witness first started business, that was the style of the firm, but Carstens was not then partner, and later on the heading was altered to "Hoole and Co." Witness said he knew nothing of what was going on in connection with the case, nor did he know that Carstens had written any of the letters until plaintiff's agent had shown them to him about a fortnight previously. Carstens had permission to take money out of witness's cashbox, but he did not think he had ever taken more than £5, and he always debited himself in the books with the amount, and left a note that he had taken it. Witness's clerks also had access to the cash-box. Carstens received half of the net profits in the business, besides getting his salary—if there were no profits, he drew his salary. When witness was absent moneys were paid out of the business by Carstens, as also by the clerks, for produce bought on account of the business without consulting witness, but not on account of speculations.

Application was made for absolution from the instance on the ground that it had not been proved that Carstens was manager or partner of the defendant firm. The Magistrate, leaving the question in abeyance, called upon the defendant's agent to proceed with the defence, but the agent replied that he had no witnesses. The Magistrate subsequently granted absolution from the instance on the ground that there was not sufficient proof of the defendant's liability. He held that

the purchase of mules was outside such a business as he carried on; that it seemed clear that he knew nothing of the letters written by Carstens or the purchase of the mules. Carstens was not a partner, nor was he joined in the summons as such, and there was no proof of ratification.

Mr. Innes, Q.C., for the appellant.

Mr. Howel Jones for the respondent.

Buchanan, A.C.J., said: In this case the plaintiff sued for the purchase price of a certain mule sold by him to the defendant. The defendant pleaded the general issue, but at the trial the real defence set up was that Carstens, who bought the mule, had not defendant's authority to do so. It appears that defendant started business at Laingsburg, and that Carstens, who was held out as a partner, was not really a partner in the business. Defendant says he told his merchants that Carstens was not a partner, but he had some interest in the business, receiving a salary and a portion of the profits. The defendant was frequently away from his business, and Carstens, with the other clerks, conducted it in his absence, and in that capacity Carstens purchased for defendant a couple of mules for £50. These mules were paid for. Plaintiff was told to bring a third mule, and Carstens said he would give £25 for it. It appears that when the third mule was brought some objection was raised to the first two mules, on the ground that they were not 13 hands high, but there was no objection to the third mule. Certain correspondence took place between defendant's firm and the plaintiff with regard to the two mules, the former saying that as the first two mules were under 13 hands high the £50 paid for them was too much, and Hoole and Co., through Carstens, said plaintiff must take back those two mules or reduce their price. The real question in dispute at that time was that the first two mules Carstens bought for £25 each turning out to be under 13 hands high, defendant considered he had paid too much for them, and wished to take £10 off the price, and he had actually offered to pay for the last mule if the price was reduced to that extent. Then there is proof that this mule was actually used by defendant, and when last seen it was drawing his cart used in his business. The defendant has kept the mule. The Magistrate seemed to think that very little more evidence was necessary to establish the

agency of Carstens, but in the absence of that little more he gave judgment against the plaintiff. We are of opinion that in face of the conduct of defendant his defence cannot be sustained. The appeal must be allowed with costs, and judgment entered in the court below for plaintiff for £20 and costs.

Maasdorp and Solomon, J.J., concurred.

[Appellant's Attorneys, Messrs. Silberbauer, Wahl and Fuller; Respondents' Attorneys, Messrs. Tredgold, McIntyre and Bisset.]

DEWAR AND MCALLISTER V. { 1900.
MCNAUGHTON AND SON. { May 3rd.

This was an action in which the plaintiff claimed the sum of £286 18s. 10d., alleged to be due upon certain contracts and for certain work done by plaintiffs at defendants' request.

The declaration set forth that the plaintiffs, James Dewar and Alexander McAllister, were in partnership as builders and bricklayers until December 31 last, when the partnership was dissolved and Dewar was authorised to act in and about the winding-up of the business. The defendants, McNaughton and Son, were also builders, and between April and November last year the plaintiffs entered into two verbal contracts with them for the completion of the stone, brick, and concrete work on two villas in Annandale-street, Cape Town, for £855, and three villas in Sidney-street, Green Point, for £961. Between these dates the plaintiffs also did certain other work for defendants, bringing the sum total to £1,918 19s. The plaintiffs had received from defendants from time to time, by way of cash and material supplied, payment to the amount of £1,632 0s. 2d., leaving a balance due of £286 18s. 10d., which amount was now sued for. The defendants refused to pay this amount, but since the issue of summons had tendered £124 7s. 8d., and therefore there was a difference of £158 4s. now in dispute between the parties.

The defendants in their plea admitted that work had been done upon the villas in Sidney-street, Green Point, but said that it was agreed that the work should be done for £812 16s., and not for £961. They admitted the other two items in the plaintiffs' account. They said that the payments made by them to defendants, and in respect of which they ought to have been credited by

the plaintiffs, ought to be £1,642 0s. 2d., and not £1,632 0s. 2d., and that the true and correct amount of their indebtedness was £128 14s. 10d., which sum they tendered.

With regard to the difference of £10 in the amounts alleged to have been paid by the defendants to the plaintiffs, the latter did not press that amount, which was made up of a number of small items.

The plaintiffs in their replication relied on a *quantum meruit* in case the Court found that there was no contract between the parties to do the work at Green Point for £961.

On the application of plaintiffs' counsel the declaration was amended so as to make the claim in the replication an alternative claim.

Mr. Searle, Q.C. (with whom was Mr. Close), appeared for the plaintiffs.

Mr. Graham, Q.C. (with whom was Mr. Gardiner), appeared for the defendants.

The first witness called was

James Dewar, the plaintiff, who stated that he was a builder residing at Woodstock. He was formerly in partnership with Alexander McAllister, but the partnership was dissolved on December 31 last year, and witness was, by a power of attorney from his late partner, who had gone to the front and was now a prisoner in Pretoria, authorised to act in and about the winding-up of the business. Witness had been a builder for eighteen years. The partnership had done work for McNaughton and Son, the defendants. In May, 1899, the elder Mr. McNaughton entered into an agreement with witness with regard to the erection of two villas in Annandale-street, Cape Town, for which McNaughton and Son had a contract, and the agreement with witness was to do a portion of the work. With regard to the second contract, about the end of May, while witness was still working on the Annandale-street houses, Mr. McNaughton gave him the plans and specifications of a job at Green Point, and asked him to give a price for it. Witness made up the price and put it in his notebook, and a few days later informed Mr. McNaughton that the price would be £1,013. The latter said he could not give that, and they then went over the items in witness's notebook, and they re-

duced the total amount to £961. As they went over the notebook witness put the items down in the same book. McNaughton saw those entries. He said that the reduced price was a bit stiff yet, but witness said he could not do it for less. McNaughton then said, "I suppose you will have to do it," or words to that effect. Next morning witness gave him a written tender for time working on the Annandale-street job, while McAllister was on another job. McNaughton wanted witness to start on the Green Point job right away, but witness said he could not. Ultimately witness agreed that McNaughton should supervise the putting in of the concrete work and stone foundation, and for that he made debits from time to time against witness. There was some dispute about £10 in these accounts, but witness did not press that. From time to time McNaughton paid witness cash, which was also shown in the account. The work at Green Point was completed on November 17. The first account was sent in at witness's own request in September, with the debits made up to that date. About November 20 witness sent in his account, amounting to £1,918. From that had to be deducted the amount of the debits against himself. On November 24 or 25 witness received a payment of £80 by cheque, and credit was given for this in the accounts. There was some objection as to several items in the Annandale-street job, but this was settled. There was also a question as to an alteration in the plan with regard to the shifting of a casement and the putting in of a window, and witness would take nothing off what he had charged for that, because he had put it in at absolute cost. Witness and McNaughton had a few words about that, but came to no definite conclusion. On December 19 witness wrote asking for an account, and he received one giving the total items debited as £1,643 9s. 4d. On January 3 witness again wrote asking for a settlement, otherwise he would be obliged to take steps for the recovery of the amount due. In reply witness received a letter from defendant saying that if he had known witness intended to do such a thing he would not have spoken as he did the previous day. McNaughton by that referred to a conversation he had with witness the previous day, when he asked if

witness would go to Observatory and do another job for him. Witness said he could not, as his partner was going to the front, and besides he did not care about doing any more work for defendant until he settled the account. Witness also spoke about the difference between the items in the two accounts, and he said witness had overcharged him £100 on the Green Point job. Witness answered, "No, certainly not; I have only charged you what the tender price was." Witness had never until this case heard about the figures £812 16s. for the Green Point job. Witness's tender for the job was low compared with the £855 for the Annandale-street job. Witness knew exactly what each job cost him. On the Annandale-street job he paid away £620, and the actual cost to witness of the Green Point job was £834, so that as a matter of fact he would make a larger profit on the first-named job. If he had contracted to do the Green Point job for £812 he would have lost money over it. If he had got the £1,013 he first asked for the job he would have come out with about the same profit as on the Annandale-street job. There were actually 23,500 more bricks in the Green Point job than in that at Annandale-street.

Cross-examined: Witness had never seen Mr. McNaughton's figures for his tender. He never told witness that his (defendant's) tender for the work at Green Point was £812 16s., and witness did not note down the items and come back the next morning and say he would do it for that amount. With regard to the receipt produced, witness had signed it in the bar of the Central Hotel, but he was in a hurry at the time, and never looked at it. Witness had only previously done sub-contractor's work in this country. He had done contractor's work in America.

By Maasdorp, J.: Witness personally delivered to defendant the written tenders for the Annandale-street and Green Point jobs, but the tender for a job at the German Club he posted to defendant.

Edmund James Sherwood said he was a quantity surveyor in Cape Town, and had had considerable experience in that line, having been at it for ten years in the Colony, while prior to that he was at the same work at Home for seventeen years.

He had examined the plans and specifications of the three villas at Sidney-street, Green Point, and had also measured the buildings themselves, stonework, foundations, concrete work, and brickwork. Witness first measured from the plans and then went to the buildings to test their accuracy. As a matter of fact, there was more foundation work on the spot than shown on the plans. There were 53 cubic yards more. Witness knew the prices ruling in Cape Town last June for brickwork, foundations, and excavating. He measured the whole of this work in order to appraise it at the prices ruling here last June, and it came to £1,135 12s. 1d. Witness had taken the brickwork at 1s. 1d., and he considered that a very low price. Witness from his personal knowledge knew of 1s. 2d. being paid last June. The stone foundations he had taken at £1, which he also considered a reasonable figure. The contract was well executed, and £1,135 12s. 1d. was the true value of the work.

Buchanan, A.C.J.: There is no question as to the manner in which the work was carried out?

Mr. Searle: No, my lord.

Cross-examined: Witness knew nothing about any contract or arrangement in connection with this work. He simply was sent by the attorney to measure the work and value it, and he did so.

This closed the case for the plaintiff.

For the defence,

James McNaughton said he was a builder and contractor, carrying on business in Cape Town. He had done a lot of work in Cape Town during the last 3½ years. He had known plaintiff for about eighteen months, the latter having done work for him as a sub-contractor. With regard to the Annandale-street job witness saw Dewar and had some conversation with him about it. He told him and gave him the figures, and said: "You can have this at my price; take the plans and specifications home with you and see if it will suit you." Dewar returned the next day and said he would take the contract at those figures. With regard to the job in dispute at Green Point, about the end of May, after he had started the Annandale-street job, he got the Green Point contract, and told Dewar he would give him the plans and specifica-

tions to take home and give a price on the same lines as the Annandale-street job. Dewar came back the next day and named a figure, but did not give it in writing, and witness could not remember how much it was. As soon as he named the figure witness said: "No, you cannot have the job at that price." It was a price in excess of what witness had tendered to do the work for. After some conversation witness said: "I will quote my figures on the same lines as we did Annandale-street." That was, each line was specified. Witness called out the figures and Dewar made a note of them. Dewar generally carried a book. Of course witness did not show him the full figures of his tender. The following day Dewar came back and witness said, "Well, what about those Green Point villas; are you prepared to take it up at those figures?" Dewar said yes, and as he could not get out to Green Point he asked witness to supervise the job until he could get out himself. Witness did so. Dewar never handed him any tender. The only written tender witness ever got from him was for a small thing at the German Club. The other jobs were arranged verbally all through, and witness had never written to Dewar accepting any tender. After witness received the account on November 20 last he saw Dewar by appointment at the Standard Bank corner, and said to him: "What do you mean by putting those figures in for the Green Point job; you know that is incorrect." Dewar said: "I know that it is incorrect, but I have mislaid the figures we agreed upon previously, and I wanted to make up the account, and when we settle up I will alter those figures and make it right." The receipt in question for £80 was given in the Central Hotel. Witness supposed plaintiff read the receipt. Witness produced his tender-book, the figures in which had not been altered since he gave the items to plaintiff. £812 was a fair tender, and at that the work could be done at a profit. Witness tendered that amount for the work, and was prepared to take it up. Before witness got the job at Green Point a commencement had been made on the work by another contractor. Witness's tender for the whole work at Green Point was £2,100. It was usual for a contractor to sub-let part of the contract.

Witness always looked to making a profit from the brickwork and concrete work. Witness supplied a considerable amount of material to Dewar. That was entered in the accounts.

Cross-examined: Witness brought the receipt to the Central Hotel written out and stamped. Witness had already had the account, and as there was an error in it he wanted to fix plaintiff. Witness never said anything about an overcharge of £100 when he met plaintiff at the Standard Bank corner, and it was not at that time that they spoke about the casement window. Witness could not say whether there was a large quantity more brickwork in the Green Point job than there was in the Annandale-street job.

William Black said he was the architect both for the houses in Annandale-street and Green Point. Witness had gone carefully through the plans and specifications, and had made calculations as to what would be a fair price for the work done by plaintiffs on those buildings. He considered that £752 16s. would be a fair price for the work done by them at Green Point. Witness allowed for a master builder. Witness supervised the building from start to finish. As a rule architects did not recognise sub-contractors, and it was a surprise to him that there had been a sub-contractor on this job. Witness was not supposed to know anything about the sub-contractors, and as a matter of fact he knew nothing about them in this case until the dispute arose. In his calculation witness allowed £75 for the work already done by the previous contractor.

Cross-examined: Witness made his calculations according to the plans and specifications, and according to the work actually done. Witness reckoned the brickwork at a shilling, which he considered a fair price last June. Witness explained with regard to the foundations that there was less work than shown on plans owing to the slope of the ground. There was more work in the Annandale-street job. Witness thought £855 was a very high price for the Annandale-street job.

Re-examined: There were no sleeper walls in the building at Green Point, which would, of course, decrease the amount of the brickwork.

Alfred George Gray said he was a builder in Cape Town, and had had considerable experience of the work in Cape Town during the last six years. Witness had gone over the plans and specifications for the Green Point villas, and had also examined all the buildings with the exception of the foundations. He should say that £782 11s. would be a fair tender for the work. That would leave a margin of profit. At the time 11d. per foot for brickwork would be a fair price. Witness had no contract at Green Point at that time for 11d., but he had one far out at Sea Point for 1s. Witness had not the slightest interest in this case.

Cross-examined: The height and length of the villas witness took from the plans, but the width he got from Mr. McNaughton, who said the plans had been altered in that respect, and that the width was less. After giving evidence as to the variations in his quantities from those of other witnesses, the witness said he allowed 5 per cent. for the sub-contractor's profit, as a sub-contractor always worked himself, and therefore his daily wage was also allowed.

By the Court: Work was a little dearer at Sea Point than in Cape Town.

Buchanan, A.C.J., pointed out that Mr. McNaughton himself had allowed 20s. for the foundations at Annandale-street, while witness only allowed 18s. for Green Point, and again Mr. McNaughton had allowed 25s. for the concrete work at the former place, while that was the same as was allowed by witness for Green Point.

Fred. Donnithorne, another builder, estimated the value of the work done by plaintiffs at Green Point at £754 10s., but he had not allowed for concrete supers, which would mean about £20 extra.

Cross-examined: Witness had deducted the openings in the brickwork. Some people did not deduct openings. Witness took the brickwork at 11d. Witness only formed his estimate from the plans and specifications, which he had gone through.

Re-examined: Plaintiffs had done work for witness, and there was always a written agreement between them with regard to such work.

After argument,

Buchanan, A.C.J., having outlined the matter in dispute, said that to his

mind the evidence given in behalf of the plaintiff was more reliable than that given on behalf of the defendant. Taking all the circumstances into consideration, he thought that the books and the documents corroborated the evidence of the plaintiff. Judgment would therefore be given for the plaintiff for £286 18s. 10d., less £10 owing to the defendant by plaintiff, with costs.

Maasdorp and Solomon, J.J., concurred.

[Plaintiff's Attorneys, Messrs. Tredgold, McIntyre and Bisset; Defendant's Attorneys, Messrs. Fairbridge, Arderne and Lawton.]

[Before the Hon. Mr. Justice MAASDORP and a Jury.]

BROOKES V. MULLER AND ISRAELSON. { 1900.
May 4th
" 7th.

This was an action for £2,090 damages, brought by Mrs. Brookes against Messrs. Muller and Israelson, proprietors of the St. George's Hotel, Cape Town. There was a claim in reconvention for £500 damages.

The plaintiff's declaration set forth: (1) That she was married out of community of property to John Edward Brookes, and was a public trader with knowledge and consent of her husband, while the defendants were the proprietors of the St. George's Hotel, Cape Town; (2) on December 20, 1899, the plaintiff entered into a written contract of lease with the said defendants whereunder the defendants agreed to let and the plaintiff agreed to hire a certain portion of the St. George's Hotel for a period of six months, upon certain terms and conditions set forth in the lease; (3) the plaintiff entered into possession of the said portion of the hotel under the said lease, and duly complied with all the conditions thereof, but on or about January 11, 1900, the defendants wrongfully and unlawfully broke the said contract by prohibiting the plaintiff from entering upon or using the said premises let to her as aforesaid and ejected her therefrom; (4) the plaintiff before and subsequent to the date of entering into possession of the premises purchased certain groceries, kitchen utensils, and other goods and provisions to the value of £90 for the purpose of carrying on a boarding establishment in the said

premises, for which purpose the said premises were hired by her, and in consequence of her ejection by defendants she has been unable to carry on the said boarding establishment, has been put to great loss and inconvenience, and has sustained damage in all amounting to £2,000; the plaintiff has demanded payment of the said sum from the defendants, but they have refused to pay the same or any portion thereof. Wherefore the plaintiff claims: (a) the sum of £2,000, as and for damages; (b) alternative relief; (c) costs of suit

The defendants' plea was as follows: (1) They admit that they were the proprietors of St. George's Hotel, but they have no knowledge of the other allegations in paragraph 1, and did not admit them; (2) they say that being unwilling to carry on the boarding department of their business at the St. George's Hotel, they let certain of the rooms, furniture, etc., of the said hotel to the plaintiff for the purpose of her carrying on the boarding department establishment in connection with the same, the defendants retaining certain rooms and bars as more fully set forth in the lease; (3) the plaintiff prior to entering into the said agreement represented to the defendants that she was a married woman separated from her husband, who was in America, and induced by and relying upon the said representations, the defendants entered into the said agreement, and the plaintiff took possession of the said premises on January 2 last; it was the duty of the plaintiff to conduct the boarding establishment in connection with the said hotel in a proper and orderly manner, so as not to injure defendants in their persons or property, but in breach of her said duty the plaintiff was in a state of intoxication every day, and cohabited with a man, who she subsequently alleged was her husband, in her bedroom, and on January 11, together with the said man, entered into the private bedroom of the said defendant Muller, which was not let to her, assaulted the said Muller, and thereafter in the presence of several customers of the hotel used violent and abusive language, and created such a disturbance that the police had to be called in; on January 12 the plaintiff, then in an intoxicated condition, wrongfully and unlawfully entered the hotel bar,

and in the presence of several customers used violent, filthy, and abusive language in general, and towards the employees of the defendants in particular, and the customers complained to the defendants, and the latter's licence to sell drink was imperilled; (4) in consequence of the above premises the defendants requested the plaintiff to leave the premises, which she refused to do, and on January 13 the defendants ejected the plaintiff from the premises, and prohibited her from entering upon the use of the same. Save as above, the defendants deny paragraphs 2 and 3 of the declaration; (5) as to paragraphs 4 and 5, the defendants say that there was on January 13 certain groceries and other things belonging to the plaintiff, but they deny that they were of the value of £90, and they say they were always willing and ready to deliver up the same to the plaintiff, and they tendered before the action was brought, and again tendered in their plea to deliver up the same, but the plaintiff refused, and still refuses to accept the same; (6) the defendants deny that the plaintiff has sustained damages as alleged, and they say that they were about to pull down and rebuild the premises let to plaintiff, and that on February 9 last they tendered plaintiff £5 with costs to date, and again in their plea tendered the same; save as above, they deny paragraphs 4 and 5 of the declaration. Wherefore they pray that plaintiff's claim may be dismissed with costs, and for a claim in reconvention the defendant Muller claimed £5 as damages for the assault committed upon him on January 11 by the plaintiff, acting in concert with the man. They also referred the Court to the plea in convention, and said that by reason of the premises they had been seriously injured in their property and in their bar business, and their liquor licence had been and was imperilled, and they had sustained damage and loss to the extent of £500. They therefore claimed: (a) The sum of £500; (b) alternative relief; (c) costs of suit.

In her replication the plaintiff admitted the tender of £5, which she said was wholly inadequate, and said that save as above, and save in so far as the said plea admitted any of the allegations of fact and conclusions of law in the said declaration con-

tained, she denied the allegations of fact and conclusions of law in the said plea contained, and specially denied that she allowed any other man than her husband to enter her bedroom, or that she misconducted herself in any way in connection with the management of the said boarding establishment, and she joined issue with defendants, and again as before prayed for judgment with costs. For a plea to the claim in reconvention she admitted that on January 11, in company with her husband, she went to the defendant Muller, but denied that either she or her husband assaulted him. She also denied the other allegations in the defendants' claims in reconvention, and prayed that the claims might be dismissed with costs.

In their rejoinder and replication in convention, the defendants admitted that the plaintiff had not allowed any other man than the man she alleged to be her husband in her bedroom.

By the terms of the lease the plaintiff was to have all the rooms on the upper story of the building and also those downstairs, with the exception of the bars and the rooms in a line with and connected with the bars. Plaintiff was also to provide two rooms for the barmaids and one room downstairs for the use of Mr. Muller. She was to supply no liquor, and all liquor was to be supplied by defendants, who were to retain control of the bars, and she was also to provide meals for the barmaids or other servants at the rate of £3 10s. per month. Should the defendants decide to rebuild the premises then the lease could be terminated by the giving of one week's notice, but when the premises were rebuilt then the plaintiff was to have the right to take over not only the boarding establishment, but the whole place at such a rent as any other person might be willing to offer.

Mr. Searle, Q.C., and Mr. Graham, Q.C., for the plaintiff.

Mr. Innes, Q.C., and Mr. Buchanan for the defendant.

The first witness called was

Charlotte Harriet Sarah Brookes, who said she was married at Cape Town in November to John Edward Brookes. She was married out of community. After the marriage she and her husband lived in Cape

Town. Her husband had the licence of His Lordship's Larder, a hotel in Loopstreet, but witness put money of her own into the business. They had that hotel for 2½ years, during which time witness took the Hope and Anchor Hotel in Rosestreet. She had that hotel for five months, after which she sold it and went back to His Lordship's Larder. Shortly afterwards they went to Johannesburg, but did not stay there long, going on to Volksrust, where they took a hotel. They were forced to leave Volksrust on the outbreak of hostilities. Witness had been separated from her husband by a formal deed of separation. Before they left Volksrust witness and her husband had a few words, and witness came down here by a different route, covering the distance between Volksrust and Charlestown on her bicycle, and then proceeding by rail to Durban. From Durban she came to Cape Town by boat, arriving here some time in October, and lived with a lady on the Walmer Estate, Woodstock. Witness met the defendant in the early part of December, and after a fortnight's negotiations the contract of lease was signed. Defendant never asked witness for references, but she offered to give him one, and said she had had two hotels in town. He said, "Oh, no, no; I can tell by the look of you that you are all right." He asked witness if she had any money, and she said yes, that the money was all right. She told him she had kept His Lordship's Larder Hotel and the Hope and Anchor Hotel. He said, "A German had that hotel." Witness replied, "No, he was an American." He then said, "Oh, yes, he had a row with his wife." Witness said, "Yes, that was me; but I don't want to talk about it." Witness said her husband was an American, but she never said he was in America. Nothing more was said beyond that. At that time witness did not know where her husband was, but subsequently, prior to the signing of the lease, she was informed that he was in Cape Town. The agreement of lease was signed in the office of Mr. James Brittain, and at that time not a word was said about her husband. Proceeding, witness gave evidence as to the goods she bought from Messrs. Lawrence and Co. and Findlay and Co. when she entered upon possession of

the premises. There were then five monthly boarders in the establishment, and these were to remain on. They had paid £10 per month when Mrs. Clark had the place, but witness thought she would do better business if she charged £8 only. Witness had sleeping accommodation for eighteen boarders, and could feed sixty. If certain rooms, which she understood he was to get, had been given her she would have had sleeping accommodation for twenty-four. Her rooms were nearly all the time occupied. That was chiefly through a number of casual boarders, who came for two, three, or four days. She also got three additional monthly boarders, so that she had eight, and she had made arrangements for eight others, five of whom were to sleep on the premises, and to come at the beginning of February. Some unpleasantness arose as to the rooms for the barmaids, Florence Wells and Linda Kirkwood. These two were paid by defendants. Witness had engaged six servants, a chef, kitchen-man, pantry-maid, house-man, and two waiters. When witness had been in the house two or three days she asked the barmaids to sit at a table at the top of the room, so that they could get their meals together, and they were all willing to do so except Linda Kirkwood, who wanted the run of the place. Witness spoke to defendants about that, and also about her refusal to go into a small room instead of occupying one of the large ones. Mr. Israelson said he could not interfere as Linda was a good girl, and sold on his behalf six or seven bottles of champagne a day. Witness said she did not want her at the table half-intoxicated because the customers complained. Linda Kirkwood was half-intoxicated nearly every day. Witness was not addicted to drink. She took a glass of stout or beer at night, but nothing beyond that. One evening witness had some friends named Sutton visiting her, and she invited them to have a glass of something, but when she called a waiter he refused to carry out her order. Witness was not intoxicated, and had had nothing to drink the whole of that day. Witness then detailed the visits her husband made to the hotel on the night of the 9th January. On January 11 witness ordered a boy to change Linda Kirkman's bedroom, but the boy

said he could not do so, as Mr. Israelson had told him not to do so. Witness went to Mr. Israelson and said, "Why did you tell the boy not to change the bedrooms?" Israelson said, "I want the hotel for myself, and I will have it if I have to pay £500. Linda has had a hotel in Johannesburg, and she is quite capable of managing the place." Witness said she did not understand him, and he then replied that he wanted a respectable person to run his place, and he did not want a woman like witness, who had had a man in her room. Witness replied that the man was her husband. Her husband came round the same evening, and they went together to the general room, where it was now alleged Mr. Muller had his bedroom, but which was not the case. There was no light in the room. They went to see Mr. Israelson, but he was not there; Mr. Muller was in the room. Mr. Brookes was explaining to Mr. Muller when the latter pushed him in the chest, and tried to get him out of the room. Witness's husband caught hold of Mr. Muller by the coat, and the latter thereupon shouted "Police, murder." Linda went for a policeman, and when he came the party proceeded to the police-station. There Mr. Muller said that Mr. Brookes had not struck him, and the officer would not take the charge. Mr. Brookes then left, and afterwards went to the hotel and had a drink. Witness's husband had never misconducted himself on the premises. Next day Mr. Israelson repeated that he wanted the place, and would have it if he had to pay £500. On the Saturday witness discharged one of the boys because he would not obey her, but he was immediately taken on again by Mr. Israelson. Mr. Muller then came to witness after lunch and said that he was going to lock everything up. He then locked up the bedrooms and took away the linen, and the boarders had to go and get food where they could. Witness was left without a bed on which to sleep, and Saturday night and Sunday night she had to sleep on the stone landing upstairs. She left the place on Monday morning, and afterwards, accompanied by her attorney's clerk, she went to the hotel and formally demanded possession. Witness only got her personal luggage away. Witness was then examined as to her

schedule of damages. She was sure that she would have made £50 or £60 per month out of the place.

Cross-examined: Witness had agreed to board a child of Mrs. Kirkwood's, but a day or two afterwards she asked her to take the child away, as it was troublesome.

It was Mrs. Kirkwood's behaviour that really caused the quarrel. Witness never called her opprobrious names, but she could do it, she was so wicked. Witness had never misconducted herself. Defendants had asked her to sell liquor, but she had refused to do so.

Archibald Bultitude deposed that he was the manager of Ohlsson's Cape Breweries, Limited, and had known plaintiff as the tenant of two hotels, His Lordship's Larder and the Hope and Anchor, belonging to the company. She managed the hotels to witness's satisfaction, and as far as he knew she did not drink, and was a hardworking woman.

Cross-examined: Defendant met witness after he had leased the rooms to plaintiff, and asked if he knew for certain that she was a married woman. Witness said yes, and defendant would not believe it. Witness gave him approximately the date of her marriage, and defendant afterwards went to the Magistrate's Court and found out that it was so.

Florence Till said she was a barmaid at St. George's Hotel from about January 7 of this year. She had known Mr. and Mrs. Brookes when she kept the Lordship's Larder. While witness was on the premises of St. George's Hotel she had seen Mrs. Brookes constantly, and had never seen her drunk or taking drink. She never came into the bar and seemed a hardworking woman. When Mr. Brookes came into the hotel on January 9 witness greeted him and addressed him as Mr. Brookes in the presence of Messrs. Israelson and Muller. On the Wednesday afternoon she again saw Mr. Brookes sitting in the corridor speaking to Mrs. Brookes. Mr. Brookes always acted as a gentleman when on the premises. On January 11 witness was behind the bar, when she heard Mr. Muller calling out "Police" and "Murder." Witness and the three or four customers in the bar went to see what was amiss. Witness

went back to the bar, and the others proceeded to the police-station, but returned in about five minutes and had a drink. After the rooms were locked up Mrs. Brookes slept two nights on the stone landing. So far as witness saw, Mrs. Brookes always behaved herself and conducted the premises properly. Witness stayed on until the 28th, and never had any dispute with the defendants.

Cross-examined: Witness never heard Mrs. Brookes calling Linda Kirkwood names.

Re-examined: After Mrs. Brookes left there was no management over the boarding establishment, everyone just doing what he pleased. Witness and Mrs. Kirkwood left the service of defendants together.

Florence Wells said she was a barmaid at St. George's Hotel with the defendants, having been in their service previously at the Mountain View Hotel. She only stayed for five days at the St. George's Hotel. During that time she frequently saw Mrs. Brookes, and had never seen her drunk or drinking. She only came into the bar in the morning to bring in sandwiches, etc. She conducted the business in a proper manner, and so far as witness saw was a hardworking woman.

Cross-examined: Witness left of her own accord because she could not get on with Mr. Muller. She was not told to go. She had a good reason for leaving.

In re-examination witness gave her reason for leaving defendants' service.

Cornelius van Ryn said that during the time he was at the hotel it was properly conducted. He had never seen Mrs. Brookes the worse for liquor.

James Robert Emerson, an importer of horses and mules, said he was at the St. George's Hotel on the evening of the 11th of January with Mr. Brookes. After conversation a policeman came along and spoke to Mr. Brookes, but no charge was taken at the police-station. Mrs. Brookes and Mr. Brookes were quite sober at the time. He did not hear the Mullers making a disturbance.

Frederick Richard Atkinson, the chef engaged by Mrs. Brookes, said he had

never seen Mrs. Brookes the worse for liquor, and she always seemed a woman of business.

Albert Richard Sutton, of the Café Royal, Church-street, said he knew Mr. and Mrs. Brookes. On January 12 Mrs. Brookes came over to his place in the evening, and witness returned to the St. George's Hotel with Mrs. Brookes. Witness asked the waiter to bring some drinks, but the waiter refused to do so. Witness fetched the drinks. Mrs. Brookes was perfectly sober at that time. He did not hear Mrs. Brookes use any bad language. He had never seen Mrs. Brookes the worse for liquor.

Jane Debitt, of Woodstock, said that Mrs. Brookes lodged at her house for some time, and she had never seen her the worse for liquor.

Elizabeth Stone, the proprietress of the Albion Hotel, said she had known Mrs. Brookes for about three years, and had never seen her the worse for liquor. Mrs. Brookes was a well-conducted, respectable woman.

Henry Henning, a detective in the Cape police, said that on January 11 he was at the police-station, when Brookes came up with a policeman, who said he had been given in charge by Mr. Muller for assault. Both Mr. and Mrs. Brookes were sober at the time, but all the parties seemed to be excited.

Cross-examined: No charge was taken.

John Edward Brookes, the husband of the plaintiff, said that on one or two occasions he had separated from his wife. On the night of the 11th Muller pushed witness about because he remarked that he was Mrs. Brookes's husband. On that evening Linda was making an awful "shout."

Cross-examined: Witness and his wife had been separated about twice.

For the defence, David Israelson, one of the defendants, who with Muller owns the St. George's Hotel, stated that the first friction between plaintiff and himself was concerning the barmaids. Both the plaintiff and her husband had been drinking on the night of the assault. He went into the dining-room on the following night and found fish on the floor and crockery broken.

He accordingly gave Mrs. Brookes notice, and locked the room, because he was afraid he might lose his licence.

Abraham Muller, one of the defendants, said that on the night of the 12th he saw Mr. and Mrs. Brookes in their room. He had frequently seen Mrs. Brookes under the influence of liquor.

Linda Kirkwood said her husband was now at the front with General Brabant's force. Mrs. Brookes gave witness a room in which she was to sleep with her child, and occasionally another barmaid. On the 11th of January she found Mr. and Mrs. Brookes and Mr. Muller in a room. Disgusting language was used, and witness sent for a policeman, who eventually appeared.

Cross-examined: Mrs. Brookes was drunk nearly every day. Witness was not disorderly on the evening in question.

Morris Solomon said he had been employed by the defendants as a barman for about five months. He served in the American bar, but also in the evenings in the upper bar. He had from time to time served plaintiff with drink, on more than one occasion with brandy and soda. He had seen her drinking it herself, but sometimes she took it away. The night after the alleged assault on Mr. Muller plaintiff came into the dining-room with Mr. and Mrs. Sutton. Willie, one of the waiters, went out for Mrs. Kirkwood for some fish, and when he returned plaintiff used bad language, and asked what he meant by going out for that woman, and then the fish was knocked off the table. Afterwards plaintiff came into the bar and used bad language. She was excited, and was not sober.

Cross-examined: Witness was still in defendants' employ. He had seen plaintiff the worse for drink two or three times. The fish was intended for a late supper for witness and Mrs. Kirkwood. Witness never knew until that night that plaintiff objected to late suppers. Willie was in plaintiff's employ.

Frank Wright said he was in the employ of the Australian Meat Company, and was in the St. George's bar on the night of the alleged assault on Mr. Muller, and heard the latter calling out "Police." Plaintiff was very excited, and shouting, and wit-

ness should say she was the worse for liquor. He had seen her in that condition before. He could not give the exact date, but it was during the time she was at the St. George's Hotel. It was during the afternoon.

Cross-examined: Witness knew Mrs. Kirkwood, but he had not gone into the bar from time to time to see her. He had previously known Mrs. Kirkwood in Johannesburg. He went to the bar to have a drink, and not particularly to see Mrs. Kirkwood. Before that date he did not believe he had been in the bar more than once. Since the day in question he had not been in the St. George's bar until last Wednesday.

By the Court: He had not been at the St. George's more than four times before the date of the alleged assault.

Maasdorp. J.: You said before that you had only been there twice, and now you say four times.

Cross-examination continued: Witness had never brought Mrs. Kirkwood presents of grouse or other little dainties, birds and that sort of thing.

James Scott, a broker, carrying on business in Cape Town, said he knew both defendants and plaintiff, and he had done business for both parties. He had been in the St. George's during the time plaintiff was there. On one occasion plaintiff came in with some sandwiches. Plaintiff was very unsteady in her walk, and witness thought she was the worse for liquor, and on Mrs. Kirkwood remonstrating as to the manner in which the sandwiches were put before customers, plaintiff used abusive language.

Cross-examined: Witness had very often done business for defendants, and hoped to do business for them again. He hoped to sell the St. George's Hotel again shortly. Witness had had a serious difference with plaintiff in connection with the sale of His Lordship's Larder.

Francis Coghlan, another barman at the St. George's Hotel, said he used to serve in the American bar after plaintiff came. He had served her with brandy, German beer, and stout. Sometimes she drank it in the place and sometimes she took it outside.

Cross-examined: Witness was still in the same bar,

Solomon Romain said he was in the bar of the St. George's on a Friday evening in January. He heard a row and the breaking of crockery in the dining-room, and then plaintiff came into the bar and used bad language. Witness should say she was drunk.

Cross-examined: Witness was very often in the St. George's bar. He and his partner were the contractors for some building operations for the defendants.

Meyer Gronitzski, a partner of the last witness, deposed that he was with him in the St. George's bar on the night in question. He generally corroborated his partner's evidence.

William Linds said he was second waiter at the St. George's, and was taken over by plaintiff when she took over the boarding establishment. He had gone for all kinds of liquor for plaintiff. On the Friday evening in question witness went out for some fish for a Mr. Davidson, a boarder. Plaintiff came in with Mr. and Mrs. Sutton and asked who the fish was for. Witness said it was for Mr. Davidson, but plaintiff said it was not, and that it was for Linda, and smashed the dishes. Next day plaintiff discharged witness. On the Friday evening plaintiff was the worse for liquor. Witness subsequently had a conversation with plaintiff, and she said what a fool Mr. Muller was, and that her husband had just shaken him up. She then said she would bring a case against Muller, and said that if witness would give evidence on her side she would give him £25 out of the £100. Continuing, witness said: "And I would have been on her side if she had not behaved so badly to me."

Cross-examined by Mr. Searle: You would have taken it?—I don't see how anyone could refuse it.

But that was before she went out of the hotel; what was the case to be?—Damages, I suppose. Continuing, witness said he did not want the £25 exactly. He just wanted to see what she was driving at, and at the same time he went and told Mr. Muller.

Mr. Searle: You wanted to trap her?

Witness: Yes.

Cross-examination continued: Witness did not know who was to have supper that

night. Mr. Davidson gave him the money. Witness could not remember how many suppers were laid for that night.

Louis Vavas said he kept the books of defendants' business. He produced a statement of the receipts and expenditure of the boarding establishment from January 13 to March 31, when the place was closed. The receipts were £247 9s. 10d., and the expenditure £273 17s. 8d., showing a loss, exclusive of rent, of £26 7s. 11d.

Cross-examined: It was impossible to tell from the statement whether there was a profit in any particular month. It looked from the statement as if in March there was a considerable profit. After Mrs. Brookes left there was no one separately managing the boarding establishment.

This concluded the evidence in the case.

After argument, Mr. Justice Maasdorp summed up.

The jury returned a verdict for the plaintiff for £500 damages and costs, the claims in reconvention being dismissed.

Judgment was entered accordingly.

[Plaintiff's Attorney, Mr. David Tennant, jun; Defendant's Attorneys, Messrs. Silberbauer, Wahl and Fuller.]

SUPREME COURT

[Before the Hon. Mr. Justice BUCHANAN (Acting Chief Justice), the Hon. Mr. Justice MAASDORP, and the Hon. Mr. Justice SOLOMON.]

EAST LONDON MUNICIPALITY V. (1901) COLONIAL GOVERNMENT. (May 8th.)

Informal agreement—Crown lands—Government — Municipality — Expropriation—Compensation—Act 23 of 1880.

An informal agreement was come to between the Government and the E. Municipality that certain Crown lands within the Municipal limits should be secured to the town for pasturage, subject to the

condition that all lands required for public purposes should be reserved to Government. Subsequently, Act No. 23 of 1880 transferred and vested these lands in the Corporation, but contained no reference to the informal agreement or any express reservation in favour of the Government. The Government having now expropriated certain land for railway purposes, the Corporation claimed compensation therefor.

But held, by the majority of the Court [Buchanan, A.C.J., diss.], that the informal agreement previously entered into barred any such claim.

This was an action for a declaration of rights.

1. The declaration set out that the plaintiff was a Corporation under Act 23 of 1880. The defendant was the Commissioner of Public Works.

2. It referred to section 42 of Act 23 of 1880, and said that by it all property and servitudes theretofore or by that Act vested in the Municipal Commissioners and all unsold erven within the limits of the Municipality, and all Municipal pasture lands, were transferred and vested in the plaintiff Corporation. And by section 1 of Act 11 of 1895 the property in the streets, etc., and open spaces to which the inhabitants of the Municipality should at any time acquire a common right were vested in the Mayor, Councillors, and townsmen of East London.

3. By Act 19 of 1874 the Governor was authorised to construct, etc., a railway line from East London to King William's Town, and for that purpose had the powers conferred by Act 9 of 1858 of expropriating lands.

4. In June, 1898, the Government gave notice of intention to expropriate, and had since expropriated certain land within the Municipality.

5. The land so expropriated formed portion of the Municipal pasture lands, which by the Acts aforesaid were vested in full ownership in the plaintiff Corporation,

6. The plaintiff Municipality contended that it was entitled to compensation in respect of the land so expropriated, the amount to be settled by arbitration.

7. The defendant Government refused to pay or acknowledge any liability for the land.

The prayer was for an order declaring that the plaintiff Municipality was entitled to compensation, the amount, failing agreement, to be fixed by arbitration, and an order compelling the defendant Government to do what was necessary to ascertain the amount, and to pay the amount when ascertained.

The plea admitted paragraphs 1, 3, and 4 of the declaration.

2. As to paragraphs 2 and 5 of the declaration, the defendant said that subsequently to the establishment of the Municipality of East London under Order 9 of 1836, disputes arose between the Government and the Municipal Commissioners with regard to the rights of commonage and other matters, and in 1875 an agreement was entered into by which the Government was to reserve in favour of the Commissioners all the ungranted and unappropriated land within certain limits, and this agreement was ratified by a resolution of both Houses of Parliament in 1876. The Government admitted that the piece of ground expropriated by the Railway Department formed portion of the land so reserved in favour of the Commissioners, and said that it was so expropriated for railway purposes by the Government, acting on competent professional opinion.

3. One of the terms of the said agreement was that all lands, that may at any time be required in the judgment of the Government on competent professional opinion for general public purposes, such as railways, harbour works, etc., should be reserved in favour of the Government.

4. The Government submitted that the reservation referred to was not abrogated or affected by declaration. Save as above, they denied the allegations in paragraph 5.

5. They denied paragraph 6, and admitted the refusal to pay compensation, but justified it on the grounds above set out.

For a claim in reconvention, the Government said that subsequently to the

agreement referred to certain land referred to in that agreement had been expropriated by the Railway Department for railway purposes, and certain other lands had been transferred by the Government to the plaintiffs as compensation for the land so expropriated. The said lands were transferred to the plaintiffs by mistake and in ignorance of the terms of the agreement. Defendants prayed for an order for the re-transfer of the said lands.

The replication was general. The plea in reconvention alleged that there had been no mistake or ignorance, but that a binding and valid agreement had been arrived at between the parties as to the expropriation and compensation referred to in the claim in reconvention.

Mr. Innes, Q.C., and Mr. Searle, Q.C., appeared for the plaintiff.

Mr. Ward and Mr. Howel Jones for the defendant.

Alfred Everett Murray, a land surveyor, residing at East London, who said he had both there and at other places done a great deal of work for the Government. He had frequently been one of the Expropriation Commissioners. He knew the boundaries of East London in 1876. He had defined the final boundaries, having in 1884, at the request of the Government, surveyed the township of East London and the Municipal boundaries. On the plan produced the piece of ground coloured yellow was reserved for the Government. The piece of land now in dispute was not within the ground reserved for the Government.

Cross-examined: It was on instructions from the Surveyor-General that the land coloured yellow was reserved. There was a plan accompanying the letter from the Surveyor-General.

Mr. Innes now submitted that the onus of proving the agreement was upon the Government.

Mr. Ward thereupon called

Ernest F. Kilpin, Clerk of the House of Assembly, who produced the journals of the House. He showed that on June 30, 1876, the House concurred in the grant proposed to be made to the Commissioners of the Municipality of East London in terms of the arrangement entered into provisionally between the latter and the Government

in regard to the limits of the commonage. etc. There was a further resolution passed the same day with regard to the boundaries of the land at East London, and this also referred to the provisional agreement that was entered into. Proceeding, witness said he had the papers which were laid on the table of the House when the resolution was passed.

Mr. Innes said they were going to object to any papers being put in which did not emanate from the Municipality.

Witness was proceeding to read a report forwarded by Captain Mills to the Colonial Secretary, when

Mr. Innes pointed out that the report was only communicated to the Municipality a year after Parliament had granted the land, so they said they were not bound by it.

Buchanan, A.C.J.: That will be a matter to be considered afterwards. We had better have it in now.

Mr. Ward then read paragraph 3 of the report, which was as follows: "It is agreed: (a) All land belonging to or claimed by the Imperial Government; (b) all land claimed by virtue of any general regulation or specific promise by competent authority; (c) all private property duly registered by title or other valid conveyance; (d) all land that may at any time be required in the judgment of the Government, founded upon competent professional opinion for general public purposes, such as railways, harbour works, etc., be reserved.

Cross-examined by Mr. Innes: The resolution granted all the land within certain limits of the Municipality. He presumed that would be done under section 10 of Act 2 of 1960. If a matter of that kind came before the House now it would be referred to the Waste Lands Committee. The present practice was for all grants to be investigated before that committee, evidence taken if necessary, and a report submitted to the House, and then the House acts upon the recommendation of the committee. In 1876 there was no such standing committee. The practice in 1876 was for the Minister to give notice of a resolution and lay the papers connected therewith upon the table for the information of members. The papers connected with the resolution in question were laid

upon the table on May 18, 1876, in the ordinary course in which public papers were laid upon the table on the first day of the session. The papers were not annexures to the resolution. They were simply there for the information of members.

John Brown, the Engineer in-Chief of the Cape Government Railways, said the piece of land in question, which adjoined the railway workshops, had been expropriated for railway purposes under his authority.

Correspondence with regard to the negotiations for the granting of the ground to the Municipality in 1876 was then read

Captain Juritz, at present acting as Surveyor-General, produced the plan of the township of East London, and deposed as to the grants made in 1876 to the Municipality.

Mr. Ward, in reply to the Court, said the evidence as to the grants was to show that Mills's agreement had been acted upon, and that the Municipality got theerven it was agreed they should get.

Mr. Innes, in answer to the Court, said that the Municipality had a claim to the land in question, independent of the resolution of the House of Parliament, it being pasture land, so that the Government could not deal with it as Crown land.

After putting in further correspondence, Mr. Ward closed his case.

Mr. Innes then called

Alfred Webb, at present a Councillor at East London, who said that he was also a Councillor in 1875, having been one of the first elected Commissioners in 1873. There were then many disputes between the Municipality and the Government as to the dealing with vacant land in the Municipality. Part of the land within the Municipality had been cut up into lots for sale or grant to German immigrants. There was also a large area of pasture land which, after the Municipality was proclaimed in 1873, was included in the Municipal boundaries as proclaimed. Witness remembered Captain Mills coming to East London in 1875, witness and Mr. Gately being among the Councillors who met him. No minutes or notes of the meeting were kept. Captain Mills personally requested that no notes should be taken, and that no reporter should be present, as it was a purely

informal conference. As a matter of fact, there was no record of what had taken place. Witness had read the letter written by Captain Mills in 1875. A provisional agreement was to be come to, and was to be submitted to the Councillors after the sanction of the Government had been given.

Buchanan, A.C.J., addressing Mr. Innes, said that the provisional arrangement referred to in the resolution of Parliament must be Captain Mills's letter. Unless it could be shown that there was some other provisional arrangement submitted to the House, and the evidence went to show that this was the only evidence before the House, then the letter must be taken to be the arrangement.

Examination continued: Witness was quite certain that the agreement mentioned in section 8 of Captain Mills's letter, with regard to the Government's right to re-sume occupation, without compensation, of land for railway purposes, was never mentioned. He was certain of that, because at that time the Municipal authorities were exceedingly jealous with regard to the disposal of any land. At their meeting with Captain Mills they agreed upon the reservations contained in clause 4 of the report (the ground coloured yellow on the plan). Clause 8, however, was never brought before them, and if it had been he was sure it would have been repudiated at once. They would not have dreamed of agreeing to it. It was in consideration of their receiving the full commonage they claimed that they gave the reservation in clause 4. That was what Captain Mills and the Commissioners took as the basis of the arrangement. No papers were produced, and no instructions were read by Captain Mills, nor was any report of the Surveyor-General put before them. It was simply an informal talk at which Captain Mills took notes, but the Commissioners did not. Witness had a clear recollection of what took place, and he was quite positive such a proposal as that in clause 8 was never mentioned. Although they pressed for it, they did not get Captain Mills's report until two years later, in June, 1877, and then they only got it by writing to their members. When they got that report it was referred to the Streets Committee. At

that time there was a good deal of friction between the two sides of the river—the east side being then growing into a town—and there was a Streets Committee for each side. Captain Mills's report was referred to a joint meeting of the committee which appeared never to have taken place. Witness knew that a portion of this pasture land had been taken by Government, and other land had been given in compensation. One large portion had been given to the Government without compensation, but that was in consequence of the Government having intimated that as they were unable to obtain land for an extension of the railway workshops they would have to remove the workshops from East London, and in order to retain these workshops in the town the Council granted the necessary land. In the present case it was only after the Government had given the Municipality notice of their intention to expropriate that the Municipality were informed that the Government were going to take this land without compensation. Previous to that negotiations were actually going on for compensation.

Cross-examined: Witness should say that the whole of the so-called arrangement was practically a correct record of what had taken place at the informal conference with Captain Mills, with the exception of section 8, which was certainly never proposed or agreed to by the Councillors.

John Gately said he had been connected with the Municipality of East London since its inception, being the first chairman in 1873, and had remained continuously in the Council until a year and three months ago. Between 1873 and 1875 disputes arose between the Government and the Municipality. The latter took up the position that the ground was theirs, but the Government did not agree with them. Witness corroborated Mr. Webb as to the visit of Captain Mills. The latter distinctly and clearly stated that he had come there as a friend, and had no authority to do anything except have a friendly talk. Witness was certain there was no talk about the Government reserving the right to take back land for railway purposes. If there had been witness would certainly have opposed it. They would never have given

up what was conveyed by proclamation without referring to the whole of the inhabitants. Proceeding, witness gave corroborative evidence as to the delay in obtaining Captain Mills's report, and as to a portion of the ground having afterwards been given back to the Municipality, so as to retain the workshops in the town.

This concluded the evidence.

Mr. Innes, Q.C.: There is no dispute as to *fact*. The fact of expropriation is common cause. Ground expropriated must be commonage, or else why should Government give notice of expropriation?

[Solomon, J.: If it was a commonage before 1875, had Parliament power to deal with it?]

Clearly. Government was giving a reserve, out of which it was impossible to turn the Municipality. In paragraph 5 of declaration we describe the land as "pasture land"; this allegation is not denied in the plea. If not pasture land, what is it? "Pasture land" is merely a euphuism: it means "commonage."

[Maasdorp, J.: How can the Crown make it commonage?]

The Crown is the *dominus* of the land, and as such can do so. Its powers must be curtailed by Statute before it can be prevented from doing so.

[Maasdorp, J.: But the Governor is not the Crown.]

With his Executive Council he is. He has full power until prohibited by Statute. Act 2 of 1860 in section 1 of the schedule points out how Crown lands should be disposed of. Section 10 allows grants or reserves to be made by Governor for public purposes, but only with the concurrence of the Assembly and Council. The person making the grant is the Governor. Section 11 assumes that the Governor can assign Crown lands or commonage for any municipality. Section 12 is even stronger; it also assumes the Governor's power to assign as pasturage. This ground in dispute must be commonage; there is no evidence to the contrary.

If this ground is pasturage or commonage, the *dominium* in it is vested in the Municipality by Section 43 of Act 23 of 1880. *East London Municipality v. Colonial Government* (3, Juta, p. 313). In that case there was a dispute as to *erven*, and not as to pasturage. See, however, the judgment of of De Villiers, C.J., where a distinction is drawn between commonage and unsold *erven*. "As to the form of

Municipality." We stand on the dictum here delivered. The pasture land is the unoccupied land, which is continually being eaten into by the *erven*. This was pasture land in 1873; we rest our case on the Act, and not on the resolution of the House which made it commonage in 1876. The Municipality can sell commonage under the private Act, but under the public Act it has to get the consent of the Crown. We hold the land under Statutory title, and so if Government wish to expropriate they must pay compensation. See *Town Council of Cape Town v. Colonial Government* (Foord, p. 21), which is exactly in point.

[Buchanan, A.C.J.: I understand that the Government does not deny that compensation is usually payable, but they say they are not liable in this case, because of the condition in the alleged agreement.]

The Court has held that the Crown could expropriate land under Statutory power, but must pay compensation. How then can the Government take this case out of the ordinary law? Our title is founded on section 42 of Act 23 of 1880. Defendants want to read into the plain words of the Act something quite inconsistent with it. By what rule of law can they do that? The Act gave us full *dominium*. The Colonial Government wants to carve a portion of this out. See *Green Point Municipality v. Metropolitan and Suburban Railway Company* (8 Juta, p. 61). The alleged agreement which the defendants want to read into the Act was entered into four years before the Act (1876).

[Solomon, J.: You are bound by a resolution of the House.]

That is a matter for doubt. The resolution of the House only referred to an arrangement. The House may have been misinformed.

[Solomon, J.: That does not matter; it passed its resolution in certain terms, and that binds you.]

The only evidence the House had was that of Captain Mills, which was unfortunately wrong.

- [Buchanan, A.C.J.: If the grant was made in terms of the resolution, would not that include the provisional arrangement?]

No; certainly not. The condition must be attached. The Municipality would have refused it if they had known what Captain Mills had represented to the Government. We found our case on the grant of the Gov

error, and not on the resolution. The Governor made the grant without any reservation.

[Buchanan, A.C.J.: You did not repudiate the agreement, and you took the benefits conferred.]

The mischief was already done.

[Solomon, J.: But surely you could have objected at the time?]

There are two resolutions; one is in general terms, the other refers to erven inside the reserve. We could have repudiated and petitioned Governor to refer the matter to Parliament again, on the ground that Parliament was misinformed.

[Solomon, J.: But you did not do so.]

Both parties acted on the grant for 25 years. Then came the Act of 1882, which gave us full *dominium*. A clause as to reserve should have been put into that Act. The Act transfers to us the pasturage land, but not the reserved land. We rest our case on section 42 of the Act. The previous arrangement does not entail the rights given there. The informal agreement can't override the Act.

[Maasdorp, J.: The General Municipal Act vests the property in the Municipality. Does that deprive a private person of his servitude, and would such a person have an opportunity of opposing?]

The General Act only vests the property belonging to the people as of a common right. See *Municipality of Swellendam v. Surveyor-General*, 3 Menzies, p. 578, section 49 of Act of 1882.

Mr. Ward: Regulation does not vest the land in the Municipality. The unoccupied pasture land was only delimited, but not vested. The Act of 1862 does not vest or give power to the Government to give land to the Municipality. Then comes the proclamation. The fact that cattle were allowed to roam over waste Crown lands gives no right; prescription must be proved. (*Surveyor-General v. Inhabitants of Swellendam*. Under the proclamation, they had no right of commonage. The only right they have is under the new resolutions of the two Houses of Parliament. If they did not get any right from the resolutions, then they got no right until the Act of 1880. The position taken up by the Government was that the Municipality had no right to the commonage, but that it was expedient that they should have commonage. Commissioners were accordingly appointed to go into the matter, to find out what the needs of the Municipality were

and what Parliament ought to grant. The letter of 22nd February, 1875, shows the position of the Government all along, viz., that the Municipality had no commonage. Then as to agreement: it is common cause that an agreement was made. The clause in the agreement merely puts into precise language what would have been law without it at that time. That brings us to the Act of 1880. This is a private Act, and it was for the Government to put anything into it. Section 42 simply transfers from the old Commissioners what rights they had to the new Municipality, and from the Chairman of Commissioners to the Mayor.

[Buchanan, A.C.J.: But what about the words "and all pasture lands"? Are you not applying too narrow a meaning to the section?]

No; the Court will not hold that the section vests greater rights in new municipalities than those which the old Commissioners had, unless we get some compensation. *Attorney-General v. Horne* (54, L.J. (U.S.), C.P. 232). An Act of Parliament is not to be construed as depriving persons of the right without compensation, unless such construction is unavoidable. If we have here a private Act taking away rights without compensation, then any other construction possible should be adopted. Moreover, the transfer is "on like trusts and purposes."

[Buchanan, A.C.J.: But the Act refers to such erven as are not now transferred for the first time.]

That is a common clause in such an Act. By the passing of the Act the Municipality had no *dominium*, but had certain rights under resolutions. The Act gives no greater rights, and does not deprive the Government of its rights. Assuming the Court holds that the Act transferred *dominium*, it did so subject to our rights. The language in the Cape Town Council's Act was quite different to that in the East London Act. (Ford's Reports, p. 21.) "Vest" does not necessarily mean "grant the freehold" if such meaning deprives others of their rights. See *Hinde v. Charlton* (36, L.J.C.P., p. 79). It is only necessary to vest in them such rights as will give them control of commonage.

[Buchanan, A.C.J.: But did not the Act give them power to sell the commonage?]

Any municipality may sell commonage by permission of Government: Ordinance 9 of 1848. Ordinance 9 of 1836 did not allow sale; then came Ordinance 9 of 1848, which

did allow it. See *De Villiers v. Cape Divisional Council* (Buch., 1875, p. 60), and *Stellenbosch Divisional Council v. Myburgh* (5 Juta, p. 8). The Crown's grant must be construed as going only so far as is necessary for carrying out the purpose. It is a presumption that the Crown is not bound by Act of Parliament, unless specially named. See *Maxwell*, 2nd edition, p. 163. The *Metropolitan and Suburban Railway* case has no bearing here. The judgment of De Villiers, C.J., in *East London Municipality v. Colonial Government* was only a dictum.

Mr. Innes, Q.C., in reply: As to the presumption being in favour of the Crown, *Maxwell* adds that the presumption is not so applicable where the grant is to a public body for public purposes. Government never took up the position that East London had no pasture lands, but only that pasture lands did not belong to East London. They only had servitude of pasturage. The Act gave them no *dominium*.

[Solomon J.: Has the Municipality greater powers over land now than it had before?]

Yes; now it can sell. See *Dutch Reformed Church, Tarkastad, v. Tarkastad Municipality* (15, S.C.R.).

Cur advt. rult.

Postea (May 17).

Buchanan, A.C.J., said: As far back as 1873, if not previously, disputes had arisen between the Government and the then Commissioners of East London in regard to their respective rights over the property within the Municipality. In August, 1875, Captain Mills, of the Colonial Secretary's Department, was instructed to interview the Commissioners personally. Informal private meetings were held, no minutes of proceedings being taken. In September, however, Captain Mills sent a letter to the Colonial Secretary reporting the result of the discussion. He stated that subject to the approval of the Government it had been agreed that certain lands should be reserved for harbour, railway, and other purposes, as also certain vacant lots in the township. Certain specified erven were to be granted to the Commissioners, new limits to the Municipality were to be fixed, and the boundaries of the commonage defined. His letter further added "that all lands that may at any time be required, in the judgment of the Government, founded on competent pro-

fessional opinion, for general public purposes, such as railways, harbour works, etc., be reserved." No copy of this report was sent to the Commissioners till two years afterwards, and several of these gentlemen have been called to testify to the arrangement come to, and they all deny that any such general reservation was agreed to. The writing at the time is, however, more likely correctly to represent the result of the discussions than the recollection of persons who speak from memory of twenty-seven years ago. Most of the proposals stated in Captain Mills's letter as having been agreed upon were adopted. The new boundaries of the Municipality were proclaimed. During the session of 1876 resolutions of both Houses of Parliament were passed, concurring in the grant of the specified erven to the Municipality. These resolutions state that the grant of these erven, proposed to be made, was "in terms of an arrangement entered into provisionally between the Commissioners and the Government." The title of these erven seems thereafter to have been issued unconditionally and without any reservation. Other resolutions of both Houses were also passed, stating "that His Excellency the Governor be requested by respectful address to reserve in favour of the Commissioners, in terms of an agreement entered into provisionally between them and the Government, all the ungranted and unappropriated land" situated within certain specified limits. These limits included the pasturage lands. There is no record of what the provisional arrangement referred to consisted, unless it is to be found in Captain Mills's letter, which was among the Parliamentary papers laid on the table at the commencement of the session. The Municipality was afterwards surveyed at the instance of the Government, and the lands then reserved for harbour works, railways, and other public purposes were laid down in the plan prepared at the time. The Parliamentary resolutions were no doubt passed to comply with the conditions and regulations under which Crown lands could at that time be disposed of under Act No. 2, 1860, which was then in force, section 11 of these conditions being as follows: "Grants or reserves of land may be made by the Governor for special public purposes, provided that no grant or

reserve be made until the Legislative Council and House of Assembly shall have communicated to the Governor their concurrence therein." It will be noticed that the pasturage lands were thus placed on a very different footing from the erven. Titles as to the erven were, upon the resolutions of Parliament, granted to, and the property therein was thereby vested unconditionally in the Commissioners, but the pasturage lands, though, reserved for Municipal use, remained vested in the Crown. No title was issued for them. Later on the Municipality was by Act No. 23, 1880, created a Corporation, and the 42nd section of that Act calls for interpretation in this suit. It is as follows: "All property and servitudes as heretofore or by this Act vested in the said Commissioners or chairman of the Commissioners, and all unsold erven within the Municipality's limits, and all Municipal pasturage lands, after the taking effect of this Act, and by virtue thereof, are hereby and shall be transferred to and vested in the Corporation hereby created, or to and in the Mayor respectively upon the like trusts and purposes for which the same were originally granted or transferred, and, as to such erven and pasturage lands, subject to the provision for the sale, leasing, or other disposition thereof hereinafter contained; and in like manner all liabilities or debts lawfully incurred and contracts lawfully entered into by the aforesaid Commissioners, acting for and on behalf of the said Municipality, shall become the liabilities, debts, contracts, and engagements of the said Corporation, and all expenses incurred in the passing of this Act shall also in like manner be charged to the Corporation herein created." This section, therefore, in the first place, transferred to the Corporation all property previously belonging to the old Municipality; and, in the next place, transferred to them all unsold erven, and also the Municipal pasturage lands which at that time were vested in the Crown. In a previous suit between the parties (*East London Municipality v. Colonial Government*, 3 Juta, 313), it was laid down that this Act No. 23, 1880, was a private Act, and was in the nature of a contract between the promoters on the one side and those persons whose interests were affected by it on the other. According to *Maxwell*, private Acts con-

ferring exceptional privileges on private persons or bodies for their own benefit and profit, should be construed more strictly against those persons or bodies than any other kind of enactment, and the benefit of the doubt is to be given to those who might be prejudiced by the exercise of the powers granted. But he adds this principle of strict construction is less applicable where the powers are conferred on public bodies for eventually public purposes. In this former action certain Government property was claimed by the Corporation as having passed to them under the words "unsold erven" in section 42. As it was said that there might have been unsold erven within the Municipality at the date of the passing of the Act belonging to private individuals, as to which the Corporation admitted that the Act did not apply, the Court held that the Government must not be put in a worse position by the Act than were private individuals, and that as it was not clear that the specific erven then claimed by the Municipality from Government were intended to be vested in them, the benefit of the doubt was given to the Government. But as to the Municipal pasturage lands, the Chief Justice said: "There can be no doubt that they were intended to be conveyed from the Government to the Municipality. At the time when the Act was passed the inhabitants had acquired a common right in respect to these lands, and therefore the reasonable inference is that it was the intention of the Legislature to transfer these lands to the plaintiffs. But the unsold erven stand on an entirely different footing." Whether or not this expression of opinion as to the pasturage lands was absolutely necessary for the determination of the question then before the Court, I think there can be no doubt that it correctly interpreted the section in question in regard to them. The Government indeed admit that the section bears this construction. It may be that the exigencies of our Deeds Registry require that the statutory grant of these lands should be supplemented by a formal title deed to be issued from the Surveyor-General's Department with proper diagrams attached, but any such deed would be in accordance with the provisions of the Act of Parlia-

ment. The Government does not claim that this land in question was reserved to them, on the contrary, they admit that it had passed to the Corporation, and for that reason they have given notice to expropriate it from the Municipality for railway purposes, and have since taken possession of it to that end under the special Acts which authorise the expropriation of private property. To the plaintiff's claim to be paid compensation for the said land, the Government plead that by the agreement entered into in 1875 they were entitled to expropriate this land without payment. To support the alleged agreement pleaded they rely entirely upon Captain Mills's letter. The Government have also, in their pleadings, set up a claim in reconvention for the re-transfer to them of certain lands which they had previously transferred to the Municipality in mistake and in ignorance of their rights under the agreement, in compensation for other ground previously expropriated for public purposes. No evidence, however, was offered in support of this claim in reconvention, and as it was abandoned at the trial it may be dismissed from further consideration. It certainly affords some evidence of the interpretation which the parties in the past put on the Act, but it cannot be held to be conclusive against the future exercise of any rights which the Government may have. It is open to grave doubt whether the informal interviews could be construed as forming a contract which could be enforced against the Municipality as a corporate body. The individual Commissioners expressed their views to Captain Mills as to the rights of the Municipality, and they concurred in the Government making certain reservations, but the Municipal Council as a body never entered into any formal contract with the Government. Captain Mills reported the matter to his superiors, and the Government of the day apparently considered the report showed a fair way of ending disputes, and acted accordingly. The reference in the Parliamentary resolutions to "an arrangement entered into provisionally" seems to me to have been more with the object of stating a reason for the reservation of the pasturage lands to the Municipality than as stating a consideration for

a contract between the parties. The Government at any rate retained the dominium of the pasturage lands. But that position was materially altered in 1880, when the Act transferred the dominium from the Government and vested it in the Corporation. There was then no express reservation to the Government of any rights of future expropriation without payment of compensation such as are now set up. Nor do I think it a reasonable construction of the latter portion of the 42nd section to hold that there was an implied reservation of any such rights in the stipulation that all liabilities or debts lawfully incurred, and contracts lawfully entered into by the Commissioners, acting for and on behalf of the Municipality," shall become the liabilities, debts, contracts, and engagements of the newly-created Corporation. This provision was intended, I think, merely to secure continuity of liability on existing obligations. I think it would be straining these words to make them include what the resolutions termed a provisional agreement. The arrangement may or may not have been in the mind of the parties at the time the Act was passed. Whether this was so or not, I do not see sufficient grounds for holding that this proviso gave a statutory sanction to it. The Act No. 23, 1880, appears to me to have given the Corporation a clean title to these lands. I do not think we are at liberty to read into that title any reservations which are not to be found in the Act itself. Had there been a transfer between private individuals in these terms, the same principle would have applied. If there had been any mistake or fraud, or there were any other good grounds for having the transfer amended, proceedings should be taken to have the title rectified. But as long as it stood unchallenged, it has been repeatedly decided that the Court cannot go behind its terms. To sum up the case, the position is as follows: The Government wish to expropriate for public purposes a portion of the pasture lands of the Municipality which have been transferred to and are vested in the Corporation. They can only do so under the Land Acts upon paying compensation. If they have any right to expropriate outside those Acts they must establish that right. To do this they set up an agreement which they al-

lege was entered into while these lands were still vested in them. But when these lands were subsequently transferred no reservation was made of any pre-existing rights, nor has it been shown that there was any intention to reserve any such rights. If the unreserved transfer was incorrectly made, steps should be taken to rectify the same. As long as the transfer remains unrectified the Court cannot go behind it, and the parties are bound by its terms. The terms of the transfer do not give the Government the right to expropriate this land without the payment of compensation. Under these circumstances the plaintiffs are, in my opinion, entitled to judgment on their declaration, and to absolution from the instance on the claim in reconvention, with costs of suit.

Maasdorp, J., said: The defendant in this case having practically abandoned his claim in reconvention, the only question now in issue is whether the Government in expropriating for railway purposes the land in question is or is not liable in law to pay compensation to the Municipality. To decide that point it will be necessary to ascertain the nature of the plaintiff's title to the land. It seems to me the most convenient way to deal with this case is to follow in chronological order the events as adduced in evidence which throw light upon the plaintiff's tenure of the land at various times up to the passing of the Act constituting the Municipality in 1880. Upon the threshold of this inquiry appears the proclamation of the 22nd of April, 1873, which establishes the Municipality and publishes the Municipal Regulations, the first of which provides that "The Municipality shall comprise the villages on the east and west banks of the Buffalo and the adjoining village of Panmure, together with the unoccupied pasture lands, the public commonage, with the following lines of boundary." The plaintiffs have all along attached and still attach great weight to the proclamation, contending that it in fact amounts to an assignment of the lands inside the boundaries given in the regulations as pasture lands and commonage to the Municipality. This is a position the plaintiffs have always insisted upon, and this has always been disputed by the Gov-

ernment. The object of this regulation will appear from section 7 of Ordinance 9 of 1836, which enacts that "It shall be the duty of the committee elected to frame the Municipal regulations that fix the limits of the Municipality"; and from section 2 of Ordinance 2 of 1844, which enacts that it shall be lawful for the committee to fix the limits at and by convenient boundaries. It is clearly the object of the regulations to fix the limits of Municipal jurisdiction, and not the limits of Municipal property. It cannot be taken to operate as an assignment of land by the Governor to the Municipality. There is no provision in our law for an assignment of land by the Governor in this form. In this particular case such a construction of the proclamation would lead to most awkward results. The regulation upon the face of it would assign all land inside the boundaries mentioned and outside the villages named as pasture land, whereas it is clear that these boundaries included a number of agricultural sections, acre lots, and land reserved to the Imperial Government, which cannot have been so dealt with. The defendant contends that these boundaries in addition to the lands above mentioned include Crown lands, which it was never contemplated should become Municipal property. The regulation is, in my opinion, merely descriptive. When the proclamation was made there was certainly an impression that inside the limits given there were pasturage lands and commonage belonging to the people of East London. In how far that impression was correct, and what the limits were of such commonage, remained an open question left unsettled by the proclamation. No evidence has been adduced outside the proclamation to prove the acquisition of any pasturage lands or commonage by the inhabitants of East London before the date of the proclamation. In this condition of affairs it was felt by the Government that it was only reasonable to settle the disputes then existing by assigning to the Municipality as pasturage a portion of the Crown lands in the neighbourhood of East London. This opportunity was made use of to arrange other differences which were then causing trouble. For the purpose of making the desired assignment of land to the Municipality it was

thought necessary under the provisions of Act 2 of 1860 to obtain the sanction of Parliament. Before doing so Mr. Mills was in 1875 appointed on the part of the Government to arrange affairs to the satisfaction of both parties. The result was a provisional agreement, subject to the approval of Government, upon the basis of which Parliament was to be moved for its approval of a reservation or assignment of land in favour of the Municipality. On the 30th June, 1876, Parliament passed the following resolution: "That His Excellency the Governor be requested by respectful address to reserve in favour of the Commissioners of the Municipality of East London in terms of an arrangement entered into provisionally between them and the Government all the ungranted and unappropriated land situated within the following limits." The limits are given. There can be no doubt that the provisional agreement here referred to is that set forth in Mr. Mills's letter. It is useless, in the face of what was thereafter done, to deny that the resolution of Parliament was carried into execution. This is the joint authentic record of any reservation or assignment of pasturage or commonage to the Municipality. And this, up to the passing of Act No. 23 of 1889, was the only title the Municipality had to pasturage and commonage. The rights of the Municipality were then governed by the provisions of Ordinance No. 9 of 1836. Section 45 of that Ordinance enacts that the property in lands to which the inhabitants of any municipality shall at any time have or acquire a common right, shall be vested in the Commissioners of such Municipality for the time being. Section 50 provides that nothing contained in the Act shall extend or be construed to extend to injure or impair the rights which any person may have in the matters aforesaid. It seems to me that in 1876 the land reserved to the Municipality, with the approval of Parliament as expressed in the resolution, became vested in the Commissioners, but their title was subject to the terms of the provisional agreement embodied in the resolution. One of its conditions is that all lands which may at any time be required in the judgment of the Government, founded upon competent pro-

fessional opinion, for general public purposes, such as railways, harbour works, etc., be reserved. The question now arises whether there is anything in Act 23 of 1880 which alters the tenure or title of the Commissioners so as to free it from all burdensome conditions theretofore existing. Section 42 of Act 23 of 1880 enacts that all property and servitudes as heretofore or by this Act vested in the said Commissioners or chairman of the Commissioners, and all Municipal pasturage lands after the taking effect of this Act and by virtue thereof are hereby and shall be transferred and vested in the Corporation. The pasturage lands formerly vested in the Commissioners are thus transferred from those Commissioners to the Corporation. Now it seems to me that nothing could be transferred from the Commissioners but what they held themselves. If they held a conditional title then only a conditional title could be transferred. This I think would have been the effect of the words quoted, even if nothing more was said. But this view is confirmed by what follows. It is provided that the lands are transferred or vested upon the like trusts and purposes for which the same were originally granted and transferred; and all contracts of the Commissioners had become contracts of the Corporation. I therefore come to the conclusion that the Corporation holds the pasturage lands subject to the terms of the provisional agreement set forth in Mr. Mills's letter. One of the conditions is that all lands that may at any time be required, in the judgment of the Government, founded upon competent professional opinion, for general public purposes, such as railways, harbour works, etc., be reserved. This can only mean that the Government is entitled to take such land as of right without paying any compensation to the Corporation. The land in question falls within the limits of the pasturage lands or commonage reserved to the Corporation, but is subject to the above mentioned condition in favour of the Government. I therefore come to the conclusion that the Government has the right to expropriate it for railway purposes without paying compensation. Judgment should in my opinion be given for the defendants on the claim in convention and for the defendants in reconvention on the claim in reconvention.

Solomon, J., said: Two questions arise for decision in this case: the one, a question of fact; the other, a question of law. As to the question of fact, I am satisfied that previous to the passing of Act 23, 1880, the commonage lands of the Municipality were burdened with the reservation in favour of the Government, which is set forth in the plea. The history of the matter is shortly this. It appears that soon after the establishment of the Municipality in 1873 disputes arose between the Government and the Commissioners with regard to the pasture lands of the Municipality, and after some correspondence had passed between the parties. Captain Mills was appointed by Government to interview the Commissioners, and, if possible, to arrange a settlement with regard to this and other matters. Mills met the Commissioners, discussed the subject with them, came to a provisional arrangement with them, and reported to the Government the result in the letter of September, 1875. In that letter he states that "the following arrangements were mutually agreed upon provisionally, subject to the approval of Government." Then follow the various terms of the arrangement, amongst which is the following, which is now relied upon by the Government in support of their contention, viz.: "All lands that may at any time be required in the judgment of the Government, founded on competent professional opinion, for general purposes, such as railways, etc., shall be reserved." The plaintiffs contend that this was not one of the terms of the provisional arrangement, and that it never was binding upon them. And in support of this contention two witnesses named Webb and Gately, who were members of the Municipality in 1875, and who took part in the negotiation with Mills, were called. These witnesses, who speak entirely from their recollection of what took place twenty-five years ago, swear positively that no such condition was ever discussed between the parties, and that, if it had been, it is impossible that the Commissioners could ever have agreed thereto. In my opinion, however, the recollection of these two witnesses is not to be relied upon. It is admitted by them that Mills and the Commissioners did arrive at a provisional arrangement; that

Mills took notes of what passed at the meeting; and that his letter sets forth correctly all the terms of the arrangement, with the exception of the one clause now in dispute. If then their evidence is accepted, it seems to me that we shall be bound to come to the conclusion that Mills deliberately inserted this 8th clause in his letter, knowing full well that he had no authority to do so, and that by so doing he was committing a fraud upon the Commissioners. That is a conclusion which I should be slow to come to except upon the very strongest evidence, which I do not think we have in the present case. But the matter does not rest there, for we find that in the following session of Parliament this provisional arrangement, as set forth in Mills's letter, was laid before both Houses of Parliament, and that a resolution was passed in June, 1876, requesting the Governor to reserve in favour of the Municipality of East London, in terms of an arrangement entered into provisionally between them and the Government, all the ungranted and unappropriated lands within certain limits. Webb and Gately say that the Commissioners had no knowledge of the passing of this resolution; but it is difficult not to believe that they must be mistaken about this, and that in the ordinary course the matter must have come to their knowledge. But even assuming that this was so, we have the further fact that Mills's letter itself was sent to them the following year; that its terms were never repudiated by the Commissioners; and that they accepted grants of erven and other benefits from the Government, under this same resolution and agreement, which contain the clause now objected to. I can, therefore, only come to the conclusion that the provisional agreement embodied in Mills's letter correctly sets forth the terms agreed upon between him and the Commissioners; that it was approved of by Government; that it was adopted by the resolutions of both Houses of Parliament; that it was thereafter ratified by the Commissioners; and that the commonage, which was thereby reserved for and subsequently accepted by the Municipality, is, therefore, burdened with this reservation in favour of the Government, which has already been set forth. Then, if that be so, the next question that

arises is the question of law as to the effect of section 42, Act 33, 1880. Does that section, as contended for by the plaintiffs, vest in them the common pasturage lands free from any burden and reservations not expressly set forth in the Act? Now, if one reads the whole of that section, it seems to me difficult to avoid coming to the conclusion that the real object which the Legislature had in mind was to transfer to the new Municipality constituted by the Act all the rights, and to make them subject to all the liabilities of the old Municipality. Clauses similar to this are to be found in all Acts of Parliament of this nature, though the language used may vary to some extent. At the same time, if in such clause the Legislature in express words confers upon the new Corporation rights other than those possessed by the old Corporation, the Court of course must give effect to the language used by the Legislature. But the whole tenour of the decisions on such questions is to the effect that the language relied upon must be clear and explicit, and that if there is any doubt as to the intention of the Act, it is the duty of the Court to construe the section in favour of those whose rights are challenged. It is not necessary for me to refer to many cases on this point; it is sufficient to quote the words of the Chief Justice in the case between the same parties, which was strongly relied upon by the plaintiffs, and which is reported in 3 Juta, p. 313. There the Chief Justice said: "At all events it is a very doubtful point, and I think that where any doubt arises under any private Act of Parliament the benefit of the doubt should be given against the forfeiture of existing rights or compulsory alienation of property, whether belonging to the Crown or to private individuals." That being the principle of construction to be applied in such cases as the present, let us see what the contention for the plaintiffs is. Their case, as I understand, is that when the Act was passed there was a certain reserve of Municipal pasturage lands, but that the Municipality had no title to or *dominium* in that land; that by the words of the section the *dominium* was transferred from the Government and vested in the Municipality; and that the effect of this was the same as if the Government had

granted them a clean title to these lands without any burden or reservation in their favour. With that contention I am unable to agree. If at the time of the passing of Act 23, 1880, the Commissioners had actually obtained a grant of the pasture lands, it would be exceedingly difficult to resist the conclusion that the object of section 23 was to effect a transfer of rights and liabilities, and that consequently if there was at the time a reservation upon these lands in favour of the Government, such reservation would remain in force after the passing of the Act. Does it make any difference that the lands were reserved for the Municipality instead of being granted to them? In my opinion, it does not. And in the first place I think that, if one looked carefully through all the Acts on the subject, there is much to be said in favour of the view that the words "reserve" and "grant" as applied to commonage lands are frequently used as synonymous terms; as indeed they are in the resolutions of the Houses of Parliament in this very case, where in one place the word "grant" is used and in another place the word "reserve." Moreover, the commonage lands of any municipality are often spoken of in perhaps somewhat loose language as the "property" of the Municipality, as, for instance, in section 39 of Ordinance 9, 1836, the general Municipal Ordinance, which empowers the making of regulations for the protection of common pasture lands, the property of the Municipality. Moreover the rights of enjoyment of such lands in the case of a "reserve" would be substantially the same as in the case of a "grant," and it is clear that the Government would have no right to reclaim the land reserved. It is, however, unnecessary to pursue this subject, for granted that before the passing of Act 23, 1880, the Municipality merely had a reserve, and that the effect of section 40 was to vest in them the *dominium*, I do not see that it follows that such *dominium* is vested in them free from any burden or reservation which was in existence at the time. It is argued that such resolution unless expressly mentioned in the section must be taken to have been surrendered by the Government; but that seems to me to be reversing the canon of construction to which I have already re-

ferred, that only rights expressly mentioned in the Act are forfeited, and "that the benefit of the doubt should be given against the forfeiture of existing rights whether belonging to the Crown or to private individuals." The case for the plaintiffs is put on the footing that section 40 places the Municipality in the same position as if the Governor had given them a clean transfer of these lands. But I am unable to take that view of the case. The vesting of the *dominium* in the Municipality was an act of the Legislature, not of the Governor; and in my opinion the Government is in no worse position than any private person would have been if these lands had been the property of such private person. Had that been the case, I cannot think that any rights belonging to such private person would have been forfeited, unless they were expressly mentioned in the Act. The construction of this clause of the section is by no means clear; but where an Act is capable of two constructions, I think the leaning of the Court should be against construing an Act in such a way as to produce a forfeiture of rights. Further, I do not think that in considering the effect of section 42 we should overlook the last clause of the section, which provides, amongst other things, that all contracts lawfully entered into by the Commissioners shall become contracts and engagements of the new Corporation. These words are very clear and explicit, and I do not see why effect should not be given to them here, as I hold, on the facts, there was a contract provisionally entered into between the Commissioners and the Government, thereafter submitted to and approved by the Government, ratified by resolution of Parliament, and subsequently accepted by the Commissioners. Why, then, should not this contract, upon which the reservation now relied on is based, be held to come within the words of the section? The answer, I understand, is that the pasture lands are finally dealt with and disposed of in the first part of the section, and that, therefore, contracts affecting the pasture lands were not intended to be included amongst the contracts referred to in the last part of the section. The words, however, are exceedingly wide, and it is difficult to see on

what ground the contract in question should be excluded from their operation. This, then, being my construction of the section, I do not think that the rights of the parties can be affected by the mere fact that on more than one occasion when the Government desired to expropriate portion of the pasturage lands they offered other land to the Municipality in exchange therefor. Such offers were no doubt made by mistake or in misapprehension of their rights, and it is impossible, therefore, to come to the conclusion that the rights of the Government have been lost thereby. In my opinion, therefore, the plaintiffs are not entitled to compensation for the expropriation of the land in question, and judgment should accordingly be given for the defendants.

[Plaintiff's Attorneys, Messrs. Fairbridge, Arderne and Lawton; Defendants' Attorneys, Messrs. J. and H. Reid and Nephew.]

SUPREME COURT

[Before the Hon. Mr. Justice BUCHANAN (Acting Chief Justice), the Hon. Mr. Justice MAASDORP, and the Hon. Mr. Justice SOLOMON.]

QUINE V. MARSHALL AND (1900.
OTHERS. { May 9th.

This was an action for damages sustained by plaintiff through the loss of a boat.

The declaration set forth that on or about January 25 last the plaintiff had a boat named the British Queen moored at the Central Wharf, Cape Town, and the defendants, Marshall, Bell, Daniels, and Solomons, acting in concert, wrongfully and unlawfully unloosed the boat from her moorings and went for a sail in her. It was further alleged that they were guilty of negligence in the unskillful handling of the boat or pay £50 he giving them Breakwater, where they abandoned her in a damaged condition. The plaintiff therefore claimed: (a) That they repair the boat or pay £50, he giving them

the boat; (b) the sum of £83 damages (£8 for towage and £75 for the loss of hire of the boat); (c) alternative relief; (d) costs of suit, or in the alternative, the sum of £108 damages, made up as follows: Repairing damages to boat, £25; towage, £8; loss of hire, £75.

Mr. Buchanan appeared for the plaintiff. There was a default of plea, but the defendant Marshall appeared in person, and denied the debt. He stated that he and the other defendants had entered an appearance, but there was no plea as they could not afford counsel, and two of the defendants had already left.

The Acting Chief Justice told defendant he was in default, but he could suggest questions and they would be put through the Court.

The correspondence that had taken place was read by counsel. A demand was sent to the defendants on January 31 by Mr. G. O'Reilly, attorney for the plaintiff, calling upon them to place in a thorough state of repair a certain boat called the British Queen hired by him, and left by them in a damaged condition on the Breakwater, or in default to pay £50, the value of the boat, and £4, being the charges and expense of towing the boat off the rocks, and 15s. a day as loss of profit since the boat was damaged. In reply, Messrs. Fairbridge, Arderne and Lawton wrote on behalf of the defendants, requesting that they should be allowed an inspection of the damaged boat. The plaintiff's attorney wrote stating that the British Queen was ready for inspection, and offering to delay issue of summons until the inspection. There was further correspondence without prejudice, and there was no intimation of a withdrawal from the defence.

The first witness called was the plaintiff,

William Quine, who said he had sixteen or seventeen boats between the Central Wharf and the Docks. One of his boats, the British Queen, was left properly moored at the Central Wharf on the evening of January 25, but next morning, in consequence of information received, witness went down to the Breakwater and saw the boat lying about 50 yards from the end of the Breakwater on the top of the stones. She was full of water, and one oar and the

mast was gone. Witness employed another boat and seven men and had her towed into the Docks. She was then put on the slip, and witness examined her and found the bottom all stove in, seven planks on the one side and five on the other being damaged. Witness detailed the other damage, which included the loss of rowlocks, tiller, main sheet, etc. The boat was an ordinary sailing boat kept by witness for hire. She was about 28 feet long and was a boat that could be used in tempestuous weather. She was more used than any other boat at the wharf. Witness got the names of the four defendants from Sergeant Gandy, and went to see Mr. Marshall and asked him if he had had the boat. He said yes, and witness told him he had had the boat hauled up on the slip. In the afternoon Marshall came to the Docks, and after seeing the boat told witness he would do his best to have her repaired as quickly as he possibly could, and they saw a carpenter, who said he would do it for something over £20. Afterwards witness went twice to Mr. Marshall, but nothing was done, and he gave witness no satisfaction whatsoever. Witness had a practical knowledge of boats, having been for sixteen years a boatman in Table Bay, previous to which he had been fourteen years at sea. He estimated that it would cost about £35 to put the boat in the same state as before. Fourteen days before she was taken out she had been painted and thoroughly repaired. The cost of towing the boat from the Breakwater to the Docks he put down at £4 or £5, and he estimated that he lost 15s. per day owing to the loss of the boat's services. He had received more than 15s. per day for her. Witness supposed it would take about three weeks to repair the boat, but he could not get a boatbuilder to do the work at the time owing to the pressure of other work.

In reply to questions put by the defendant Marshall, witness said he never authorised any Government official to hire boats out on his behalf. Witness had had the boat for about twelve years, and originally she had cost him about £35, or with sails and rigging complete £45 or £46.

Re-examined: Last January it would have been difficult to buy a boat of that size, and to have one built would cost from

£70 to £80, and he would have to wait a long time for the boat because all the builders were busy at present.

Edward M. Ashley said that last January he was an outdoor officer in the employ of the Customs, and was on night duty at the Central Wharf from five to ten o'clock on the evening of January 25. Four gentlemen, including Mr. Marshall, came to the Jetty and asked witness if they could have a boat. He replied that he did not think there was any boatman there. They then went on to the Jetty, and returning said to witness that they badly wanted a boat to go out to a ship. They asked if they could have witness's permission, but he told them he was not entitled to let boats, and that he was solely in charge of the Jetty for the Customs. They then asked if it was possible in any way to get a boat, and witness made the chance remark "Only by taking it." The remark was not seriously meant. They then walked down the Jetty, and witness believed he walked with them. He drew their attention to the fact that the Bay was not safe, as there was a south-easter blowing outside, and reminded them that it was not a right thing to remove a boat, as they seemed to have some intention of doing so. They selected a boat that they thought would be safe to go out in, and witness told them he would not have anything to do with it, and walked away. He did not see them get into the boat. Witness did not know the name of the boat until next day. He asked defendants if they were willing to pay if they took the boat, and they said, "Oh, yes, that will be all right." Witness asked them for their names, and they gave them, and he also asked if any of them could sail a boat, upon which one of them, Marshall he believed, told him he could manage a boat. That was all the conversation witness had with them. The next morning he saw Marshall and told him that it had been reported to him that the boat was lying on the Breakwater, and he told him to go down and see the owner and try and arrange matters. While he was still speaking the plaintiff came up and witness left. Mr. Marshall, in speaking of the experience they had had the night before, said, to use his exact words, "Thank God we struck something."

In answer to the defendant Marshall, witness said that he did not give defendants permission to take the boat. He was a Customs official, and was not supposed to have anything to do with the boats, but of course he personally knew the boatmen who were plying for hire at the Central Jetty. Witness might have made the remark that he knew the owner of the boat, and that it would be all right. Witness might have asked Marshall the next morning not to mention his name in the case because he might be charged by his superior officer with having exceeded his duty. Witness thought it would be all right if the defendants brought the boat back next morning. Witness had never received salary or commission from any boatman.

Police-Sergeant Gandy, of the Dock Police, said about eleven o'clock on the night of January 25 Mr. Bell, one of the defendants, came to witness and said they had taken a boat to go off to the Australian steamer, but on their return journey it was blowing so hard they were unable to get back to the Jetty, and the boat had drifted on to the Breakwater. Witness was on the way down to the Breakwater, when he met the other three defendants at the West Quay, and they said they had left the boat as they were unable to get it off. They did not know the name of the owner of the boat, and witness took their names and addresses, saying he would find out the owner of the boat in the morning. Mr. Marshall said he would take the whole responsibility. Witness afterwards went with some of his men to the boat and took away the sail and oar, etc., remaining in her. The boat was full of water, and he could not see the extent of the damage then, but he afterwards saw the boat on the slip. Witness knew the boat. It was greatly in demand, being the largest passenger boat at the wharf. The boat could have made the Docks easily that night with skilful handling.

By Mr. Marshall: Defendants came to witness quite openly.

John Henry Otto, a boatbuilder at Cape Town, deposed that he knew the boat British Queen, which before being taken out by defendants on January 25 was in good condition. Witness afterwards saw the boat at the slip, and estimated that it would

cost £24 19s. to repair her, but that did not include the mast, sails, or rowlocks, only the carpenter's work. She would also have had to be painted afterwards. He did not think £50 would cover the total cost of the repairs. It would have taken about two weeks to do the repairs. Witness could have at once put workmen on the job. As the boat was now, witness would not give £5 for her. Witness could not build a boat of the same class as the British Queen under £80.

The Acting Chief Justice: But then she was a very old boat, the plaintiff himself having had her for twelve years?

Witness: But then there was hardly anything left of the old boat, she was always being repaired.

After Mr. Buchanan had been heard for the plaintiff,

The defendant Marshall, addressing the Court, said he had a tender from one boat-builder to put the boat in thorough order for £14. They had, as a matter of fact, tendered £29 9s., but the plaintiff would not accept that; he wanted them to make a new boat of it.

Buchanan, A.C.J., in giving judgment, said: It appears that the plaintiff was the owner of a boat which was moored at the Jetty in Table Bay, and that on the evening of January 25 the defendants took this boat for the purpose of going to a ship lying in the anchorage. In consequence of the south-easter blowing they were not able to return to the Jetty, and the boat came upon the Breakwater, where it was considerably damaged and left by the defendants. At first sight it would appear that the defendants had acted in a very unjustifiable way in taking the boat at all without the owner's consent, but the evidence of the Customs officer on duty at the Jetty shows that he said that it would be all right if they took the boat and paid for it. The Court would not, under these circumstances, give vindictive damages, which it might otherwise have done had the boat been taken wrongfully and maliciously. At the same time, the defendants took this boat without permission of the owner, without being able to manage it properly, and without a skilled boatman; and as they were unable to bring her safely back to her moorings, they were answerable for all the consequences. It was useless to say it was the

act of God when the sergeant at the Docks said that properly managed the boat could have been brought safely into the Docks. The plaintiff alleges that the amount of damage done to the boat is £25, and I think that amount is fully proved, and he is therefore entitled to the £25 claimed in the declaration. Secondly he claims £8. expenses of towing the boat into the dock. He has not kept any correct account of his expenditure under this head. He says it cost him about £4 or £5, and we are inclined to give him £5 for that expense. Thirdly, the plaintiff claims for the loss of profit through his being unable to hire the boat out, and estimates his loss at 15s. per day. The question for the Court is to say what under the circumstances would be a fair amount to allow for the use of the boat. Apparently the repairs could have been completed in fourteen days if they had set to work at once, but we cannot be too rigid in assessing the damage. We have set down this item at £25, so that judgment will be for £55 and costs.

Maasdorp and Solomon, J.J. concurred.

[Plaintiff's Attorney, Mr. J. G. O'Reilly.]

GOLDMAN V. THE NATIONAL } 1900.
BANK OF THE SOUTH AFRICAN REPUBLIC. } May 9th.

Appeal—Joint-stock bank—Shareholders—Public enemy—Imperial licence—Foreign hostile concession—Trading with the enemy.

The mere fact that one shareholder in a joint stock bank is a public enemy would not of itself make the bank a hostile company.

Where a bank, holding a concession from the Government of an enemy's country, but licensed by both the Imperial and Colonial authorities to carry on business in the Colony, sues a debtor, it is on ground of defence that dealings with the bank are prohibited as constituting trading with the enemy.

This was an appeal from a decision of the Resident Magistrate of Cape Town in an

action in which the respondent, the National Bank of the South African Republic, sued the appellant Goldman for the sum of £53 lbs. 6d. on a promissory note made by the appellant in favour of one Cohen and endorsed by Cohen, and the said bank was the legal holder of the said note. The defendant's plea stated that he had been estopped from trading in any way with the plaintiffs, whom he described as domiciled in the South African Republic, with which Republic Her Majesty's Britannic Government was now at war, and by virtue of a proclamation by the Governor issued in the month of October, 1899, subjects of Her Majesty were prohibited from dealing with the Queen's enemies or persons subject to them. The Court gave judgment in favour of the plaintiffs for the amount claimed with costs. Against this the defendant appealed.

Mr. Graham, Q.C., appeared for the appellants.

Mr. Innes, Q.C., appeared for the respondent.

In the evidence given before the Magistrate the manager of the bank here stated that the title National Bank of the South African Republic was merely descriptive, the said bank having several branches in Cape Colony and Natal, and one in London, and it was not the case that the Transvaal Government was the largest shareholder. The bank was licensed to carry on business in the Cape Colony. Letters from the Military Secretary with regard to the bank carrying on business under certain regulations and in which a special permission was mentioned, were put in.

In his reasons for his judgment, the Magistrate said the bank carried on business as an ordinary joint stock company, or banking corporation, and although the South African Republic was a shareholder in the bank, the bank was not a State bank, or the property of the South African Republic. It could not therefore be held that the defendant, in paying the promissory note, would be having dealings with the Queen's enemies.

Mr. Graham, Q.C.: We must look at the concession from the South African Republic under which the bank carried on business. Even if the Magistrate was right in holding that this was not a State bank, still it was formed under a concession which

practically bound the bank to the Government of that Republic. The bank was undoubtedly domiciled in the Transvaal Republic. As to the effect of the concession, see *Hall's International Law*, 1884 edition, page 461. The privileges granted in the concession to this bank are very exceptional. The Transvaal holds a very large number of shares. Then, although a licence to trade has been issued by the Government of this colony, there is nothing to show that the Imperial authorities had authorised such trading. The licence should have been granted by the Imperial authorities, and not by the Colonial Government.

[Solomon, J.: Is there not a letter from the Military Secretary recognising the right of the bank to carry on operations?]

That recognises that the bank is carrying on operations.

[Solomon, J.: We need not trouble ourselves about the licence if there was a permission to trade from the Imperial authorities.]

The special permission mentioned has not been put in. It is extraordinary if this bank had a special permission that it was not put in. My client has no desire to avoid payment of the note, but desires to have a judgment of the Supreme Court on the matter.

[Buchanan, A.C.J.: There is no doubt that trading can be authorised by Her Majesty?]

There is no doubt about that.

Without calling upon Mr. Innes for argument, the Court dismissed the appeal.

The Acting Chief Justice, in giving judgment, said: It is not necessary to hear Mr. Innes. Here was a transaction between the defendant and the Cape Town branch of the National Bank of the South African Republic, and defendant professes to be under the apprehension that if he pays his obligation to the bank he will be rendering himself liable to penalties for trading with the enemy. This bank is a joint stock bank, having a special concession from the Transvaal Government, and in that way perhaps has a more hostile character than other joint stock institutions. The Transvaal Government, as a Government, are shareholders in this joint stock company, but the mere fact that one shareholder is an enemy would not in itself make a joint stock company a hostile company. However, it is not necessary to discuss this question further. The Colonial Government has

granted this company a licence to carry on their business in Cape Town, and, in addition to this, on January 10 last special authority was given by the Imperial authorities to the bank to carry on its business in the Colony, subject to certain regulations. The only evidence given in the case is that of the manager of the bank, who said that these regulations had been strictly adhered to. The Magistrate, after hearing the case, gave judgment for the plaintiff on the promissory note, which had been discounted in Cape Town. As far as the evidence goes, the judgment was sound; and the defendant need not be alarmed at any consequences arising from his paying his debt, a licence to carry on business having been given, both by the Colonial and Imperial authorities. The appeal must be dismissed with costs.

[Appellant's Attorneys, Messrs. Innes and Hutton; Respondents' Attorneys, Messrs. Van Zyl and Buissonne.]

LAWRENCE V. BOMAIN AND { 1900.
GRONITZSKI, { May 9th.

Pleading—Exception—Denial and estoppel—Servitude—Tender.

To a declaration founding on a servitude of a right to have certain lights free and unobstructed, plea was filed denying the validity of the servitude, alleging an estoppel, and making a tender of another servitude in place of the one claimed in the declaration.

Held, on exception taken, inconsistent and bad pleading.

This matter came up for argument on exceptions taken to defendants' plea.

The plaintiff's declaration was as follows:

1. The parties reside in Cape Town; the plaintiff is the registered owner of certain landed property situated in Long-street, Cape Town, and the defendants are the registered owners of certain property situated in Long-street, adjoining the aforesaid property of the plaintiff.

2. In 1871 one Johannes Henricus Bam was the registered owner of both the aforesaid properties, and in the month of July in the said year the said Bam sold and

transferred the said property now owned by the defendants subject to the following servitude, which was duly and legally registered against the title deed of the defendants, to wit: "The windows in the stable opening into the yard of the property sold to remain unobstructed, the doorway to be closed up by Bam at his expense, the fan-light over the door to remain unobstructed, Bam and his successors to have the right once a year to enter the yard or other portion of the property sold to repair his adjoining property, and likewise to enter for repair upon unforeseen circumstances." The said stables in the said servitude mentioned were situated upon the other property owned by the said J. H. Bam.

3. In 1874 the said Bam sold and transferred the said other property, upon which the said stables in the aforesaid servitude mentioned were and are situated, to the plaintiff's predecessor in title, and the said deed of transfer specially refers to the said servitude aforementioned.

4. In or about the month of December, 1899, the defendants wrongfully and unlawfully built a wall right up against the wall of the stables aforementioned belonging to the plaintiff, and completely and entirely obstructed the said windows in the said stables in the said servitude aforementioned, and have prevented the plaintiff from entering the yard of other property sold to repair his property in terms of the said servitude.

5. The plaintiff was and is entitled to have the said windows remain unobstructed and to enter the said yard as aforesaid, but the defendants refuse to remove the said obstruction, though requested to do so.

6. By reason of the said wrongful and unlawful obstruction by the defendants the plaintiff has suffered damage to the extent of £100.

The plaintiff claims: (a) An order compelling the defendants to remove the said obstruction and to allow the said windows to remain unobstructed; (b) the sum of £100 as and for damages for the said wrongful and unlawful obstruction; (c) alternative relief; (d) costs of suit.

The defendants' plea was as follows:

1. The defendants admit paragraph 1, save that they are not registered owners of

the property of which they are alleged to be; one Anthony Bell is the registered owner thereof, but they admit that they are in occupation thereof, and have purchased the property from the said Bell.

2. They admit paragraph 2, save that they crave leave to refer to the whole of the document quoted for the full terms of the said servitude; nor do they admit that the said document constituted a binding servitude upon the purchasers from the said Bell of the property now owned by them (the defendants).

3. They admit paragraph 3, but save as is hereinafter set forth, deny paragraphs 4, 5, and 6.

4. In or about the commencement of the year 1899, the plaintiffs pulled down the said stables and erected a store upon the site thereof, and placed three large plate glass windows in size about 10 feet by 3 feet 6 inches in the wall which he erected upon the former site of the stable wall existing in the year 1874, and adjoining the property occupied by the defendants; the said windows were of much larger size than the lights previously existing in the said stable wall, and introduced far more light than at the date of the said sale by Bam in the year 1874 used to enter the stable through the said wall.

5. The defendants say that whatever may be the effect of the said servitude the plaintiff can under no circumstances claim more light than his predecessors in title enjoyed in 1874 at the date of the sale by Bam, through the said stable wall adjoining the premises in the defendants' occupation.

6. They admit that in or about December, 1899, they erected a store upon the premises purchased by them from the said Bell, and that they have built a wall adjoining plaintiff's wall and obstructing the three large windows placed therein by the plaintiff, but they say that the only lights existing in the year 1874 in the portion of the plaintiff's wall immediately adjoining the wall so built by the defendants was a small window faulight or "stable grill," in size 3 feet 6 inches by 2 feet 6 inches, situate above the old doorway; the defendants in building their wall acted under the *bona fide* belief that they had a right to act as they did.

7. The plaintiff was fully aware of the defendants' operations, and did not interfere with the same; the defendants have now incurred great expense in completing the said portion of the store which they have erected; after such completion the plaintiff applied for an interdict against the defendants, but this Honourable Court refused the said interdict, and directed the plaintiff to proceed by action.

8. In order to avoid litigation and to settle the dispute between the parties the defendants have offered to allow the plaintiff to place a window in a wall between his and their property, at the place where the said wall abuts upon their yard as now constructed; the said window to be of such dimensions as plaintiff may desire, and to remain unobstructed.

9. The defendants have offered in addition to remove or set back a certain other wall of the said premises erected by them, being on the south side and forming the back portion of the said premises, to a distance of 5 feet, so as to enable plaintiff to receive free and unobstructed light from certain windows placed by plaintiff upon a wall owned by him, adjoining that purchased by defendants, but which the plaintiffs have obstructed as they are entitled to do.

10. The defendants are further willing to do all things necessary to protect plaintiff in the continued and unobstructed enjoyment of the said lights.

11. The said lights thus offered far exceed those enjoyed at the date of the sale in 1874 by plaintiff's predecessor in title, in respect of the stable wall adjoining the premises now occupied by the defendants.

12. The defendants repeat the said offer in this plea with taxed costs to date.

Wherefore, subject to the above tender, they pray that plaintiff's claim may be dismissed with costs.

To the defendants' plea an exception was taken on the ground that it was vague and embarrassing and bad in law.

Mr. McGregor appeared for the plaintiffs.

Mr. Searle, Q.C. (with whom was Mr. Graham), appeared for the defendants.

Mr. McGregor: We want the plea set aside as being vague, embarrassing, and bad in law. In pleading a defendant cannot deny the plaintiff's claim, and in the alterna-

tive make a tender: see *Van der Spuy v. Colonial Government* (14 S.C.R., 410), *Jones v. Borrudale* (1875, Buch., p. 38), *Durham v. Peiser & Co.* (Buch., 1878, p. 8). The last case is very much in point here. In paragraph 2 of the plea the servitude against the title deed is admitted, but they say it is not binding on the purchasers. By this they would say that the servitude is a personal one. We are out of court if the plea raised in section 2 is good. But in section 8 they make certain offers. They first deny our right, and then admit it. This cannot stand. Again, in section 6 they plead only as to two of the windows, but do not say anything as to the third window. There is here such embarrassment and lack of clearness in expression as would justify the Court in ordering the plea to be expunged. In section 7 they say we know of their operations. Does this mean that we have lain by, or is it mere surplusage? It leaves us in doubt as to whether we must meet evidence that we are estopped. We must know for certain whether they set up section 7 as a bar to our action.

Mr. Searle, Q.C.: The cases quoted do not apply. Our offer is made to avoid litigation.

[Buchanan, A.C.J.: Do you admit the servitude or not? You must admit or deny.]

With great submission, we need not. We can say: "Never mind the servitude; we will settle the dispute amicably." Our real defence lays in section 7.

[Buchanan, A.C.J.: Rule of Court 330 requires that you must admit or deny, or confess, and avoid the allegations in plaintiff's declaration.]

When this matter was before the Court the Chief Justice suggested a settlement.

[Solomon, J.: Your only plea is a tender?]

Yes. We make a tender of one servitude in substitution for another. We don't want to go into the question of the servitude.

[Solomon, J.: But while the question of the servitude remains on the pleadings it is open to argument.]

We do not say that we will tender only if the Court holds the servitude binding on us. The tender is not conditional. This distinguishes this case from those quoted. Section 6 is a good defence to plaintiff's claim.

[Maasdorp, J.: If an allegation is not denied it must be taken to be admitted: Rule 330.]

We do not want to raise the question of the servitude.

[Solomon, J.: If section 7 is a good defence, why do you go further and burden your plea with irrelevant matter?]

See *Krynaur v. Greef*, where there was a claim for building on land; the plea admitted building on the land, but offered compensation. They can only except to section 2. We do not admit an absolute right in plaintiff. It is clear from the plea that the servitude will not be argued upon. If not, we give that assurance now.

The Acting Chief Justice said: This is an argument on an exception taken to the defendants' plea. The plaintiff's declaration alleges that a certain servitude of the right to have windows overlooking the adjoining property has been registered against that property, which is now owned by the defendants, and goes on to allege that in defiance of this servitude the defendants have obstructed the lights which had been secured to plaintiff's property. This is the material and fundamental allegation in the declaration. The rules of Court require that in a plea every allegation of fact contained in the declaration must be dealt with specifically. The defendant in his plea must admit, deny, or confess, and avoid all the material facts alleged in the declaration. As to the material fact in this case, the defendants admit the whole of the second paragraph of the declaration, but do not admit that the agreement registered constituted a servitude binding upon them. If the plea had stopped here it might have been held that it was a good and sufficient answer, but the defendants go on and set up an estoppel, and also plead a tender. By all the rules these pleadings are bad. The denial of a servitude and an allegation that it exists, but that the plaintiff cannot rely on it, is inconsistent. Again, there cannot be a denial coupled with a tender. Then defendants' offer to substitute one servitude for another is no legal defence, for we cannot compel a person who has one right to take another right in lieu of it without an Act of Parliament. The exceptions must therefore be sustained on all the grounds, but of course the defendants will be allowed to amend their plea, and seven days will be given for that purpose.

Their lordships concurred.

[Plaintiff's Attorneys, Messrs. Findlay and Tait; Defendants' Attorneys, Messrs. Fairbridge, Arderne and Lawton.]

DE JAGER V. VORSTER. { 1900.
May 9th.

Appeal — Promissory note — Postponement — Costs — Dismissal.

Plaintiff sued on a promissory note, and defendant set up a defence which required plaintiff's viva voce evidence to meet. Plaintiff being absent, his agent applied for a postponement. This application the Magistrate considered a reasonable one, but would only grant it on condition plaintiff agreed to pay all costs of suit to date. Plaintiffs' agent not consenting, the Magistrate dismissed the case with costs.

On appeal, case remitted to the Magistrate for further hearing and determination.

This was an appeal from a decision of the Resident Magistrate of Philip's Town in an action in which the appellant sued the respondent for £45 on a promissory note dated April 13, 1898, signed by the defendant, for value received, payable on demand.

The plea alleged that there was no consideration for the note. The Magistrate had dismissed the claim with costs. The defendant gave evidence in support of the plea, and the plaintiff's attorney had then asked for a postponement in order to give the plaintiff an opportunity of rebutting the plea. The Magistrate refused this unless the plaintiff agreed to pay the costs to date, but to this the appellant objected; the case was then dismissed by the Magistrate with costs. The transaction concerned the purchase of some shares in the Roodedam diamond-mining speculation at Hope Town, and the defendant alleged that he had not received the scrip, and that the mine had proved to be a complete fraud.

Mr. Searle, Q.C., appeared for the appellant; Mr. Buchanan for the respondent.

Mr. Searle, Q.C.: Appeal is on the ground that the Magistrate ought to have allowed plaintiff to prove his case. Plaintiff applied for a postponement, but the Magistrate refused, and dismissed the claim. Plaintiff could not be there on the day of trial. Plaintiff did not know till the day of trial what defence was to be set up. The case

should be remitted to the Magistrate, who should also be allowed to decide the question of costs in the case. The Magistrate did not exercise reasonable discretion.

[Buchanan, A.C.J.: What objection is there to the case being remitted, Mr. Buchanan?]

Mr. Buchanan: The matter should not have been brought up by way of appeal, but by summons on review. *Gubb and Fraser v. Greenshields* (13 S.C.R., p. 466.) Assuming, however, that appeal is the right course, the plaintiff should have been prepared to proceed with his case on the day of trial. See sections 31 and 32, Schedule B, of Act 20 of 1856. It was not shown to the Magistrate that there was a justifiable reason for plaintiff's absence. The Magistrate had discretion, and was right in not granting a postponement. The Magistrate offered to grant postponement, provided plaintiff paid costs to date.

Mr. Searle, in reply: Postponements are always granted in the Magistrate's Court when a defence is raised against a claim on a liquid document. *Gubb v. Greenshields* does not apply.

[Buchanan, A.C.J.: Dismissal under section 31 of Schedule B of Act 20, 1856, is not a final judgment.]

It seems that the Magistrate had decided the case on the evidence.

[Buchanan, A.C.J.: Do you say that the Magistrate's decision was a final judgment, Mr. Buchanan?]

Mr. Buchanan: Yes, certainly I do.

[Solomon, J.: But why did the Magistrate depart from the ordinary words "judgment for defendant," and say "claim is dismissed"?]

The parties took this for a final judgment. Plaintiff could not have gone on after the judgment of the Magistrate. The Court should remit the case to the Magistrate.

[Buchanan, A.C.J.: Not if we hold the judgment to have been absolution from the instance.]

[Solomon, J.: Must we not either reverse or confirm the judgment?]

No. The Court can reverse, alter, confirm, or even remit if there is not sufficient evidence.

[Buchanan, A.C.J.: Then we must go into the merits.]

That is so. But the Magistrate should have exercised discretion.

[Solomon, J.: Are you not appealing against the refusal to grant postponement?]

There was a judgment against us, and we appeal against that. On the merits we are entitled to a reversal of an adverse judgment. The Magistrate's discretion was unreasonably exercised. He might have ordered plaintiff to pay costs of the day, but not the whole costs of the action, if he postponed. Both parties hold there was a final judgment. Appeal is the only procedure open to us. We could not bring the case under review.

Buchanan, A.C.J., said that the plaintiff sued on a promissory note in a Magistrate's Court, and on the day of hearing the defendant set up the plea of want of consideration. After the defendant had given evidence, the plaintiff, who was himself absent, applied through his agent for postponement of the case in order to enable him to give his evidence. The Magistrate intimated that he was prepared to grant a postponement if the plaintiff would pay the costs. It is evident that the Magistrate thought a postponement of the case reasonable, and he imposed a condition that is not a usual condition to impose in such a case. Having once come to the conclusion that the postponement was reasonable, on the defendant refusing to pay all costs to date, he refused an application for postponement, and gave a judgment, which both parties considered to be final judgment. Now I think that in terms it was not a final judgment. By Rule 36 of the Magistrates' Court Act a case dismissed does not mean a final judgment. But both parties here contend that it was a final judgment, and looking at the Magistrate's reason, it is evident that he intended it to be a final judgment. If we were to go into the merits of the case, I think we would require further evidence before deciding upon them. Under the circumstances, therefore, and considering the large powers given to the Court, the Court will, under the 33rd section, remit this case to the Magistrate for further hearing and determination, but I think the plaintiff should pay the costs of the further hearing, the costs of the appeal to abide the result of the further hearing, as also the costs of the past hearing.

[Appellant's Attorney, Mr. Gus Trollip; Respondent's Attorney, Mr. P. de Villiers.]

WORDON AND PEGRAM VS. } 1900.
ARISTON MINERAL WATER CO. } May 3th.
Trade-mark—Infringement—*Bona*

fides—Interdict.

This was an application for an interdict restraining the respondent from making use of a certain trade-mark.

The applicant was one Thomas Henry Pegram, and the respondent George Alexander Perram, of the Ariston Mineral Water Company, Kenilworth. The notice served on the respondent was to the effect that application would be made to the Supreme Court on May 3, when respondent would be required to show cause why he should not be restrained from using the word "Club" as a trade-mark in connection with the sale of his aerated soda waters, and further to show cause why he should not be made to destroy all labels, invoices, etc., bearing that trade-mark, and to pay applicant's costs.

The application was supported by the affidavit of William Henry Christian, who stated that on or about April 9 he ordered from respondent a dozen bottles of "Club" soda, and on April 20 one dozen bottles of sodawater stated to be "Club" soda were received by him from respondent.

There was a further affidavit by Thomas Henry Pegram, the registered proprietor in the Colony of the trade-mark "Club" sodawater, which set forth, that, noticing an advertisement in the "Cape Argus" and other papers in the following terms, "Club Soda is our specialty. Guaranteed equal to Schweppe's. Try it. The Ariston Mineral Water Company, Kenilworth," deponent caused a letter to be sent to the respondent informing him that the word "Club" was not to be used by him as applicable to sodawater, it being the registered trade-mark owned by applicant. To this a reply was received through respondent's solicitors intimating that respondent was not aware that the word "Club" had been registered by applicant, having regarded it as a universal term denoting sodawater of high quality. He was not prepared to publish any advertisement in the local papers to the effect that he had not been within his rights in selling sodawater bearing the "Club" mark, but he would agree to withdraw the sale of the "Club" soda, and to discontinue the use of the trade-mark "Club" in future.

The respondent's affidavit set forth that the statement made by Mr. Christian, that the dozen bottles of sodawater sold and delivered to him had been so delivered as "Club" sodawater, was not correct. Further, the statement made by applicant that respondent had continued to sell "Club" soda after learning that applicant was the registered proprietor of that trade-mark was also incorrect. As soon as respondent ascertained that the applicant had registered the word "Club" respondent

substituted the word "Corked" sodawater. Respondent had had no intention of infringing applicant's rights, and respectfully submitted that his unintentional use of the word "Club" was not an infringement of applicant's rights. The bottles supplied to Mr. Christian were not labelled "Club" soda, but owing to inadvertence an old invoice had been used, containing the word "Club." This had been a pure oversight, and respondent had written through his solicitors to applicant offering to pay his taxed costs to date. In reply to that a letter had been received from applicant's solicitors informing him that they preferred to rely upon the judgment of the Supreme Court rather than upon the respondent's good faith.

Mr. Innes, Q.C., appeared for the applicant; Mr. Searle, Q.C., for the respondent.

Mr. Innes, Q.C.: We want an interdict. We will not be satisfied with respondent's undertaking not to make further use. Since April 4, when they undertook not to use the word "Club," they have broken their word, excusing the use as accidental.

[Solomon, J.: If we find they acted *bona fide*, must we make an order?]

Yes! They must not be negligent. If they are acting *bona fide*, why do they object to an interdict? We want a formal order.

Mr. Searle, Q.C.: The use after April 4 was accidental. The applicants should be content with our undertaking. There must be wilful infringement before an interdict can be granted. The Court must find *mala fides*.

Mr. Innes, Q.C., in reply: When respondent got the order (after his undertaking not to make further use of the word "Club") to deliver "Club" soda, he should have refused to sell "Club" soda and offered "Corked" soda.

Buchanan, A.C.J., said: This is an application for an interdict restraining respondent from using the word "Club" in reference to a particular kind of sodawater sold by him. It appears that the applicant had registered the word "Club" as a trade-mark, indicating a certain quality of sodawater which he manufactured. Respondent, in ignorance of this registration, also advertised his sodawater as "Club sodawater, equal to Schweppe's." When it was brought to respondent's notice that a trade-mark had been registered, he immediately discontinued the use of this description, and gave notice to applicant that he would not continue to sell sodawater as "Club" soda. He also undertook to destroy all his labels and invoice books. Unfortunately on April

19 an order was sent respondent for one dozen of "Club" soda, and he supplied a dozen of sodawater not marked "Club" soda, but equal in quality to what was known under that title. He explained that this had been done by mistake, and again disclaimed all intention to sell his soda as "Club" sodawater. He wrote to the applicant that the bottles supplied on April 19 were not labelled "Club" soda, and that the use of the word "Club" on the invoice was a pure oversight. Now it is not usual to grant an interdict unless there has been *mala fides* or unless there has been some misconduct or intention in future to continue the use of a registered trade-mark. In this case I think there is perfect *bona fides* on the part of the respondent, and no desire to infringe or interfere with his rights. I think, therefore, it is unnecessary in this case to grant any interdict. There is no intention to continue the use of the word, and there is perfect *bona fides*. The application will be refused with costs, but respondent must pay costs up to the date of his tender on May 1. After that date the applicant will pay costs, as there was no necessity to come into Court.

[Applicant's Attorneys, Messrs. Fairbridge, Arderne and Lawton; Respondents' Attorneys, Messrs. J. & H. Reid and Nephew.]

SUPREME COURT

[Before the Hon. Mr. Justice Buchanan (Acting Chief Justice), the Hon. Mr. Justice Maasdorp, and the Hon. Mr. Justice Solomon.]

ADMISSION. { 1900.
May 10th.

On the application of Mr. Burton, Jan Johan Michau was admitted as a conveyancer, and the oath administered.

PROVISIONAL ROLL.

WEAKLEY V. DE JONG.

Mr. Innes, Q.C., moved for provisional sentence for £750 on a promissory note dated September 30, 1899, and made payable at the Standard Bank, Colesberg, on January 1 last.

Mr. Burton appeared on behalf of the defendant, and read an affidavit made by the defendant, in which he stated that on or about June 21 last year, he purchased from the plaintiff certain erven with buildings thereon at Colesberg, with the printing press, type, etc., therein, and the goodwill of the business, including the newspaper, the "Colesberg Advertiser," on the terms and conditions set forth in the deed of sale annexed, transfer of the said erven to be given on the payment of the last instalment. On or about September 30 last year deponent was at Colesberg, and it was agreed between the plaintiff and himself that she should carry on the business in her own name as before until January 1 of the present year, the plaintiff undertaking on that date to hand over and deliver to the defendant the property, etc., he giving the promissory note now sued on. On or about November 15 last year a military force of the Orange Free State occupied the district of Colesberg, and remained there until the end of February of the present year, and during that time it was impossible for deponent to communicate with the plaintiff; that immediately after the said occupation the publication of the "Colesberg Advertiser," which until then was a weekly newspaper, ceased entirely, and did not commence again until April 6, by which reason the goodwill became absolutely worthless. Defendant therefore claimed that as he had not been placed in possession of the premises by the plaintiff, and had been put to considerable loss and damage, and as he had received no value or consideration for the said promissory note, he was not liable on it until the plaintiff carried out her undertaking.

In an answering affidavit the plaintiff stated that the defendant asked her to accept the promissory note now sued upon, and to manage the business for him until the end of the year; that as soon as the Boers had been compelled to withdraw from Colesberg the paper was again started. No delivery had been tendered, as the property now was, and had been, at the disposal of defendant on his paying the note, and upon that being done, she was willing to do everything necessary to give transfer and possession.

Mr. Burton: There is a conflict of testimony about the agreements; especially with regard to the second agreement made in September. If defendant's statement is correct, then plaintiff has made no tender of delivery,

and therefore she is not entitled to sue until delivery has been tendered. The note was signed subject to the agreement of September. The conflict is large enough to induce the Court to refuse provisional sentence.

Mr. Innes, Q.C., was not called upon.

Buchanan, A.C.J., in giving judgment, said: The parties to this case entered into an agreement for the sale and purchase of certain landed property, certain shop, printing office, together with printing press, type, etc., and, it is alleged, the goodwill of a certain business which was being carried on by the plaintiff in the town of Colesberg. This agreement was entered into on June 21, 1899, and in pursuance thereof the defendant passed to plaintiff a promissory note falling due on January 1 last. This note the defendant has not paid, and he now objects to do so on two grounds. The first ground has been withdrawn by counsel. The second objection is founded upon the fact that the defendant has not taken possession of the property, and that there has been no tender to deliver the property to him. In answer to this we have the affidavit of the plaintiff, in which it is distinctly stated that after the agreement was entered into the defendant, not being then able to take possession of the property, requested that plaintiff should continue to manage the business for him. As to the tender of delivery, the plaintiff's affidavit says distinctly that she was quite ready and willing to hand over the property at any time after the said 1st of January, when the note became due, but there was no further tender of delivery, and no payment of the note, inasmuch as Colesberg was at that date in the occupation of the enemy. At any rate nothing was done on either side. The defendant claims the right to reduce the purchase price in consequence of the depreciation of the goodwill. It is not desirable now to discuss the question whether or not that can be done. If the defendant has a good case on that ground he can go into the principal case. Here, however, there is a valid and liquid document, which represents the first instalment of the purchase price, and no sufficient reason has been shown why provisional sentence should not be granted as prayed.

Their lordships concurred.

[Plaintiff's Attorney, Mr. Gus Trollip; Defendant's Attorney, Mr. J. J. Michau.]

ROSMAN, POWIS AND CO. V. C. W. CORLETT.

Mr. McGregor, for the plaintiffs, asked for the discharge of the provisional order of sequestration of the defendant's estate.

Granted.

CUTHBERT AND CO. AND OTHERS V. LULHAM AND CO..

Mr. Buchanan moved for the final adjudication of defendant's estate as insolvent.

Defendant appeared and admitted the act of insolvency, viz., failure to pay a judgment of the Court.

Order granted as prayed.

PURCELL V. WEBSTER AND OTHERS.

Mr. Heydenrych moved for provisional judgment for the sum of £195, being interest at the rate of 6 per cent. on a mortgage bond for £3,240.

Provisional judgment granted as prayed.

TRUSTEES OF THE CHURCH OF SOUTH AFRICA V. WEBSTER AND OTHERS.

Mr. Heydenrych moved for provisional sentence for the sum of £18, being interest at the rate of 6 per cent. for six months on a mortgage bond for £600.

Provisional sentence granted as prayed.

PAUL V. J. P. COETZEE.

Mr. P. S. Jones moved for provisional sentence for £100 upon a mortgage bond with interest at the rate of 6 per cent. for portion of the time, and at the rate of 8 per cent. for the remainder of the time, as per agreement.

Provisional sentence granted as prayed.

FREEMAN AND CO. V. HENDRICKS.

Mr. Maskew moved for provisional sentence for £52 11s. 9d. due on a certain promissory note, with interest reckoned from April 4, 1900.

Provisional sentence granted as prayed.

MACLEOD V. H. J. HORNE.

Mr. Closs moved for provisional sentence for £102, due on a promissory note.

Provisional sentence granted as prayed.

ILLIQUID ROLL.

OOSTHUISEN V. A. A. OOSTHUISEN.

Mr. McGregor moved for judgment, under Rule 32nd, for the sum of £500 9s. 2d., being amount due for certain goods sold and delivered.

Judgment granted as prayed.

IN THE MATTER OF THE FRESH FISH AND FRUIT SUPPLY COMPANY.

Mr. Burton presented the further report of the liquidator of the above company for confirmation.

The Court confirmed the report, and awarded the liquidator as remuneration the small balance remaining.

GENERAL MOTIONS.

IN THE ESTATE OF THE LATE JOHANNES ANDRIES NORTJE.

Mr. Nathan moved on behalf of the widow of the late J. A. Nortje for leave to mortgage the landed property in the estate, consisting of a certain share in a farm, for the sum of £600. The movable property in the estate was insufficient to pay off all the deceased's debts, there being a deficiency of £552 remaining, and petitioner wished to remain on the farm, which she had managed for some time past, so as to maintain and educate her orphan children.

The Master's report being favourable, the application was granted.

SOUTH AFRICAN ASSOCIATION V. KING.

Mr. Maskew applied on a notice which called upon the respondent to show cause why a certain inheritance accruing to respondent should not be attached to satisfy a judgment of the Supreme Court obtained on March 12. The acknowledgment of debt on which the judgment had been obtained was secured by the inheritance which had been pledged as security for the payment of it. Personal service of the notice had been made. There was no appearance for the respondent. An order declaring the inheritance executable was granted.

IN THE MATTER OF THE MINORS MULLER.

Mr. M. Bisset moved for the appointment of a curator to represent the above minors in the division of certain property in which they were interested. The Resident Magistrate of Oudtshoorn, where the property is situated, was suggested as curator.

The matter had not been before the Master for report.

Counsel asked that the Court should appoint the Magistrate, who had been recommended by the Master, and that the transfer, when effected, should be submitted to the Master for his approval. See *In re Camphor* (5 Juta, 75).

Granted.

AFRICAN BANKING CORPORATION V.
SEARLE.

Mr. Maskew moved for judgment for £2,969 12s., being the amount of the defendant's overdrawn account with the African Banking Corporation, with interest thereon at the rate of 8 per cent. per annum from October 31, 1899, with costs of suit. Defendant had been summoned by edictal citation and citation; interdict and notice of trial were served on defendant's wife at his hotel in London, she saying that she would see that defendant got them. Defendant had failed to enter an appearance, and had been duly barred.

Judgment granted as prayed.

IN RE THE PRIZE S.S. "MASHONA."

Mr. Searle moved for an order declaring certain 1,000 cases of lubricating oil consigned to the Netherlands South African Railway Company to be lawful prize.

Mr. Molteno appeared for the respondents, and read an affidavit from the Consul-General for the Netherlands in Cape Town, asking for time to be granted within which the company might file a claim, as they were unaware of the order granted on March 20 last, and had only received notice of the present application on the 3rd inst.

Mr. Searle, who appeared for the captors, said they did not wish to keep out any real claim, but they thought there had been time enough.

The Court ordered the claim to be filed before May 25, for hearing on May 31.

Mr. Searle made a formal application for leave to sell by private treaty certain goods on account of which no claim had been made. He explained that the Court had ordered these goods to be sold, and the Marshal understood that to mean a sale by public auction, while affidavits were put in to show that it would be more advantageous to dispose of these goods by private treaty.

The application was granted.

[Applicants' Attorneys, Messrs. Fairbridge, Arderne and Lawton; Respondents' Attorneys, Messrs. Van Zyl and Buissine.]

VAN HEERDE V. CAPE OF GOOD HOPE
PERMANENT LAND BUILDING AND INVESTMENT SOCIETY, IN LIQUIDATION.

Building Society—Creditor.

Upon proof that V. who had previously been a shareholder of a building society, now in liquidation, had, before the liquidation,

had the amount standing to his credit in the shareholders account transferred to the depositors account.

The Court ordered that he should be ranked as a depositor and creditor.

This was an application for an order declaring applicant to be entitled to rank as a depositor, for the removal of his name from the list of subscribers, and that he be ranked as a creditor for £361 8s., and awarded dividends.

The applicant's affidavit said he had made inquiries and had been informed that his name had been included among the list of registered subscribers. He annexed the petition which he had put before the Court in October, 1898, which set forth his connection with the society. It appeared that requiring a loan of £600, he had taken twelve shares in the society. The loan he had paid off, and in March, 1893, he was informed by the then secretary (Mr. Simkins) that his shares were fully paid up, the amount standing to his credit in the list of subscribers being £691 1s. 10d. He then informed the secretary to put the money to his credit as a depositor, and the secretary said that would be done. Since that time deponent had always regarded himself as a depositor, and had from time to time withdrawn different sums, viz., £90, £75, and £250.

In an affidavit by Mr. Hy. Gibson, one of the liquidators of the society, it was stated that the then secretary, Mr. Simkins, was dead. It was also stated that the applicant had retained his subscribers' book, and it had not been changed for a depositor's book, and further, that the dividends credited to applicant since 1893 were higher than the interest that would have been credited if he had been a depositor.

The pass-book was put in, and it was pointed out that up to the date in question in 1893 all profits were entered as dividends, but after 1893 profits were entered as interest.

In reply, the affidavit of Francois Hina-beek was read, who stated that for many years he was bookkeeper to the society, retiring on pension in 1895. Deponent had made up the accounts, and always after March, 1893, treated applicant as a depositor.

Mr. Innes, Q.C., for applicant.

Mr. Searle, Q.C., for respondent.

Mr. Innes, Q.C.: See 8 *Sheil* (p. 367). No list of contributories has been settled. There being funds in hand, applicant can still ask to be admitted as a depositor. There will be no list of contributories. Applicant wants to be a creditor and not a subscriber. He is an advance-member. He took twelve shares under the 37th Rule of the society in order to get a loan advanced to him. Unadvanced members were ordinary shareholders, whereas the applicant would not have taken the twelve shares unless he wished for the loan.

[Buchanan, A.C.J.: The question is whether he changed his position from advance-member to unadvanced-member.]

Clause 2 of the petition states that he asked to cancel the shares and to become a mere depositor. The shares were cancelled, and he then became, at his request, a depositor. He could have remained a subscriber, but he did not wish it. Rule 61 says that shares may be withdrawn on three months' written notice. By rule 62 he ceased to be a member from date of notice of withdrawal. *Wurtzburg on Building Societies*, at p. 162, shows that the Courts of England have carefully guarded members in connection with this withdrawal. True, there are special Acts in England. At p. 272 of *Wurtzburg* we find that members who have withdrawn are considered as creditors. See also p. 277 and 5 *Times' Law Reports*, p. 211. It is a question of fact here whether applicant became a depositor. The secretary treated him as a depositor. It is true he did not give written notice of withdrawal, but the society is estopped from saying that the withdrawal is nugatory by the action of its secretary. The fact that he was given interest at dividend rate, and not at the ordinary rate, is a small matter which can not affect his status. Withdrawal of a portion of the shares can not be effected under the rules of the society.

Mr. Searle, Q.C.: We can not contradict what is alleged to have taken place between applicant and the late secretary. But the rules of the society have not been complied with. Besides the fact that no written notice was given and that applicant receives interest at the dividend rate, he still retains his member's pass-book, and has entries made in it. Now he has given us notice in terms of rule 61. Verbal notice is not sufficient. He has been a member since 1881; he ought to have known the rules, and ought to have changed his book.

[Buchanan, A.C.J.: Is written notice absolutely essential? His verbal notice was accepted by the secretary. Is it not then binding?]

He continued to act as a shareholder. The notice, even if binding, was not acted upon. He had not changed his status. The onus of proving that he is a depositor is strictly on him. The liquidators dealt fairly with him, but did not treat him as a depositor. By taking dividends for many years he has put himself out of court in regard to this application.

[Maasdorp, J.: What do you say as to the withdrawal of the shares?]

Under rule 62 portion of shares can be withdrawn.

Buchanan, A.C.J., said: The applicant in this case was formerly a subscriber or shareholder in the Cape of Good Hope Building Society, having taken twelve shares, upon which he paid monthly subscriptions from time to time until the shares were paid up in full in March, 1893. The present application depends upon what took place at that date. It is alleged by the applicant that when he paid up the whole of the £600 he ceased to be a shareholder, and became a depositor instead, his reason for so doing being that it would enable him to withdraw his money from time to time upon easier terms. The applicant had a member's pass-book, which contained entries month by month of the amounts paid up to that date. The applicant alleges that with the consent of the secretary of the society, the amount to his credit was transferred from the shareholders' to the depositors' account. Mr. Simkins, who was then secretary, is dead, and so cannot now be called to corroborate the applicant's statement, but Mr. Hinsbeek, who was the bookkeeper of the society, has made an affidavit in which he distinctly supports the applicant in his statement. The applicant also produces his pass-book, which supports his statement. At the end of March, 1893, when he said he ceased to be a shareholder, there is a significant entry "to new pass-book" and certain initials, apparently those of the bookkeeper. Also up to that date the applicant was credited from time to time with dividends on his shares, but after the date the applicant paid no more money into the society, he is from time to time credited with interest, and he also from time to time withdrew certain sums of money, and only in one instance do these sums of money fit in with the exact amount of any share or number of shares he would have been entitled to withdraw as

a shareholder. The liquidators very properly would not transfer the applicant from the shareholders' list without an order of Court, but they are unable to put any facts before the Court to contradict the applicant except that the strict letter of the rule requiring written notice of withdrawal of shareholders did not appear to have been given. Under all the circumstances put before the Court, I think the applicant has sufficiently proved that he did in 1893 cease to be a shareholder and changed his fully paid-up shares into a deposit. That fact being once established, the applicant is entitled to claim as a creditor, and not to rank as a shareholder. Under these circumstances the application of the applicant must be granted; costs of this case to come out of the liquidation, and as there is some dispute as to his having been over-credited with interest, the amount to be credited to him for interest will have to be debated.

Their lordships concurred.

Mr. Searle mentioned that there were several other cases of people in the same position as applicant.

Buchanan, A.C.J., said that if after this case the liquidators were satisfied they could treat them as depositors, they could do so, but if not they must come to Court.

[Applicant's Attorneys, Messrs. Van Zyl and Buissinne; Respondent's Attorneys, Messrs. W. E. Moore and Son.]

SAYERS ESTATE V. MULLER { 1900. May 10th.

In this matter provisional sentence for the sum of £40, due on a mortgage bond, together with interest at 8 per cent. from May 1895, had been prayed for on March 12, 1900. An affidavit was filed by the defendant Muller alleging that the signature attached to the bond was not written by him, but was a forgery. The plaintiff asked that the matter might be allowed to stand over until April 12, to enable him to file replying affidavits. On the 12th April the Court ordered that, seeing there was an absolute denial of the signature by the defendant, evidence should be led, and fixed May 10 as the day for hearing such evidence.

Mr. Searle, Q.C. (with him Mr. Bisset), appeared for the plaintiff.

Mr. Burton for the defendant.

James Searle, examined by Mr. Searle, Q.C. said he resided at Port Elizabeth, but formerly at Blanco, George, where he carried on business as Searle Bros. In 1891

the estate of the firm was assigned. Charles and Richard Searle were the two other partners. The mortgage bond in the suit was originally in witness's favour. It was passed on December 18, 1879, by John Christie, as defendant's agent, to James Searle. Witness knew the defendant, who was in his employment as postcart driver. Witness was present when the power was signed. The witnesses were Charles Searle and one Dare, a Fingo. The signature was signed by defendant in witness's presence in the shop at Blanco. The body of the power was in Mr. Spencer Innes's handwriting. The date was in witness's handwriting. Mr. Innes was witness's agent at the time. The power mortgaged certain property at Watsonsdorp, defendant having purchased the ground from one Hayward. Witness offered to advance the purchase price to Muller, and there was a further agreement with Hayward that he should pay into the Master's Office the amounts that came into the estate. The transfer was passed in 1878, but witness did not advance the money until he was called upon by the Master. But he advanced money for repairs, paying it direct to the mason. As soon as the amount was paid in to the Master it had been arranged that Muller should pass a bond. The bond was for £40, to cover purchase price, transfer, bond expenses, and repairs. The documents were sent to witness's agent, Mr. Spencer Innes, at George Town. After the signing of the power of attorney defendant was arrested for murder; that was on December 24. Muller was sentenced to five years' imprisonment. While defendant was in gaol defendant asked witness not to call in the bond, as his wife and children were living on the property. When Muller came out of gaol witness took him in his employ to try and work the matter out. Interest was paid from time to time on the bond for two years, when defendant went into the employ of Mr. George Rowe. Witness got a promissory note out of defendant for £8 10s., for which he was sued, and on which witness got judgment. The bond was ceded, as security, to the firm, and was afterwards sold, witness giving the assignee power to sell or cede. Defendant had never disputed the bond, but nothing had ever been paid off the capital. Defendant was occasionally debited with the interest on the bond, but the whole of his salary did not go against the interest.

Cross-examined by Mr. Burton: Defendant could read and write. Witness got a letter from the defendant, but treated it

with contempt, as being an insulting and impudent letter. This was on July 6 last. It was a fishing letter and an insulting letter.

Buchanan, A.C.J.: It was a letter threatening criminal proceedings, so I am not surprised that it was not replied to.

The Witness: I had no fear of criminal proceedings.

Further cross-examined: Transfer was passed in 1878 and the bond in 1879. Witness got the bond, but did not give the defendant his transfer because defendant was on the Breakwater. Defendant could have got the transfer at any time if he had asked for it.

Re-examined: No criminal proceedings whatever had been taken against witness since defendant's letter had been written. Defendant could read and write.

Charles Searle, of Kimberley, brother to previous witness, said he was formerly a partner in the firm of Searle Bros. at Blanco. Witness remembered the power of attorney being signed, and recognised Muller's signature. The power was signed in the shop at Blanco. Witness had made an affidavit at Kimberley that Muller was unable to read or write, and had made a cross instead of a signature. He had been in error in making that statement, and he now recognised defendant's signature.

Cross-examined by Mr. Burton: Witness remembered the circumstances of the signature very well.

How came it that you made this remarkable mistake?—I said at the time it was to the best of my recollection. It was a good many years since witness had seen Muller's signature as well as his own. Witness was very familiar with defendant's signature.

And yet you made this affidavit that defendant was unable to read or write?—I knew his signature well. Sometimes, as he did not sign very well, defendant used to offer to sign with a cross.

Re-examined by Mr. Searle: Witness knew about the purchase of the ground.

By the Court: Witness had no interest in the bond until it was ceded to the bank as security.

Henry William Parsons, a licensed auctioneer of George, said he sold the bond in question for the firm of Searle Bros. in April, 1885. An advertisement of the sale appeared at the time in the "George and Knysna Herald." At the time of the sale witness believed defendant was in gaol at Knysna. When defendant came out of gaol witness asked him how it was that he owed the money, and why he had not been

at the sale. Defendant replied that he did owe the money, but had already settled with them through his pass-book. Witness was then simply speaking about the bond.

Cross-examined by Mr. Burton: Witness knew that at the time of the sale defendant was not at George, having been sentenced at Knysna to a term of imprisonment. Witness could not give the date of his conversation with defendant. Witness could not say whether defendant understood that the conversation referred to the bond.

Mr. Burton said he had an affidavit from defendant and his witness, Dare, that they were both too poor to appear in the Supreme Court. They had absolutely no property. He wished to make an application that the evidence of the defendant and his witness Dare might be taken on commission at George.

Mr. Searle contended that the application came altogether too late. He had only received the letter stating the inability of the defendant to appear on the previous day. He would have been quite ready to have had the matter settled on affidavits alone.

Mr. Burton put in an affidavit by the defendant, in which he declared that he had paid over the purchase price of the ground and was not indebted to Mr. Searle for any money. He denied having ever passed a bond or paid any interest thereon. He further deposed that he was an illiterate person who could neither read nor write, and that the signature on the power of attorney on which the bond had been passed was a forgery.

[Solomon, J.: Your case is that Mr. Searle committed a forgery.]

Mr. Burton: Well, no.

[But it must be. Your attorneys made the charge in their letter.]

Well, the charge does come to that.

[Then is your case that your client was unable to read or write?]

Yes.

[And that he usually made his signature by a cross?]

Yes.

[And that that was known to Mr. Searle?]

Yes.

[And yet Mr. Searle, in forging the name, forged the name of a man whom he knew could neither read nor write. That seems to me unanswerable.]

After further argument,

Buchanan, A.C.J., gave judgment. He said: This is an application for provisional sentence on a mortgage bond. On the return day defendant denied his signature to

the power of attorney, and a day was at once fixed for enabling the plaintiff to prove defendant's signature. Ample time was given for this purpose. The defendant now says that as he was a poor man he was unable to appear in court, though in such a case it is as a rule indispensable to have witnesses examined *viva voce*. Under the special circumstances defendant's affidavit has been allowed, as a matter of courtesy, to be read and taken with the other evidence. It is now for the Court to say whether, in its opinion, the signature is genuine or not. Mr. Burton is quite correct in his contention that if there is any doubt as to the genuineness of the signature provisional sentence should not be granted. The question is, is there any such doubt. Mr. Charles Searle has been called, and related the circumstances under which the transaction arose, and he tells us confidently that the power of attorney was stated to have been and that the name of the place and date was filled in by him, and that he was present and saw defendant write his name. Though the power of attorney was stated to have been passed by Cornelius Muller, the signature was "Corneliurs" Muller, a slight but a significant difference. It is alleged by the defendant that this signature is a forgery, and a letter written by his attorney states: "The signature is a forgery, and I ask you to forthwith cancel the same and prove such cancellation to me in order to avoid criminal proceedings." The letter goes on: "We find you have forged a power of attorney, and in order to avoid criminal proceedings you had better cancel the same." Now this was not a proper letter to have been written. If the attorney believed the crime to have been committed, he had no right to use that crime as a lever; it was his duty to have given information as to the crime. It is said that defendant could not write, and that Mr. Searle knew this fact. If so, it would be a very unlikely act for him to write the name of a man whom he knew could not write, when his mark would have answered as well. After hearing the evidence of the Searles and the other witnesses, I am perfectly convinced of the genuineness of this power of attorney. Consequently, I think provisional sentence should be granted.

Provisional sentence was entered accordingly.

Plaintiff's Attorney: Messrs. Tredgold, McIntyre, and Bissett; Respondent's Attorney, Mr. J. J. Michau.

QUEEN V. POELMAN: { 1900.
May 10th.

Where accused was charged with, and convicted of, the crime of malicious injury to property in that he did wrongfully, unlawfully and maliciously destroy a flagstaff attached to a cart driven by complainant and he appealed on the grounds that there was no evidence of malice, that the property in the flagstaff was not sufficiently established, and that the property was not such as could not form the subject of such a charge, the appeal was dismissed, the Court refusing to interfere with the finding of the Magistrate since there was sufficient evidence to justify a conviction.

This was an appeal from a decision of the Assistant Resident Magistrate of Stellenbosch at a Court held at Somerset West on March 19 last, in which the defendant George Poelman was charged with the crime of malicious injury to property, in that he did tear down a flag and destroy the flagstaff bearing a certain flag, being the Stars and Stripes, the property of one Wagte, of Somerset Strand. Judgment was given against the defendant, and he was fined £3, or one week's imprisonment.

It appeared from the records of the case that the complainant had been in the habit of hoisting the Stars and Stripes on a flagstaff attached to his wagon whenever there was any cheering war news. A red, white, and blue ribbon was pinned on to the Stars and Stripes. When the news of the surrender of Bloemfontein was received, the complainant had hoisted this flag on his wagon, and the accused being enraged at this, had torn the flag down and broken the stick to which it was attached. Accused's evidence was, in the Magistrate's opinion, unreliable, and his action was malicious.

Mr. Close for the appellant.

Mr. Ward appeared for the Crown.

Mr. Close: There was no proof of wanton destruction. There was a clear absence of malice. The property in the flag and stick is not clearly established. The property in the thing destroyed should be alleged and proved in a case of malicious injury to property, as in a case of theft. Here there is

no proof of property. Even if the property in the flag and stick was established, the law will not consider it as such property as could be the subject of such a charge.

Mr. Ward was not called upon.

Buchanan, A.C.J., said: The appellant was charged and convicted before the Assistant Resident Magistrate at Somerset West on a charge of malicious injury to property. It appears that one John Wagte was driving a cart laden with bricks, and in this cart was a flagstaff to which a flag was attached. The flag was being used by him in the exuberance of his joy at the cheering war news received that day. He states that he always carried this flag with him as a means of showing his rejoicing over any cheering war news. It is certainly not blameworthy for a loyal subject to show his joy at any good news for his country which comes to his knowledge, so long as he does so without interfering with or unduly annoying his neighbours. Accused was standing on the stoop of one Theunissen, and saw the cart decorated with the flag; he jumped up, and ran across the road, caught hold of the flagstaff, tore down the flag, and broke the staff in two across his knee, and threw the pieces into the street. He said he did this not from any malicious intention to destroy property, but from fear that the cart, in passing into the yard, would cause damage by the flagstaff to certain scaffolding. The Magistrate, who had the witnesses before him, said that statement made by the accused, did not carry conviction to his mind. The Magistrate firmly believed that it was the deliberate intention of the accused to break the flagstaff and tear down the flag in order to interfere with the man's legitimate rejoicings. It was urged that this was not a wanton act, but the evidence, I think, does show that it was a wanton act, for when this flag was picked up and restored to the owner accused again got hold of it and threw it away into the street. It was also said that there was no value in the property destroyed. But this alone does not negative a malicious intention. The accused did not raise this defence in the Court below. Had he done so, possibly the sentence might have been lighter. But this was not an application for reduction of sentence. The defendant went into the witness-box and told what the Magistrate believed was an incorrect story. The sentence may be considered severe, still it is not so unreasonable as to require the Court to interfere, and make any representation thereon in another quarter. There was proof of a malicious act and of an inten-

tion to destroy property, which justified the Magistrate's decision. This is a criminal case, and we cannot interfere with the finding of the Magistrate. I think after the records have been read that there is ample evidence to support the Magistrate in his finding.

The appeal was accordingly dismissed.

SUPREME COURT

[Before the Hon. Mr. Justice BUCHANAN, (Acting Chief Justice), the Hon. Mr. Justice MAASDOBP. and the Hon. Mr. Justice SOLOMON.]

HENRY C. COLLISON (LIMITED) } 1901.
V. COLONIAL GOVERNMENT. } May 11th.

Postal Convention—Post Office Regulations—Receipt Form—Contract—Agency—Hostilities.

The mere handing by the Postal authorities to any person of an unsigned form of receipt for the payment of a sum of money does not amount to an absolute undertaking to pay such amount.

The outbreak of hostilities between two countries terminates all conventions existing between the Governments of such countries.

Where the Postal authorities at Cape Town, on receipt of telegraphic advice on the 12th October, from a Postmaster of the Orange Free State, to pay to A. the sum of £70 which had been paid in to the Free State Government by B., a resident of the Free State, had on the same day in accordance with the terms of the Postal Convention and the Post Office Regulations issued to A. a form of receipt for payment, which receipt A. had deposited in a bank for collection, and had on the following day on instructions refused payment of the amount mentioned

Held, in an action by A., that the Postal authorities were not liable for the amount, there being no contract between them and A.

Semble, the Postal authorities were merely acting as the agents of the Orange Free State Government: there was only a contract between B. and the Orange Free State Government.

— — —
This was an action for the payment of £70 upon a remittance by telegraph from the Orange Free State. The declaration alleged:

1. The plaintiff is a company duly registered and carrying on business in Cape Town as Henry C. Collison (Limited); the defendant is the Hon. John Xavier Merri-man, in his capacity as Treasurer of the Colony of the Cape of Good Hope, and as such representing the Colonial Government.

2. On October 11, 1899, the plaintiff company received a notice by telegraph from I. Barnard, residing at Vredefort, in the Orange Free State, of a remittance by telegraph to the General Post-office, Cape Town, of a sum of £70 in favour of the plaintiff company.

3. Thereupon on October 12, one John Andrews, the managing director of the plaintiff company, applied to the Post-office authorities at Cape Town for payment of the said sum and certain seven receipts for £10 each were handed to him in order that the said receipts might be passed through the plaintiff company's bank.

4. The said receipts are documents issued by the Post-office authorities for the purpose of enabling the person entitled to money transmitted by telegraphic order to receive the same and the possession of such receipts is proof of the right and title of such person to be paid the sum of money named therein.

5. On the 12th October, 1899, the said Andrews paid the said receipts into the Cape Town office of the company's bank, namely, the Standard Bank of South Africa, and on October 13 the said receipts were presented to the Post-office Department by the said bank, but payment thereof was refused by the said department.

6. The plaintiff has demanded from the defendant payment of the sum of £70, but although all things have happened, etc., the defendant refuses to pay the same or

any part thereof; wherefore the plaintiff claims the sum of £70 with interest from October 13, 1899, etc.

The copy of receipt attached to the declaration as being one of those handed to the plaintiff was in the following form:

"Receipt of payee for telegraphic money order; No. of money order, 111; date of issue, 11th October, 1899; issued at Vredefort (as per attached telegram), for £10. Received from the Postmaster at Cape Town the sum of ten pounds, forwarded to me by I. Barnard at Vredefort, pp. Henry C. Collison (Limited). John Andrews."

The defendant pleaded as follows:

1. He admits paragraph 1 of the declaration.

2. As to paragraph 2, he says that seven money orders, amounting to £70, were issued by the postal administration of the Orange Free State to one Barnard at Vredefort, in the said State, and were transmitted at the request of the said Barnard by telegraph to Cape Town in order that the plaintiff company might receive payment of the sums mentioned therein. Neither at the time the said orders were received at Cape Town nor at any time since has the Colonial Government had any funds belonging either to the said Barnard or the Government of the said State from which the said orders could be paid.

3. The said money orders were issued in terms of a certain Convention entered into in 1897 between this colony, the Orange Free State, Natal, and the South African Republic, by which the Postal Administration of this colony became the agent of the other colony and States for the payment of money orders issued therein, and payable at post-offices within this colony.

4. The defendant admits that the forms of receipt referred to in paragraphs 3 and 4 of the declaration were upon the application of the said Andrews handed to him, but the defendant says they were so handed over in order that they might be filled in and signed by the plaintiff company as required by the aforesaid Convention before payment could be made, and for no other purpose.

5. At the time the said forms were handed to the said Andrews the Postal Administration of this colony, in its capacity as agent for the Orange Free State under the Convention, was duly authorised to pay the plaintiff company the amount of the said money orders upon production by the said company of properly signed receipts.

6. The aforesaid Convention, under which these money orders were issued, was in the circumstances which then existed liable to be suspended, and the said Andrews at the time the forms of receipt were handed to him was specially informed of the risk that the payment of the orders might be suspended at any time.

7. Before the said forms of receipt, duly filled in and signed, were presented at the Post-office for payment, the authority to pay the said money orders was revoked by the suspension of the Convention by the parties thereto, and also by the outbreak of hostilities between Great Britain and the Orange Free State.

8. Save as above, the defendant denies every allegation in paragraphs 3 and 4 of the declaration.

9. The defendant admits paragraph 5 of the declaration, and also the allegation in paragraph 6 that the plaintiff has demanded payment of the sum of £70. He denies every other allegation in paragraph 6.

The replication was general.

Mr. Searle, Q.C., and Mr. Close appeared for the plaintiff; Mr. Ward and Mr. Howel Jones for the Government.

[Buchanan, A.C.J.: What are the legal grounds on which the plaintiffs based their case?]

Mr. Searle said it was based upon the fact that there was a contract with the Post-office here and the Orange Free State Post-office under the Postal Union Convention and the Post-office regulations to pay these orders.

[Buchanan, A.C.J.: That is not shown on the declaration, but still no exception has been taken.]

Mr. Ward said no objection had been taken because it was practically a test case.

[Buchanan, A.C.J.: The declaration will have to be amended so as to show the contract relied on.]

John Andrews, the managing director of the plaintiff company, deposed that on the morning of October 12, 1899, a telegram from Barnard was brought to his notice. It must have been received very late in the afternoon of October 11 or early on the morning of October 12. The telegram stated that £70 had been wired to the plaintiff company. Witness immediately went to the Post-office and presented the telegram, and inquired if that was all right. The clerk said yes, and produced the seven forms (put in), which were already filled in with the exception of witness's signature. When the clerk produced these forms he said to witness either

"Are you going to pay these into the bank?" or "I suppose you are going to pay these into the bank?" Witness said "Yes," whereupon the clerk handed to him the forms. Witness took them away and signed them, and they were paid into the Standard Bank the same day before twelve o'clock. The first intimation witness received that anything was wrong was a note from the Standard Bank on the next day (October 13) saying that the Post-office had refused to pay. The same day witness went to the Post-office and saw Mr. Carstens. Witness mentioned the matter to him and asked him for an explanation, but he simply told witness that those were the orders issued from the head of the department; that these money orders were not to be paid. After that witness put the matter in the hands of his attorney.

Cross-examined: Witness was not particularly surprised at receiving these telegrams, but he made the remark to the clerk that it looked like a brand plucked from the burning. Witness could not say, without referring to his letter-book, whether they made any particular request for this money. Witness could have signed these receipts on behalf of the company at the moment he received them, as he held the necessary power of attorney from the company, although he did not have it in his pocket at the moment.

Mr. Ward explained that the money order being payable to Collison and Co., Mr. Andrews would have to produce his power of attorney before he could draw the money at the counter.

Cross-examination continued: The clerk did not tell witness he had better hurry up, for payment might be stopped at any time.

Thomas Maynard Parkinson, a clerk in the Standard Bank, said that on October 12 the plaintiff company paid in the seven documents. Witness produced the deposit slip. In the ordinary course of business these seven forms would be presented to the Post-office the first thing next morning. Between nine and ten o'clock on the morning of October 13 the forms would be presented to the Post-office. The same day the forms were sent back to the bank.

Mr. Searle put in certain letters that had passed between the plaintiff company and the postal authorities and the Government. He also put in copies of the Postal Union Convention and the Post-office Regulations. On October 14 plaintiffs' attorneys wrote demanding payment, and the Postmaster-General replied that money order and all financial business with the Orange Free State

was suspended on October 12, and therefore the department was not in a position to honour the telegraphic orders for £70 presented by the bank. In a further letter from plaintiff's attorney it was pointed out that while their clients had no wish to embarrass the Government at the present stage, yet if payment had been demanded over the counter at the time the forms were handed in by Mr. Andrews it was clear that the money would have been paid. A further letter was received by plaintiff's attorneys in which it was stated that the Orange Free State had suspended financial relations, and the only course now open to their clients was to return the orders to the sender so that when opportunity arose the latter could make a claim on the Free State for repayment. After more correspondence summons was issued in the case.

Mr. Searle closed his case.

Mr. Ward submitted that he had no case to meet, as the position taken up by the plaintiff was that a contract was made in the Orange Free State by Barnard, and that that contract was accepted by the Colonial Government, but no evidence had been led to prove that.

Buchanan, A.C.J., said that the plaintiff company relied for evidence of the contract upon the Postal Union Convention, and the regulations. It was as well that they should settle the whole matter if they were going to argue the case.

Mr. Ward then called

Somerset Richard French, the Postmaster-General, who said that on October 12 last certain telegraphic correspondence took place between him and the Postmaster-General at Bloemfontein. On that day witness telegraphed to the latter asking whether money order arrangements were suspended, and received the following reply: "All advices on hand will be paid out within the next three days, but all issue of money orders and postal notes is suspended from to-day."

Buchanan, A.C.J.: That means that they would issue no more, but that everything they had been advised of would be paid within three days?

Solomon, J.: And if this case had arisen there they would have paid the orders?

Examination continued: Witness in reply telegraphed: "Exchange of money orders will be suspended."

Buchanan, A.C.J.: Any order you issued before the 12th they would have paid if presented within three days?

Witness: Yes, if they had been advised of it, and it had been properly presented.

Mr. Ward: You do not admit they had any right to do so?—They would have done it entirely on their own responsibility.

Examination continued: At that time the balance of money orders was against the Free State. Roughly speaking, at that time they owed the Post-office of this colony on account of money orders something over £2,500. The total indebtedness of the Free State to the Post-office here was £5,523 11s. 3d. The Post-office here never had any money belonging to Barnard in their custody or possession. These money orders were issued under section 30 of the Postal Union Convention of 1897. The term "exchange" used by witness in his telegram was a technical word, and referred to all transactions in regard to money orders. The Post-office here simply acted as the agent of the Orange Free State in making these payments. If a money order was issued in the Free State upon the Colony they paid it, but if payment was not applied for within a certain time they sent the order back.

Cross-examined by Mr. Searle: Witness could not tell what was the balance on the whole of the transactions between the Government of this colony and the Government of the Free State. Since 12th October there had been some alteration in the Post-office balance owing to the Post-office here collecting certain outstanding moneys from foreign countries. They had received a large sum, but there was still a balance due by the Free State. The Post-office here had ceased to act for the Free State. There was no reply to witness's last telegram of October 12, as the wires ceased to work after that. Telegraphic remittances must be paid at the counter, and the receipt signed by the recipient of the money there, but for the convenience of the firms in town the documents were received through the banks. The transaction in such a case did not close until the forms were presented by the bank and the money paid.

Alexander C. Wiggett, a clerk in the money order department of the Cape Town Post-office, said that he remembered Mr. Andrews coming to the Post-office on October 12, and witness produced certain receipts. He asked Mr. Andrews whether he wished to present the orders for payment through the bank, and he said yes. Witness then handed the receipts to him. He told Mr. Andrews that affairs were very unsettled, and advised him to present them as early as possible. Witness had not at that time received actual notice of the outbreak of hostilities, but he deemed them probable.

Cross-examined: Mr. Andrews could have got the money at that time if he had desired it.

Mr. Searle: We took proper steps under the Post-office Regulations, and so a contract was effected, the contract being made by Barnard with the Orange Free State, as the agent of the Colonial Government. See Articles 80-111 of the Postal Convention. Each country was the agent for the other, but each Government could make its own regulations; these regulations as set out in the Post-office Guide at pp. 142-145, the plaintiff complied with. We accepted the benefit of a contract made in the Orange Free State.

[Buchanan, A.C.J.: Do you rest your case on the receipt forms?]

Yes; they are evidence of the contract. Issue of these receipts by Post-office authorities is an acceptance of liability. It is admitted that we could have obtained the cash if we had asked for it instead of these receipts.

[Buchanan, A.C.J.: If the Colonial Government had refused to give you the receipts whom would you have sued?]

Barnard.

[Buchanan, A.C.J.: Whom would Barnard have sued?]

The Orange Free State or the Colonial Government.

[Buchanan, A.C.J.: I can't see how Barnard could have sued the Colonial Government.]

They accepted liability by granting these receipts.

[Solomon, J.: But then you must prove that there was a negotiable instrument.]

There may be a concluded contract. These receipts are regarded as cash. The bank treats them as cash. The suspension of the Convention has nothing to do with this case. The pleadings admit that on the 12th October, 1899, the Post-office was duly authorised to pay the £70.

[Solomon, J.: Would the outbreak of hostilities put an end to the agency and the Convention?]

The acts of agency were completed before the declaration of war. Commercial transactions are sometimes allowed after war. There may be transactions between the two countries and Governments. Defendants admit that the one country was acting as the agent of the other after the outbreak of war.

[Buchanan, A.C.J.: Supposing under ordinary circumstances the Orange Free State had wired down on the 12th "Don't pay?"]

We could then have sued the Colonial Government on the receipts.

[Solomon, J.: Supposing the Orange Free State had before payment put an end to the agency?]

The Colonial Government having under the provisions of the Convention issued regulations, they are bound by them, and therefore must pay on acceptance. The contract was complete on the issue of the receipts.

[Buchanan, A.C.J.: Can you sue the Colonial Government on money orders issued by the Orange Free State Government before suspension of the convention, but only presented to the Colonial Government after suspension?]

Certainly. I submit we can. We rely on Section 23 of the Post-office Money Order Regulations at p. 145. The issue of receipts to us by the Post-office was an acceptance of liability. See section 7, p. 142. The contract is completed as soon as we satisfy the Post-office that we are the payees, and they give us the receipts. It is a contract under their own regulations. Barnard paid a commission to the Orange Free State, portion of which they transmit to the Colonial Government. The receipts issued are warrants to pay. There is no proof that they had no authority to pay on the 13th. They admit they had authority to pay on the 12th. We had no notice of suspension. We acted under the regulations, and therefore claim payment.

[Buchanan, A.C.J.: What do you say as to section 23? When you issue the payment orders, do you not accept the contract?]

No. I am prepared to argue that we are not parties to a contract. The issue of receipts must be taken to be effected by the Orange Free State authorities. We are only their agents. Issue of receipts by us is no promise to pay. The receipts are only signed at the Post-office after payment of the amount mentioned. The convention was suspended at the outbreak of hostilities.

[Solomon, J.: Why do you say that you were authorised to pay on the 12th October?]

We had then no authoritative information that the convention was suspended, when we issued the receipts. The outbreak of hostilities caused suspension, and this is conclusive in the matter. The power to issue these orders was then tacitly withdrawn by the operation of section 30 of the Post-office Act of 1882.

Buchanan, A.C.J., in giving judgment, said: It appears that Mr. Barnard,

a resident of Vredefort, in the Orange Free State, handed in a sum of £70 to the Post-office at Vredefort, whereupon the Post-master at that place telegraphed to the postmaster at Cape Town advising him to pay over that amount to Collison and Co., at Cape Town. This was done in accordance with the arrangement contained in the Convention entered into between the two Governments affecting the post-offices of the two countries. This Convention terminated, as all conventions between Governments were bound to do, upon the outbreak of hostilities between the two Governments. It has been shown that hostilities broke out on October 11, and this money was paid in at Vredefort on the same day, but the telegraphic advice was not received by the plaintiff until October 12. On that day the plaintiff's representative, Mr. Andrews, went to the Post-office, and producing the telegram he had received from Barnard, was handed a form of receipt for the payment of money upon telegraphic advice form. It is contended for the plaintiff that the handing over of this receipt created a contract between the Government of this colony and the plaintiff to pay what was stated therein. According to the Post-office Regulations, this receipt takes the place of the ordinary postal order. The ordinary post-office order is not a contract between the payee and the Government of the country where it is to be paid, but is a contract between the person who pays the money and the Government who receives it; that is, in this case it was a contract between Barnard and the Free State Government. It is as near as possible analogous to a bill of exchange drawn by a merchant in one State upon a merchant in another. The person who gets the bill of exchange in one State makes a contract with the merchant there, and it is not until the bill of exchange is accepted by the merchant in the other State that it forms another contract between the acceptor and the legal holder of the document. A postal order is not strictly a negotiable document, but the nearest possible analogy to it is a bill of exchange. If the document issued by the Post-office here had contained any obligation on the face of it, any promise on the part of the Post-office here to pay the legal holder of this document, then the Post-office would have been bound to pay, but there is no such undertaking. When we look at the Post-office regulations all we find is that this form is to take

the place of the money order which is usually issued by post-offices, and by regulation 6 it appears that the remitter has absolute control over the money remitted until payment has actually been made by the department. Until, therefore, the order is actually paid the remitter has the right to stop it at any moment and prevent payment. The Convention under which the telegraphic advice was sent is now at an end, but if there had been an undertaking by the Post-office here on October 12 to pay the money, notwithstanding that the Convention was not at an end, they would have been bound by their undertaking. The question narrows itself down to this: Is the mere handing over of this form of receipt to Messrs. Collison such an acknowledgment of liability on the part of the Post-office here as to render them liable to pay the money, no matter whether the Convention was ended or not? Looking at it very carefully, I cannot come to the conclusion that this amounted to any such acknowledgment. This document contains a statement that there had been a telegram sent ordering money to be paid, and also contains a form of receipt. If it had been signed at the time, and the Post-office clerk had satisfied himself that Mr. Andrews was the proper person to receive the money, it is very probable that there and then the money might have been paid over. That, however, was not done. The receipt form was taken away and paid into the bank for the bank to collect from the Post-office, and before it was presented by the bank payment was stopped by the Post-office authorities on the ground of the termination of the Convention. I cannot find any principle upon which to fix liability upon the Post-office. A similar case has never before arisen in the Colony. I fail to see that any contract has been entered into between the Cape Post-office and Collison and Co. to pay this money. The true position, I think, is that the contract was entered into between Barnard and the Free State Post-office. The Cape Town Post-office were agents for the Free State Post-office to pay money, but their agency ceased before payment was made. It was very unfortunate for Mr. Andrews that he did not know the state of affairs at the time, or very probably he would have presented the order at once for payment, but as the thing stands now he

must look to his own correspondent, who in turn will have recourse to the Free State Government.

Mr. Justice Maasdorp concurred.

Mr. Justice Solomon also concurred, and said that it seemed to him that the contract was made by Barnard with the Free State Post-office, the Post-office here being the agents of the latter. It was perfectly clear, however, that immediately upon the outbreak of hostilities between the Imperial Government and the Free State the agency of the Colonial Government on behalf of the Free State ceased, and from that time they had no authority whatsoever to pay any money on behalf of the Free State in respect of these money orders. He was not sure he would have gone so far as to think that even if they had given an undertaking to pay the money, not knowing hostilities had broken out, they would have been justified in refusing to pay, but it was not necessary to go so far as that.

Judgment for defendants with costs.

[Plaintiff's Attorneys, Messrs. Fairbridge, Arderne and Lawton; Defendants' Attorneys, Messrs. J. and H. Reid and Nephew.]

PARSONS V. GEORGE LICENSING { 1900,
COURT. { May 11th.

Licensing Court—Section 13, 14 of Act 25 of 1891—Section 6 of Act 28 of 1898—Memorial.

Before a Licensing Court can under section 6 of Act 28 of 1898, refuse to grant a renewal of a licence because a memorial has been lodged objecting to a renewal, proof must be given that notice of such memorial has been served on both the occupier and the owner of such premises.

This was an application to set aside certain proceedings of the Licensing Court of George.

The applicant was the occupier of certain licensed premises situated at the northern entrance to the Montagu Pass. At the last meeting of the George Licensing Court he made an application for the renewal of his licence. At the same meeting of the Court a memorial protesting against the renewal of the

licence was presented in terms of section 6 of Act 28 of 1898 and sub-section 2 of section 13 of Act 25 of 1891. The memorial appeared to be in due form, but an objection was taken to it by applicant's agent on the ground that the owner of the licensed premises (the Divisional Council) had not received notice of the intention to lodge the said memorial, although the occupier had, while by sub-section 2 of section 13 of Act 25 of 1891 both the occupier and the owner ought to have received such notice. This objection was overruled, and the memorial being signed by more than half the Divisional Council voters for the district, as required by the 1898 Act, the application for renewal of licence was refused.

Mr. Graham, Q.C., appeared for the applicant; there was no appearance for the respondents.

Mr. Graham, Q.C.: Notice of this application has been personally served. We don't object to the memorial, but say that proper notice has not been given to the owner of the licensed premises under sub-section 2 of section 13 of Act 25 of 1891.

[Solomon, J.: What is the object of the notice?]

The Legislature might have considered that all parties interested should know of the circulation of memorials, so that the licensed owners might work against the memorials. The Divisional Council were the owners, and should have received notice. They don't appear on either side in this matter. The memorial ought to have been thrown out.

[Maasdorp, J.: But could not the holder who had notice waive his right under the section, and say that although the owner had no notice, he was prepared to go on?]

No. The Act distinctly requires notice to be given.

Buchanan, A.C.J., said: The object of the clauses of the two Acts mentioned is to enable a majority of the registered Divisional voters in any district by a memorial duly lodged fourteen days before the holding of the said Licensing Court to prevent the renewal of any licence within their district or ward. In this case a memorial signed by a sufficient number of voters was lodged with the Licensing Court, and the applicant's application for a renewal of the licence was refused. Section 6 of Act 28 of 1898 enacts that it shall not be lawful for a Licensing Court to grant the renewal of a licence if such a memorial be lodged, but the section

goes on to say that the provisions of sections 13 and 14 of Act 25 of 1891 shall apply to such memorials. Looking at the provisions of section 13 of Act 25 of 1891, we find that not only must the memorial be lodged with the Licensing Board, but the onus is thrown upon the memorialists of proving that written notice of the intention to lodge such memorial was given both to the holder of the licence, and also to the owner of the premises, one month before the day fixed for hearing the application. This is an obligation created by law, which the memorialists must attend to. In this case they gave notice to the holder of the licence but omitted to give notice to the owner of the premises. Under these circumstances, we are bound to say that the action of the Licensing Court in refusing this licence on the grounds it did was improper. No decision on the merits is recorded. How the applicant will fare should he again bring the matter before the Licensing Court remains to be seen. We only say now that the decision of the Licensing Court in refusing this licence under section 6 of Act 28 of 1896 was not a proper decision.

Mr. Graham submitted that under the Act, the Governor may call a special meeting of the Licensing Board under certain circumstances.

Buchanan, A.C.J., said that might be so, but the Court could not now order such a meeting to be held.

Mr. Graham said there might be a refusal to apply for such a special court, in which case the applicant would have to again apply to the Supreme Court.

As to costs, Buchanan, A.C.J., said there seemed to have been a *bona fide* exercise of the discretion of the Licensing Court, and he did not think in such cases public bodies should be called upon to pay costs. No order would therefore be made as to costs.

Maasdorp and Solomon, J.J., concurred in the judgment.

[Applicant's Attorney, Messrs. Fairbridge, Arderne & Lawton.]

SUPREME COURT

[Before the Hon. Mr. Justice BUCHANAN, (Acting Chief Justice), the Hon. Mr. Justice MAASDORP, and the Hon. Mr. Justice SOLOMON.]

GLASBERG V. DE WITT. { 1900.
May 14th.

This was an action brought by Max Glasberg, a photographer, residing at the Paarl, against Anthony M. de Witt, architect, Cape Town, for the balance of an account which plaintiff said defendant owed him for certain work and labour done in connection with the photographing of various buildings.

The plaintiff's declaration, after the formal paragraphs as to residence and occupation of the parties to the suit, went on to state that about October, 1898, plaintiff was indebted to defendant in the sum of £36 15s. for certain professional services rendered. On or about October 15, 1898, defendant requested plaintiff to do certain photographic work for him, and deduct the value thereof from the amount of his (plaintiff's) indebtedness. Plaintiff did the work and submitted an account, showing a balance of £43 12s. 6d. due to him. Defendant had tendered the sum of £9 13s., which amount plaintiff refused to accept. Plaintiff now claimed judgment for £43 12s. 6d., with interest *a tempore morae*, and costs of suit. He also had an alternative claim based upon a *quantum meruit*. Plaintiff contended that the prices charged were fair and reasonable, and an account was annexed showing the various buildings photographed.

The plea admitted that the photographs had been completed, and also as to the debt being due by plaintiff to defendant. It went on to say that on account of plaintiff being in defendant's debt and unable to pay, defendant agreed with plaintiff that the latter should work off the debt by taking certain photographs of buildings erected by defendant. Tenders had previously been called for this work, and two tenders were shown, plaintiff offering to do the work at 10s. for the first proof and negative, and 4s. each for additional unmounted copies. Plaintiff agreed to do the work at that price, but instead he

charged £1 for the first proof and 7s. 6d. each for additional copies. Defendant annexed an account to his plea showing that £9 13s. was due by him to plaintiff, which amount defendant tendered before issue of summons, and again tendered. He said the charges set forth in the account were the charges agreed upon between the parties, and that the same were fair and reasonable.

Mr. Buchanan appeared for the plaintiff.

Mr. Searle, Q.C. (with whom was Mr. H. Jones), appeared for the defendant.

The first witness called was the plaintiff,

Max Glasberg, who stated that he was a photographer, carrying on business at the Paarl and Worcester. Defendant had superintended the erection of certain buildings for witness. During the course of the building witness paid defendant about £30, leaving a balance owing. That was during March or April, 1898. Defendant said to witness: "Never mind the balance; you can work it off for me, as I have some photographs I want taken." Witness never asked defendant for time to pay, and it was not true that he was unable to pay. Defendant desired witness to photograph some buildings; the photographs to be 10 inches by 12 inches. Defendant only mentioned the buildings in the Paarl. Defendant did not at that time ask witness for his price, nor did he show him any tenders. Witness did not start the work at once, because defendant wished him to wait until the winter, when the leaves would be off the trees, so as to show the buildings better. Witness started the work on August 18, 1898, and after he had finished the first lot defendant pointed out certain other work, and asked what witness would charge to photograph these buildings. Witness said 20s. for the first copy and 7s. 6d. for each additional copies. Defendant was satisfied with the price. He did not show witness any tenders on that occasion. Proceeding, witness detailed the work he had done for defendant at Paarl, Stellenbosch, and Cape Town. The prices witness charged were fair and reasonable. Witness made that price in view of defendant giving him a large order. If it had been a small order he would have charged more.

Cross-examined: It was not true that witness went to defendant's office in Cape

Town in October, 1898, and said that he could not pay all defendant's account, but would pay £30.

Re-examined: Witness's expenses for cart hire, train fares, travelling expenses, plates, etc., came to about £25, and that was allowing nothing for his time.

Samuel Barnard said he had been practising as a photographer in Cape Town for a number of years. He had seen specimens of the photographs taken by plaintiff for defendant. Witness thought the charges made by plaintiff were fair and reasonable.

Alfred F. Hosking, a photographer, trading as J. Bruton and Co., considered the charges made by plaintiff for the work done for defendant fair and reasonable. About the beginning of the year witness was asked by defendant to give a tender for photographing some buildings. Witness tendered at the rate of 21s. for taking the negative and supplying one proof, with operator's time charged extra in the event of the subject being some distance away. The tender did not say anything about a second copy, for which witness would in the usual course charge 5s. Witness had not done any work for defendant.

[Solomon, J.: Photographers' charges vary enormously, do they not?]

Witness: Not first-class photographers; those of the men in back streets do.

Ernest Peters, carrying on business as a photographer in Cape Town, said he had seen some of the photographs in question. Witness charged 30s. for a first copy of that size and 7s. 6d. for each extra copy, and travelling expenses extra.

Cross-examined: Witness came to Cape Town eighteen months ago, having previously been three years in Kimberley. In giving his prices he was not taking Kimberley prices. Witness had done this class of work, but not for architects. Witness would not make a reduction, although there were a number of buildings to be photographed. For travelling expenses witness would charge what it actually cost him.

This closed the case for the plaintiff.

For the defence,

Anthony M. de Witt, the defendant, stated that he was an architect practising in Cape Town and suburbs, and resided at Wynberg. Witness did certain work for the plaintiff at Paarl. This was finished shortly before October, 1898, and witness

sent in his account for £66 16s. Plaintiff came to witness's office in Cape Town and said that as he had not been very successful in his buildings, not having been able to let them, he could not pay witness in full. He paid witness £30 by cheque, and asked him to wait for the balance, until it was more convenient for him to pay. Witness agreed to this. Plaintiff had previously taken photographs of some buildings at the Paarl for witness, and after paying the cheque he asked witness if he could photograph some more buildings for him, so as to enable him to pay off the balance of the account. Witness said he had intended having more photographs taken, and had asked for tenders some time before. He showed witness a couple of tenders, one by Jarman and the other by Matthews. Jarman's price was 10s. for two negatives and a first proof, and 4s. for each extra copy. Witness said to plaintiff that he could have the work at those prices, and the latter agreeing, witness made out the list of buildings.

Ambrose Jarman stated that he was a photographer, carrying on business at Claremont. He corroborated the previous witness as to the tender made by him (witness) some time in 1897. Witness was now doing work of the same character for defendant. He was doing it under contract, by which he received for photographing buildings in Cape Town 12s. for two negatives and one proof, and for similar work in Wynberg 10s. For extra unmounted copies witness charged 2s. 6d. each. If witness had to go to Paarl or Stellenbosch he would charge extra for his travelling expenses. All the plans which plaintiff had to photograph in town could be photographed in five days.

Cross-examined: The contract prices witness gave were not his usual charges. His usual charge for that size of photograph was 30s., and 3s. 6d. for each additional copy. Witness made his price specially low in the present instance in consideration of the large number of buildings to be photographed.

This closed the evidence in the case.

After argument,

Buchanan, A.C.J., said: The plaintiff in this case employed defendant for the purpose of doing certain architectural work in connection with the erection of certain premises at the Paarl. For these services it is

admitted that the defendant is entitled to the sum of £66 16s. Plaintiff did not pay this account in full, but gave defendant £30 on account. It is common cause that when this payment was given an arrangement was entered into by which the plaintiff was to work off the balance due to the defendant by photographing certain houses which had been erected under defendant's supervision. The plaintiff made out his account for work so done by him, amounting in round figures to £70. The defendant says that this amount is excessive, and that the amount properly charged by plaintiff comes to about £36. Both parties allege in their pleadings that an agreement was come to between them, but the plaintiff alleges that the agreement was that he was to get £1 for the first photograph taken of each house and 7s. 6d. for each extra copy; while the defendant alleges that it was agreed the plaintiff was to get 10s. for the first photograph of each house and 4s. for each extra copy. This is the dispute between the parties. Plaintiff in his declaration goes on to say that if there was no agreement he was entitled to the sum claimed by him on a *quantum meruit*, and that the prices charged are fair and reasonable under the circumstances. Now the agreement depends entirely on the verbal testimony of the plaintiff and of the defendant. No witnesses were present at the time the agreement was entered into, and very little corroboration of it can be gathered from any of the documents. The statements of the parties are in direct conflict. I am inclined to believe that as defendant had at that time tenders from two other photographers under which he could have got the work done for 10s. for the first proof and 4s. for each extra copy, he would not be likely to engage plaintiff to do the work at a higher rate. He was willing to assist plaintiff by allowing him to work off the debt if it could be done at the same price as other people were willing to do it at, and I believe the defendant's statement that he showed the tenders of two photographers, Jarman and Matthews, to the plaintiff. It seems to me unlikely that the architect, when he knew what he could get the work done for, would agree to pay 20s. and 7s. 6d. instead of 10s. and 4s. It is true some of the work had to be done at Stellenbosch and Paarl. The plaintiff resided at Paarl, and did work there, but he came frequently to Cape Town, and I think he was offered and accepted the opportunity of doing the work

at the same price as the others had offered to do it for. Holding this view of the circumstances, it follows that the tender made, viz., 10s. for the first photograph of each house and 4s. for each extra copy, is a sufficient tender. I think defendant's account should be taken, because when we come to test it defendant's evidence was certainly better than that of the plaintiff. For instance, as to the payment of the £30, plaintiff says he paid that sum in March or April, while the defendant says it was not paid until October 7, and in corroboration of that statement he produces his bank deposit slip. This is important, because it fixes the date of the contract entered into. Then the plaintiff says he never was shown any tenders, but immediately he sent in his account the defendant sent plaintiff a copy of the tenders, saying that these were the tenders containing the prices at which plaintiff had agreed to do the work. Several minor circumstances surrounding the case induce me to think that the plaintiff's memory is not nearly so good as that of the defendant. I, therefore, am inclined to hold that the plaintiff has failed to establish his prices, while the defendant has proved his contract, and judgment must be for the plaintiff for the amount tendered only, and that plaintiff must pay the costs. Even on a question of a *quantum meruit*, I am not inclined to say that the defendant's tender was too low, although perhaps if I was sitting as an assessor I might have made it £5 more. Judgment must therefore be given for the plaintiff for the amount tendered, and as that amount was tendered before summons was issued plaintiff must pay the costs.

Maasdorp: J., said: The question in this case is whether the plaintiff is entitled to recover a certain sum which he alleges he contracted to do the work for, or whether he should only recover the value of the work which has been done without reference to any contract. He alleges that a contract was entered into, and gives the terms, but on the other hand, the defendant also alleges a contract, but the terms he gives differ materially. Looking at the circumstances surrounding the case at the time the contract was entered into as alleged by both parties, I have come to the conclusion that no contract has been proved by either of them. If we take the evidence of the plaintiff, he says that he had commenced the work and had photographed

certain buildings, when a conversation took place in which he casually mentioned to defendant what the prices would be. No contract was entered into there, it being merely the statement of the plaintiff as to what his charges would be for work such as he was then doing. On the part of the defendant, we have the statement that during a conversation with regard to photographing the buildings, he took out some old tenders and showed them to plaintiff. I believe that defendant is mistaken in his view as to what took place on that occasion, and I do not believe that at that time any tenders were offered to plaintiff. I am not prepared to believe that defendant so opportunely found these two old tenders and showed them to plaintiff. Besides defendant says he did not accept these tenders because they were too high, and therefore why should he go and show a tender which he considered too high to a man whom he was desirous should tender. If he wished to get the work done cheaper he would stand a better chance by not referring to the previous tenders. I have therefore come to the conclusion that there was no contract on that occasion. Jarman's tender, moreover, was for houses in Cape Town and suburbs, and Jarman said that if he had tendered for the buildings which ultimately had to be photographed he would have included in his tender travelling expenses. There being no contract, the next question is what should plaintiff be allowed. A number of photographers have stated that the price charged was fair and reasonable. However there were a large number of buildings to be photographed, and no doubt on that account a photographer would not ask the full charge. I therefore think that the account should be reduced, but on the other hand I do not think the amount tendered was sufficient, and I would have held that the tender was insufficient by some £15.

Solomon, J., said he concurred with the Acting Chief Justice that the defendant's tender in this case was sufficient, and he did so on the ground that the defendant had proved the contract which he alleged in the plea. It was therefore unnecessary to discuss the question of a *quantum meruit*. He had come to the conclusion that defendant had proved his contract for two reasons: first, because he pre-

ferred the evidence given by defendant as against that given by plaintiff, and thought defendant a more credible witness on the whole, and secondly, because the probabilities of the case seemed to be in favour of defendant. Dealing with the facts of the case, his lordship pointed out that it was unlikely that defendant having tenders to do the work for 10s. and 4s., would accept a tender to do the work for 20s. and 7s. 6d., nor did he think it likely that a man living at the Paarl would undertake to do work in Cape Town and suburbs unless he had some arrangement as to prices.

[Plaintiff's Attorneys, Messrs. Scanlen and Syfret; Defendant's Attorney, Mr. D. Tennant, jun.]

SMIT V. VLOK.

{ 1900.
{ May 14th.

Mutual will—Heirs—Survivor—Remarriage—Children of second marriage.

A mutual will of husband and wife, provided that after the death of the survivor certain landed property was to be sold by public auction among the heirs, among whom the proceeds of the sale were to be distributed. The survivor married again and after her death the children of the second marriage claimed to be included among the heirs, and entitled both to bid at the auction, and to share in the proceeds of the property. Held, that they were not so entitled, but that only the heirs under the mutual will of both parents could take the benefits conferred thereunder.

This was a special case set down for the decision of the Court on some points raised by a codicil to a certain will.

The plaintiffs were Albertus Smit, Johanna Elizabeth van Wyk (born Smit), widow, and Nicolaas Johannes Vlok, married in community of property to Martha Maria Margaretha Smit, and the defendant was George William Steytler, in his capacity as secretary for the time being of the Colonial Orphan Chamber and Trust

Company, and as such the executor dative of the estate of the late Johannes Hendrik Jacobus Vlok and the estate of the late Johanna Elizabeth Smit, formerly Vlok (born Louw).

The case was stated in the following terms:

In the year 1836 Johannes Hendrik Jacobus Vlok and his wife, Johanna Elizabeth Vlok (born Louw), to whom he was married in community of property, made a mutual will, by which the survivor and the children of the marriage were appointed the heirs of the testators, and by a codicil, dated the 9th August, 1845, the testators declared that their joint property—the farm Klipfontein—should be sold by public auction after the death of the survivor of them, among the joint heirs, to the highest bidder among all their heirs, provided that if, after the death of the testators, on the day of the sale there should be found to be other farms, they should be sold on this condition also, to the highest bidder among the heirs.

2. The testator died about the year 1846, leaving his wife and six children surviving, and thereafter one of the children, Jan Hendrik Jacobus Vlok, died. The widow adiated under the said will, and enjoyed the possession and usufruct of the said farm Klipfontein until her death.

3. After the death of the said child the widow, Johanna Elizabeth Vlok, married in community of property Gert Christian Smit, and they executed a mutual will on the 3rd of February, 1879, by which the testator appointed his wife and his children his heirs, and the testatrix appointed as her heirs her said last-named husband, the five children of her first marriage, and the children of her second marriage.

4. In the year 1890 the said Gert Christian Smit died, leaving him surviving five children and his wife, who died in 1897, leaving her surviving the five children of her first marriage and the five children of her second marriage.

5. The plaintiffs are children of the said testatrix by her second marriage; the defendant is George William Steytler, of Cape Town, in his capacity as secretary of the Colonial Orphan Chamber and Trust Company, and as such the executor dative of the estate of the late Johannes Hendrik Jacobus Vlok, in whose name the said farm

is still registered, and the estate of the said late Johanna Elizabeth Smit, formerly Vlok (born Louw).

6. The plaintiffs contend: (a) That each of them is entitled to bid at the sale of the farm Klipfontein when put up to auction; (b) that half of the proceeds of the sale of the said farm and one-fourteenth—a child's portion—should be paid over as belonging to testatrix, and that each of the plaintiffs is entitled, as heirs of the testatrix, to 17-210ths of the proceeds of the said farm; (c) that they are entitled to the costs of this action.

7. The defendant contends: (a) That the plaintiffs are not entitled to bid at the sale of the farm Klipfontein when put up to auction as aforesaid; (b) that the plaintiffs are not entitled to any share in or to the proceeds of the said farm; (c) that he is entitled to his costs.

Mr. Searle, Q.C., for the plaintiffs.

Mr. Innes, Q.C., for the defendant.

Mr. Searle, Q.C.: See *Oosthuizen v. Mocke* (1 Roscoe, 330). The question is, what construction is to be put on the codicil? I cannot say anything as to plaintiff's first contention. Our second contention is sound.

[Buchanan, A.C.J.: Was it not the intention of the parties to consolidate the joint estate? Does not the principle of *Modert v. South African Association* apply?]

No. There is no massing of the estate. Under the will the survivor had free right of disposition. Defendants contend that by the codicil the survivor divested herself of that right. The presumption in law is in favour of keeping the testamentary power in the hands of the testator. The only limitation is that there must be a sale, from which the public are prohibited, and that the highest bidder among the heirs should pay the proceeds into the estate. We submit that there was no distribution of the estate. The proceeds of the farm must be divided into two amounts.

Mr. Innes, Q.C.: In *Oosthuizen v. Mocke* there was no massing, consequently the survivor could make a new will. The will and the codicil could be read together. In that case the survivor only had a usufruct during the minority of the children under the will, but the codicil gave her a life usufruct. There the intention of the testators was that the land should be sold and the proceeds distributed among the heirs of both of them.

There the testatrix enjoyed benefits during her life. Massing occurred, and so she could not make a second will.

[Solomon, J.: I thought the whole question between you was whether there was massing or not?]

Clearly there is massing. Massing can exist without any disposition. But when there is a distinct disposition in addition to the massing, then the disposition governs. The codicil deals with the whole farm, and refers to certain persons as heirs, viz., the children of the first marriage. This is admitted by the opposite side when they abandon their first contention. The persons who can bid are the persons among whom alone the proceeds are to be distributed. The survivor has adiated, and (there being massing) therefore she could not deal with the property by a second will. The farm was taken out of the estate by the codicil.

[Buchanan, A.C.J.: If the survivor had adiated and had not made a second will, to whom would the proceeds go?]

To the children of the first marriage, and this is what has happened.

[Solomon, J.: Does the second will say anything about this particular farm?]

No; she does not purport to deal with it as a separate asset. She has a life interest and has adiated, therefore she cannot deal with the farm as if it were absolutely free property; she must be bound by some obligation. It is admitted that the first will does in some manner deal with the proceeds of the farm, but it is said that it deals with one-half only. The intention of the first will was that only five children should share in the farm. The codicil meant to deal with the farm in some way after the death of the survivor, i.e., masses. It cannot be denied that as the will stood there were two separate estates, but the codicil massed them. It cannot be denied.

[Buchanan, A.C.J.: And the next stage is that the survivor, having adiated under the codicil, must be bound by the codicil?]

Yes; and the codicil deals with the heirs of the first marriage alone.

[Buchanan, A.C.J.: Have you looked at *Schoombie v. Olivier* (15 S.C.R., p. 162)?]

Yes. In that case the codicil made a clear statement as to what should be done with the proceeds. Here there is nothing distinct on the question of proceeds in the codicil. Here, I submit, that the proceeds of the sale should go to the five heirs. The codicil is an amendment of the will. In the will

the farm is dealt with in the same way as the other property. The codicil differentiates the farm and the other property.

Mr. Searle, Q.C., in reply: There was no disposition in this codicil. By "massing" I mean the disposition of the estate as a whole. Here there was no massing. No case can be quoted where the Court has held massing existed unless the words "joint estate" or equivalent words were used. Mutual wills are the wills of each person separately. There was no disposition here of the estate as a whole, because the will refers to a second marriage. It gives the survivor power in case of a second marriage to deal equitably with the children of both marriages. The words "to be sold" form the only reason why massing is contended for. The survivor was not meant to die intestate, but was to have power to dispose of the property. The only preferent right the children of the first marriage had was that they could buy in the farm. Half of the proceeds should go under the first will, and the other half under the second will. The intention was to exclude the public from the sale, but not to deprive the survivor of disposing of the proceeds. There was no disposition of the proceeds under the will or the codicil.

[Solomon, J.: Does not "sold amongst our heirs" mean not only sale, but also contribution of proceeds?]

I submit not.

Buchanan, A.C.J., said: In the year 1836 Vlok and his wife made a mutual will, the terms of which were not very clear, but the parties have agreed to an interpretation, to the effect that by the will each of the spouses appointed the other, together with the children of their marriage, their heirs. By a codicil subsequently made the parties took out of the joint estate their farm Klipfontein, and gave the survivor a life interest in the farm, and provided that upon the death of the survivor the farm was to be sold among their heirs by public auction. Under this will and codicil two contentions have been set up by the plaintiffs. They claim, firstly, that they as heirs of their mother are entitled to bid at the sale of the farm. Secondly, they also claim as heirs of their mother to share in the proceeds of the sale of the farm. The plaintiffs are not the heirs of the original testator and testatrix. On the death of the testator the mother married again, and they are the children of this second marriage. They could not therefore be the heirs referred to in the will or the

codicil, who were the survivor and children of the first marriage. They have therefore no right to bid at the sale, which is confined to such heirs. The next question is more important, viz., among whom are the proceeds of the sale of this farm to be distributed? Where a mutual will has been made by spouses and a benefit is given to one of those spouses after the death of the other, the surviving spouse, if he or she accepts such benefit, cannot alter the disposition of the estate as provided for in the will. When the community of property which existed in this instance was dissolved by death, the surviving spouse had then the right to elect to take her common law rights or to abide by the will. It is admitted that the surviving spouse elected to take the benefits under the will, and she had then to abide by the will. That being so, we must look to the testament to ascertain how the spouses intended the proceeds of the property to be distributed, and by the will the proceeds of the property goes not to the plaintiffs, but to the children of the testators. This falls in with previous decisions of this Court. It follows that as the plaintiffs are not entitled either to bid at the sale or to share in the proceeds, judgment must be in terms of the contention of the defendant. As to the costs, they may come out of the estate.

Maasdorp and Solomon, J.J., concurred.

[Plaintiffs' Attorneys, Messrs. Walker and Jacobssohn; Defendant's Attorney, Mr. C. W. Herold.]

SUPREME COURT

[Before the Hon. Mr. Justice BUCHANAN (Acting Chief Justice), the Hon. Mr. Justice MAASDORP, and the Hon. Mr. Justice SOLOMON.]

COHEN V. FALCONER. { 1900.
May 15th.

Mr. Buchanan, for the defendant, applied for a postponement of this case, owing to defendant's attorneys having just withdrawn from the case on account of the instalment not having been paid.

Mr. Upington, for the plaintiff, pointed out that the case had been set down for a considerable time, in fact, from April 21,

and it was extraordinary that on the day of the trial such an application should be made.

Mr. Buchanan said it was unfortunate for the defendant's case, but the letter from his late attorneys was only received last night, so that it was impossible for the attorneys he had now got to appear in court that day.

The Acting Chief Justice said he did not see how the case could be postponed unless defendant paid the costs of the day.

Mr. Upington said he would leave the matter in the hands of the Court.

The Court decided to postpone the case until the 18th inst., defendant to pay the costs of the day.

VASCO (LIMITED) IN LIQUIDATION V. DAY. { 1900.
{ May 15th.

Contract — Breach — Detention of property — Damages.

This was an action for the recovery of certain property and also for damages for its detention.

Mr. Innes, Q.C. (with whom was Mr. Searle), appeared for the plaintiffs.

Mr. McGregor appeared for the defendant.

The declaration set forth that the plaintiffs were Messrs. Hands and Shore, the liquidators of the Vasco Company (Limited), while the defendant was Mrs. Petronella J. Day, married out of community of property to W. A. Day. It was alleged that on August 17, 1896, the defendant, whose name then was Wolf, executed an agreement with Sir James Sivewright and Mr. Graaff, on behalf of the Platteklief Mineral Water Syndicate, by which she agreed to allow them certain rights to a portion of the water of a mineral spring on her farm in the D'Urban-road district for 99 years. Thereafter the Platteklief Syndicate went into liquidation and ceded all their rights to the present Vasco Company. On September 14, 1899, Vasco (Limited) went into liquidation, and on December 18, 1899, plaintiffs, as liquidators, ceded all their rights to one J. B. Norden. On December 27 due notice of that cession was given to Mrs. Day. At the date of the liquidation there was certain property on the farm belonging to Vasco (Limited), consisting of machinery, waterpipes, and movable buildings. On January 9 last the plaintiffs tendered the defendant £54 10s., being the rent due

under the agreement to December 31, 1899. The defendant, however, refused to accept the rent or give up the goods. The plaintiffs had sold the property, but could not make delivery owing to the defendant's conduct, wherefore they claimed delivery and £100 damages. The defendant had since on May 4 accepted the rent and tendered delivery of the movable property.

The plea admitted the agreement with the Platteklief Syndicate, but alleged that the assignment of Vasco (Limited) to Norden was effected without the defendant's consent, and contended that it was not binding on her. She had accepted the rent, but was not responsible for any loss the plaintiffs might have sustained, and she alleged that the agreement between her and Vasco (Limited) was still in force, whilst rent was accruing to her thereunder for which she held no other security than the property now claimed. It alleged further that the Platteklief Syndicate undertook to clean the well or spring, but had not done so, and the spring had become foul, in respect of which the defendant had incurred £30 damages. There was another agreement with the Platteklief Syndicate by which she granted permission to lay pipes from the spring to the railway for £12 a year, on condition that they should clean a certain dam. The Vasco Company became liable for this obligation, but had not cleaned the dam, and she claimed three years' rent (£36) in this respect, whilst for the non-cleansing of the dam she claimed £50. The plaintiffs alleged that they never laid any pipes, and were not liable.

Mr. Innes said the matter was mainly one of the amount of damage suffered by the plaintiffs. The defendant had lately, in addition to accepting rent, offered to give up the property claimed, but under the second agreement she still claimed the items mentioned.

Harry Hands, a partner in the firm of Messrs. Hands and Shore, accountants, who said his firm acted as secretaries for the original Platteklief Syndicate, between which and the defendant the agreement put in was entered into. Witness had been frequently at the spring, which had been masoned, and was about 20 feet deep. There was an overflow or wastage which drained into a small dam situated a few yards be-

low the spring. This dam was used to water cattle and so on. When witness first knew the spring it had been masoned, but the syndicate, to preserve the water, covered it in with an iron cover. Witness had not been at the spring lately, but so far as he knew the water ran clean and pure and good. They had never received any complaints or had reason to think that the water was not pure, and they had bottled up to three months ago. After the syndicate commenced operations some difficulty arose as to the transport over the sandy soil to the railway line, and that induced the directors to apply for further rights as to laying pipes to bring the water either to the siding (Elsje's Halt) or the main road, which was only 200 yards distant from the siding. On April 9, 1897, a letter was written to Messrs. Van Zyl and Buissinne, who were acting for defendant, offering to pay £12 per annum and clean out the dam if the right to lay the pipes was granted, this of course being contingent upon the syndicate undertaking the work, while the defendant would not be called upon for any portion of the expense. This offer was not accepted by defendant, but on April 29 a letter was received saying that the syndicate could have the right on paying so much per gallon for the water taken away, a meter to be placed on the farm. Witness's syndicate would not agree to that, and after further negotiations defendant wrote offering them the right asked for at a rental of £24 per annum, subject to the syndicate cleaning out the dam, and further provided that the syndicate did not amalgamate with the South African Mineral Water Company, and if that offer was not acceptable she proposed to refer the matter of rental to Sir James Sivewright as arbitrator. A reply was sent saying the letter would be submitted to the shareholders. A meeting of shareholders was held, at which Mr. Day was present, and the shareholders were content with the agreement, but no letter or communication to that effect was made to defendant. The directors looked upon the agreement as an option, and as they afterwards found they could do very much better by laying piping from another spring—the Glen Lily spring—which they acquired subsequently, they did not exercise the option. That spring was on another pro-

perty, and the pipes did not go near defendant's property. Before they acquired the Glen Lily spring there were also difficulties in the way of getting a siding at the railway. The Vasco Company acquired the Glen Lily spring from the South African Mineral Water Company as well as the rights to the Platteklouf spring. With regard to the amalgamation, defendant's consent was only obtained after great difficulty. Witness believed Mr. Day was in favour of the amalgamation, but defendant was not. The Vasco Company was formed and registered towards the end of 1897. In March, 1898, defendant called upon the company to have the dam cleaned, but after correspondence the directors, on August 21, 1898, replied that the company was not liable under the agreement, as they had not exercised their option and laid the pipes. From that date until a claim was filed in liquidation on December 28, 1898, there had never been any claim for rent. Witness considered that they had the right to lay pipes if they desired to do so, but there was no liability on them until the pipes were laid. Proceeding, witness gave evidence as to the plant—machinery, bottles, etc.—and other effects in the estate at the date of liquidation. These, which included some goods stored in Cape Town, were all sold to Mr. Dominicus for £400. The cost price of the articles was £700. Mr. Dominicus had not received these articles, defendant refusing delivery, and had made a claim for damages upon the liquidators. After certain correspondence had passed, defendant accepted the rent and tendered delivery of the goods on May 4 last. As a matter of fact, they had not got the goods yet.

Cross-examined: Witness did not know defendant's reason for being against the amalgamation. He knew her old experience of syndicates had not been a very happy one. She always got the rent, but sometimes she had to wait for it. It would be fairly correct to say that the syndicate was in a chronic state of impecuniosity. The spring had not been cleaned out while witness's firm were secretaries, first to the syndicate and then to the company. He estimated the cost of cleaning the dam at from £15 to £20 at the outside. Witness had an estimate for doing it at £20. As to the spring, it was possible that a few roots of

trees might grow into the well, but he did not see that cleaning was required as the spring was now covered in.

Ludwig Dominicus, a broker and general agent, carrying on business in Cape Town, deposed as to his having purchased for £400 certain goods from the liquidators of the Vasco Company. He went to take possession of the goods at the commencement of February, but was refused delivery. In consequence of that he had claimed £50 damages from the Vasco Company liquidators.

Cross-examined: With regard to the claim for £50 damages, witness had not asked more than he was entitled to. The South African Breweries, to whom witness had sold a portion of the goods, had sent out a wagon, horses, and men to the farm, but were refused delivery of the goods, and therefore claimed £7 13s. 9d. from witness.

James William Randall said he was now manager of a bond store, but in August, 1896, he was appointed by the original Platteklief Syndicate as manager on the farm, and remained as such until March, 1897. The dam in question was about 60 by 80 feet, and was walled in on the three sides. With regard to the masoned portion of the spring, that was about 10 feet square and 15 feet deep, while the eye of the spring was about 4 or 5 feet below the masonry. The water was clean and good while witness was there, and was the same when he left, in March, 1897. Witness was there last Sunday, and it was still clean and good, and exactly the same as when witness left. He produced a flask of the water which he filled last Sunday. That water was, of course, not aerated. The dam had silted up considerably since witness left in 1897. He should imagine cattle would not drink out of the dam now, as there was a lot of duckweed in it. There were troughs at the well into which water could be pumped by the pumps of the company, or the water could be drawn up by buckets. In dry times when witness was there the cattle also drank out of the troughs. When witness was there, there was a dry period from December to the following March, and there was no overflow into the dam.

Cross-examined: The spring ran about four gallons in five minutes. During the dry period the syndicate did not use an un-

usual quantity of water. As a matter of fact, for some months they did not have bottles, and therefore did no filling.

Re-examined: In September, October, and November, 1896, the syndicate did not use more than 500 or 600 gallons of water per day. The overflow ceased in December. They were not bottling during a part of January and February, but when they did not bottle the overflow did not commence to run again.

David Easton, an aerated water manufacturer, carrying on business as Daly and Day, Cape Town, said he had had more than twenty years' experience of the business. He was one of the original shareholders in the Platteklief Syndicate, and went to this spring before the agreement was signed. He was again there last Sunday, and considered the spring in a much better condition than before the lease was signed, because at that time there was an amount of vegetable matter in the water. The improvement was also due to the syndicate having covered the spring in. The water was now perfectly clear and clean, and the sample of it they had taken was perfectly fit for use for aerated water purposes. There was very little alteration in the dam now except that a certain amount of sandy soil had blown or been carried down by storm-water into it. He took it that about £20 would be required to clean the dam. He did not examine underneath the water, and could not say how much mud there was.

George Wilkinson, a contractor, living at Cape Town, said that he had accompanied Mr. Randall last Sunday and examined the dam. He estimated that he would clean it out thoroughly for £20.

This closed the case for the plaintiffs.

For the defence,

William Arthur Day said he was the husband of the defendant, and had been managing matters since the formation of the Platteklief Syndicate. He had been acting for Mrs. Day. He had more or less managed all plaintiff's business in connection with the spring, and since November, 1897, had held her power of attorney. Witness discovered the spring some six or nine months before he floated it into a company. Witness was a large shareholder in and a director of the Platteklief Syndicate. On

July 29 defendant gave her permission to the syndicate to lay the pipes in the terms mentioned. Witness had himself got his wife to sign the letter of July 29, and had taken it to the secretaries. The offer was accepted at a meeting of shareholders at which witness was present. Mr. Hands on that occasion said that there was no need for him to write, but that witness could just tell his wife that it was all right. Witness's wife only allowed the amalgamation to go through on certain conditions, although she was opposed to it at first. After the permission to lay the piping had been obtained three miles of piping were ordered from England. With regard to the dam, it was 50 yards by 25 yards, and the average depth of the mud now in it was 3 feet. He thought that a fair and reasonable amount for cleaning it would be 1s. 9d. or 2s. per yard. The overflow from the spring was about 5,000 gallons per day. The spring had never been cleaned. Before he was married all sorts of promises were made; they were going to have a cement wall and all that sort of thing, but as soon as it got into the hands of the Philistines—as he called them nothing was done. They simply wanted to humbug his wife. A fair estimate of the cost of cleaning the spring would be £30.

Cross-examined: He discovered this spring while he was shooting.

And then after that you discovered the syndicate and became secretary?—Yes.

And married the defendant?—Yes. Continuing, witness said the spring was not cleaned while he was secretary, although he occupied that position for nine months, and although the lease said it should be done forthwith, because his wife wanted him to wait until the rainy season before they pumped out the water, so that they should not run short for the cattle. The cleaning would probably diminish the supply of water. The average of the overflow was 5,000 gallons per day, sometimes it would be more, and sometimes less. Witness had refused to allow Mr. Dominicus to remove the plant, and used strong language, because he insisted upon his wife being paid the amount of rent due, £54 10s. They could now take the goods away as soon as they liked, the rent having been paid. As to the fulfilment of the lease by the Vasco Com-

pany and the payment of rent for 99 years, he would abide by the instructions of his attorneys. He had acted as he did to Mr. Dominicus because he relied upon his knowledge as a law agent in Cape Town for many years, and he told Mr. Dominicus that if he paid the rent he could take away the goods.

Mr. Innes, Q.C.: We are entitled to some damages. Dominicus will sue us. Defendant proceeded in a most high-handed manner throughout. The rights of the parties are clear from the agreement. As to the claim for £30, by means of our failure to clear the spring, we say we have no liability. The Platteklief Syndicate ought to have cleaned the spring. We didn't take over their debt. Even if we were bound to clean the spring, no damage has been caused by failure to do so. Defendant distinctly said no damage had been done. We are not liable for the rent.

Mr. McGregor: There was a lease of a *praedium rusticum*. We have a tacit hypothec for accruing rent.

[Buchanan, A.C.J.: The question of a lien was abandoned in the correspondence. What about damages?]

It is a very small amount. On the claim in reconvention we must get some damages. There was a clear contractual duty on plaintiffs to clean the spring. I am not prepared to argue that rent due amounts to more than £48.

Buchanan, A.C.J., said: The plaintiffs in this case, the liquidators of the Vasco Company (Limited), sue the defendant on a certain contract of lease which was entered into between the Platteklief Syndicate and the defendant previous to the formation of the Vasco Company. This contract gave the right to take water from a well on defendant's ground, and to use certain ground in the locality, and to erect machinery thereon, for a period of ninety-nine years. This lease was subsequently ceded by the Platteklief Syndicate to the Vasco Company with the consent of the defendant. Under this contract, at the end of December last a sum of £54 10s. remained due for rent. The Vasco Company going into liquidation, sold their rights under the contract, and sold their movable property. We have it that the liquidators tendered this amount of £54 10s. at the beginning of January last, and intimated that they intended to remove the movable property, but the defendant re-

fused to accept the tender, and refused to allow the movable property to be taken away. However, on May 4, after considering her position, the defendant agreed to accept the sum of £54 10s., and also to allow plaintiffs to take away all the movable property, which had been sold in the meantime, and also offered to pay the costs up to date. The rent having thus been received and delivery given of the property, or at least if not actually taken, it is at the plaintiffs' disposal, it is now unnecessary to give any judgment for the delivery of the property or payment of its value. The plaintiffs will, on this part of the case, be entitled to the payment of costs up to that date. Then there is a second claim in the declaration for £100 damages for the non-delivery of the property before May 4. The property ought to have been delivered upon the tender of the rent on January 9, but it was not, the defendant contending that she had a lien on the goods for the rent for the period then running. In my opinion this lien did not exist, certainly not after the payment of the rent. Some damages ought therefore to be awarded for the detention of this property. It appears that wagons, carts, and men were sent out to the farm to remove the goods when delivery was refused, and taking into account the expenses so incurred and the interest due on the sum, we think that an amount of £15 damages should be awarded on this second claim. Therefore in convention judgment will be for the plaintiffs for £15 damages and costs up to May 4. But the defendant has filed a claim in reconvention, which raises a new case. She alleges that correspondence took place between the parties which resulted in an agreement being come to to give the Vasco Company the right of laying pipes across her property and leading the water taken from the well across her property to the railway-station, during the period of the original contract. For this right which she then gave she was to receive £24 per year. The correspondence before July 29 I think should be considered in the nature of negotiations; the contract relied on being found in the letter of July 29 and the acceptance of this on August 6 by the shareholders of the Vasco Company. This letter was written at the request of the secretaries of the Vasco Company, and was taken by Mr. Day to his wife. She agreed to the terms, which were

submitted to the meeting of shareholders on the 6th August and accepted by them, at which meeting Mr. Day was present. It was clear from the subsequent correspondence that the directors of the company thereafter acted as though the agreement was a concluded one, and they actually ordered the necessary pipes. The subsequent correspondence as to the cleaning of the dam also shows that they regarded the contract as completed. By one of the terms of this contract the Vasco Company bound themselves to pay £24 per annum for the rights secured to them. Two years' rent has accumulated since that date, and has not been paid, and judgment must therefore be given in this claim in reconvention for the sum of £48 for rent. Under this same contract a duty was imposed upon the Vasco Company of completely cleaning out the dam. After that contract was entered into the Vasco Company endeavoured to get the defendant to clean the dam herself, and offered, if she would do so, to pay her £15. Afterwards, on her declining, they raised the offer to £20. One witness only has been called to give evidence of what it would cost to clean the dam, and the highest estimate is the sum of £20. This agrees with the amount tendered by the company, and I think that should be taken as the amount which would have to be expended to do the work. Judgment in reconvention will therefore be for the amount of £48 on the claim for rent and £20 on the claim for damages. There is another claim for damages for not having cleaned the spring. It is true that the company agreed to clean the spring forthwith, and the question now is whether any damage has resulted from the non-cleaning. On this point Mr. Day's own evidence shows that the spring water is perfectly pure and perfectly good, and that no damage has been done up to the present time, and consequently I am not inclined to give anything with regard to this claim. Judgment will therefore be for the plaintiffs for £15 with costs up to May 4, and the judgment on the claims in reconvention will be for £48 and rent, and £20 damages in respect of the cleaning of the dam.

Counsel was heard in argument upon the question of costs.

Mr. Innes, Q.C.: We were justified in coming into court. They tendered less than we claimed. We were bound to go on with the claim in convention. True, they have succeeded in their claim in reconvention,

Each party has succeeded. The two claims are irreconcilable. Each party should pay its own costs.

Mr. McGregor: In their letter of 9th May they declined our tender and delivery of machinery, and our request for arbitration. Substantial questions were the questions of machinery and assignment on one side and the claim in reconvention. They could only have Magistrate's Court costs on their £15. We are entitled to costs on the contract (claim in reconvention).

The Acting Chief Justice said: The tender in the first instance was insufficient, and the plaintiffs were entitled to come into court. Though the amount now recovered is small, this was not a case which a Magistrate's Court could very well have settled. On the other hand, the defendant has been successful in her claim in reconvention. She has to pay the costs up to May 4, and there has not been a large amount incurred since that date. Under all the circumstances it will be equitable that each party should pay their own costs after May 4.

Maasdorp and Solomon, J.J., concurred in the judgment, and also as to the costs.

[Plaintiffs' Attorneys, Messrs. Van Zyl and Buissinne; Defendant's Attorneys, Messrs. Sauer and Standen.]

SUPREME COURT

[Before the Hon. Mr. Justice BUCHANAN (Acting Chief Justice), the Hon. Mr. Justice MAASDORP, and the Hon. Mr. Justice SOLOMON.]

GRIMBECK V. COLONIAL GOV. f. 1900.
ERNMENT. (May 16th.

Expropriation — Railway Acts —
Compensation — Ownership —
Compulsory and voluntary sale.

The Government can under the Railway Acts take possession of expropriated land before paying the amount of compensation. The land so expropriated becomes immediately vested in the Government who can thereupon act as full owners even though transfer has not been effected. The expro-

priation of land though compulsory, is a sale and when effected the ordinary results of the transference of ownership follow as a matter of course just as in the case of a voluntary sale and purchase.

This was an action brought by Adolph Siegfried Grimbeek, a farmer, residing near Rhenoster Station, in the Beaufort West district, against the Commissioner of Public Works, as representing the Government, for a declaration of rights as to the sinking of a certain well by Government on plaintiff's land, and for an interdict restraining Government from taking water from that well and for damages.

The declaration, after stating the parties, said that the Colonial Government line of railway to the North passes through the plaintiff's farm. In May, 1897, in order to obtain a supply for the watering of the engines on the line of railway, defendants served a notice of expropriation upon plaintiff of a portion of this land adjoining the railway. Thereafter the Government took possession and sunk a well, obtained water from the said well, and used this water for railway traffic. The Government purported to act under powers conferred by Acts 9 of 1858 and 19 of 1874. The plaintiff alleged that the effect of the sinking of this well and the using of the water was that he had a materially diminished water supply. It was contended that the expropriation for this purpose was wrongful and unlawful, and that the sinking of this well and the using of the water was wrongful and unlawful, and an interdict and £500 damages was claimed.

The plea admitted the parties and the fact that the railway passes through plaintiff's farm, and went on to say that notice was given on May 8, 1897, that the land would be required for railway purposes, and that at the end of fourteen days it would be taken possession of. Station buildings and other works were erected. A well had been sunk, but the defendants denied any damage to the plaintiff's water supply, or that the sinking of the well and the taking of the land was unlawful. Defendants contended that immediately after the expiration of the fourteen days' notice the land became vested in the Government,

who were entitled to use it for railway purposes. The replication denied that the land was *bona fide* required for such purposes.

Mr. Searle, Q.C. (with him Mr. Buchanan), for the plaintiff.

Mr. Innes, Q.C. (with him Mr. Ward), for the defendant.

Buchanan, A.C.J., asked if compensation had been awarded.

Mr. Searle said no. There were negotiations, but there was no award, and the matter was pending the decision of the Court in this case. Nothing had been done except that they merely served a notice and had placed beacons on the land. Government had stated that certain houses had been erected on this land, but he thought it would be shown that these houses were not erected on this land, but on a piece of land reserved when the farm was sold. The plaintiff contended that the Government had no right to use the water obtained from the land until they had received transfer and awarded compensation, and had a clear title. The plaintiff contended that water was not one of the materials required for railway purposes under Act 18 of 1874.

The first witness called was

Percy Stroud Dale, a Government land surveyor practising at Beaufort West. He produced a plan showing the position of the land in dispute. The railway buildings, with the exception of 15 feet of the yard of the house at the station, were all on the land originally reserved by Government, and not on the piece of land now in dispute. Witness made his survey in November last. The well in question was 330 feet from the station. Witness thought there was room on the land originally reserved for more lines of railway if required.

Cross-examined: Witness's attention was not called to an inclined bank or dyke.

Adolph Siegfried Grimbeck, the plaintiff in the action, stated that he lived on the farm Rhenoster Kop, near the station of that name. He purchased the farm at a public sale by the Government in 1890 for the sum of £1,500. A portion of the ground, marked red on the plan, was reserved for railway purposes, the railway running through the farm. That ground was quite sufficient for the purposes of a siding, there being two railway lines. In May, 1897, he received a notice from the Government as to

the expropriation of the land in dispute. A plan was annexed, which witness gave to his attorneys, and had not seen since. Witness sent in a claim for £100 for the land, but this was not granted, an offer of £10 being made. After that the well was sunk. The Government then put up a pump and windmill, after which witness's water supply became lower, and he became seriously in want of water. Witness's spring was 15 feet deep, and he had bored below that to a depth of 12 or 13 feet. About a fortnight after defendants started a steam pump witness's water became less, and the surface water flowing from the cutting ceased altogether. He had never drawn the stationmaster's attention to the decrease of water in his well, but the latter had told him one day at the station that he was surprised to see that the water in the cutting had ceased flowing altogether. In 1898 witness could not irrigate his vineyard and orchard at all, and the only water he had he was forced to use for his sheep. During that time the Government were taking a lot of water from their well. Witness could not say if this was so during the night, but every engine that passed through during the day took water there. Ever since this well was sunk witness had been getting much less water from his farm. He had lost a good many sheep and fruit-trees. The nearest centre of population was Nelspoort, a pretty large station, about twelve miles off. There was no population at Rhenosterkop Station, and there was no need for a large station.

Buchanan, A.C.J.: You would rather not have a station there?

Witness: Oh, no.

Cross-examined: It was when the steam pump was working that the surface water from witness's cutting ceased altogether to run. In 1898 there was a severe drought. Witness had lost 300 sheep. That was owing to their having to drink dirty water from the dam, as witness had no fresh water which he could run in. They had had a more severe drought in 1887, when witness was also on the farm, which was then held under a lease from Government.

Thomas Stewart, a civil engineer, deposed that he was at the farm Rhenosterkop on November 22 last year, and examined the water supply. He was of opinion that the railway well affected

plaintiff's spring. The water in the Government well was from 8 to 10 feet higher than in plaintiff's spring.

This closed the case for the plaintiff.

Herbert B. Solly, a district engineer of the Cape Government Railways, stated that he was on the De Aar section in 1897, which included the portion of the line running through plaintiff's farm. He deposed that a part of the station buildings was on the ground expropriated. Witness initiated the movement for expropriation, having received instructions to expropriate at stations where there was not a sufficient amount of ground and at all new sidings. Prior to the expropriation there was practically no water supply at this station. He did not expropriate the land for the purpose of getting water, but owing to the drought the department began to look out for water after the expropriation.

Cross-examined: The notice of expropriation was given in May, and water was looked for in the following October. The traffic there would not require anything like 50,000 or 60,000 gallons a day.

Re-examined: The ground expropriated was necessary for railway purposes. He considered that a proper amount of ground had been taken if a road was to be made between the back of the station and plaintiff's ground.

Richard Edward Brewster, station foreman at Rhenosterkop, deposed that engines only stopped at that station to water if they had not got enough water at Beaufort through their having been waiting in the yard before starting, when of course they would have been standing with steam on. Between September, 1898, and January, 1900, only 234 engines stopped to water at the station. Engines were allowed five minutes' time to take water, but about two and a half minutes was the time they were actually taking water. There were formerly two tanks there, a 3,000 and 4,000 gallon one, but now only the former was in use.

Cross-examined: Between the end of 1897 and the early part of 1898 nearly all the engines going into or coming out of Beaufort West used to water at the station.

George McGrath, a locomotive superintendent, stated that engines consumed between 300 to 600 gallons each of water be-

tween Beaufort West and Rhenosterkop, according to the condition of the engines and the loads they were drawing.

George Kilgour, a civil and hydraulic engineer, stated that he examined the water supply at Rhenosterkop in March last, and according to his opinion the supply to the station and that to plaintiff's spring were quite distinct.

John Coverdale, engineer in charge of the railway water borings in the Karoo, gave evidence as to the depth of the water in the well at different periods.

This closed the evidence in the case.

Mr. Searle, Q.C.: Are Government justified in taking this ground? Can they make the case that they took the ground for railway purposes within the Act? We say they took it for water purposes. The Act applicable is 14 of 1881, in sections 1 and 2. These sections refer us back to sections 2, 3, 4, 5, of Act 19 of 1874. Then again we refer to sections 11 and 12 of Act 9 of 1858. These are the Statutes bearing on the subject. The cases interpreting these Statutes are: *Boxer v. Colonial Government* (13 S.C.R., 138), which laid down that water was not in the same position in regard to expropriation as a material, such as stone. Government can't expropriate for the purpose of getting water. Again, Government have no free possession of the land until they get transfer. The notice to expropriate is a compulsory sale, but they have no title until they have got transfer. They intended to take transfer, but they could not get this until the arbitration took place.

[Solomon, J.: Is transfer essential?]

Certainly. They must get transfer in order to do acts not allowed to be done under the Statutes. They must get transfer before they can use the water here.

[Maasdorp, J.: What is the advantage of taking immediate possession?]

To go on doing what the Railway Acts allow them to do, e.g., build a siding: *Clayton, N.O., v. Metropolitan and Suburban Railway Company* (10 Juta, 16, 291). The effect of this case is that after transfer the appropriated land can be used for any purpose whatever. See also p. 302. Transfer, when registered, gives full ownership, and at pp. 304, 305, it is shown that this is on the basis of a sale. Government only had user of land for railway purposes before transfer. Before transfer they can't take water, because it does not come under the category of "railway purposes." *Colonial Government v.*

Gertenbach (14, S.C.R., 51), referred to in *Gillet v. Colonial Government* (14 S.C.R., 185), refers to *Landmark v. Van der Walt* (3 Juta, 300). The Acts only give them a user for railway purposes. They have got no statutory title because if they had there would be no necessity for transfer.

[Maasdorp, J.: Cannot A, after having purchased a farm, use the farm as he likes after possession, pending transfer? Is not that an alalogous case?]

No. The sale here is a compulsory one. Government have no other rights than those given under Act 19 of 1874.

[Solomon, J.: Do you say that the expropriation is not completed until transfer is passed?]

Land might be expropriated but not vested. See the judgment of *De Villiers, C.J.*, at p. 190, in *Gillet v. Colonial Government* (14 S.C.R., 185). There it was argued that there was a distinction between expropriation for railway purposes and the vesting of *dominium*. In their plea in this case the Government claim that the *dominium* was vested on expropriation. They cannot get transfer until the matter has been before the arbitrators, and so until then they can't claim ownership or *dominium*.

[Buchanan, A.C.J.: Will they be able to use the water when transfer has been passed?]

That will depend on the form of the transfer.

[Solomon, J.: Do you say that here they cannot get a clean transfer?]

If they have expropriated *bona fide* for railway purposes, I think they can. *Landmark v. Van der Walt* (3 Juta, 300).

[Buchanan, A.C.J.: In that case there was no transfer.]

We are the registered owners of this land. Government must show some other title before they can interfere with our rights in a greater measure than the Acts allow. They must show some statutory title under a deed of transfer. Government intended here to take transfer because they found that they could not agree with Grimbeck as to the water. *McDonald v. District Engineer of the M. and N.E. Railway* (7 Juta, 290); *Slabbert v. Bell* (4 Searle, 3).

The principle decided in this latter case is found in *Bower v. Colonial Government* (6 Sheil, p. 163). Now, on the evidence, we find that the whole of this large area expropriated has been left unused for the purposes of digging wells. The land is

not used for railway purposes. It is used for water. There are no sidings, no platforms, no more rails have been laid. On the question of damages in connection with the water see *Struben v. Ohlsson's Breweries* (9 Juta, p. 68). Plaintiff has proved some substantial damages, and unless Government can show they have some title, he is entitled to some damages; and this even though the Court finds against us on the question of *bona fides* or otherwise of user.

[Buchanan, A.C.J.: Mr. Innes, what do you say as to the necessity for transfer?]

Mr. Innes, Q.C.: We must consider what the legal position of Government is, if expropriation is good under section 12 of Act 9 of 1858. There may be expropriation for use by hire, or the Government may buy. There may be expropriation for use of or property in the land. After lodging money in a bank under section 12, the Government may use as freely as possible. We purchased the land compulsorily after having treated with the plaintiff for a conventional purchase of the land. Under section 12 the title is vested in us after lodgment of money in bank. We have to lodge money in the bank in order to get ownership. Section 3 of Act 19 of 1874 allows us to take the land without going into the question of compensation. This would be settled afterwards. We became owners immediately we gave notice of expropriation. Here we expropriate to acquire the land. Therefore the land is vested in us. We rely on *Landmark v. Van der Walt* (3 Juta, 300). See particularly the last few words of the judgment. *Gertenbach's* case was the first case in which transfer was taken. Since then it has always been taken. It is not necessary to take transfer to register title. Transfer is taken merely to afford evidence of an act which has already taken place by operation of law: to secure Government against subsequent purchasers. *Gillet's* and *Bower's* cases are in point. There was no expropriation in *Gillet's* case, nor proof there that the land had been expropriated for railway purposes. The words of *De Villiers, C.J.*, at p. 190 in 14 S.C.R., bear us out when we say we can use for any purposes when we expropriate. In *Bower's* case, reported at 6 *Sheil* (p. 163), see the judgment of *De Villiers, C.J.*: "The only other ground . . . alleged nor proved," at p. 167. Government can take for railway purposes and use as they like, provided their title is good, and it is good immediately they have expropriated.

Mr. Innes, Q.C., was stopped.

Mr. Searle, Q.C., in reply.

The Court has never yet decided that mere notice of expropriation gives title. There is nothing in Act 19 of 1874 to show that there is any vesting. Act 9 of 1858 only gives particular rights, but not rights to use water.

Buchanan, A.C.J., in giving judgment, said: In the year 1890 the plaintiff purchased from Government the farm Rhenos-terkop, through which ran the railway line from Beaufort West to Hope Town, constructed under Act 14 of 1881. In the title to the farm issued by the Government, they reserved the extent of land over which the line ran, as well as ground for a siding. In the year 1897 further land was required for the purpose of erecting a station and other buildings required for the railway, which Mr. Solly, the Government engineer of the district at that time, found it necessary to establish. Thereupon notice of expropriation was given, and the Government had the land surveyed, and took possession; no transfer, however, has as yet been effected. The declaration states that this was a wrongful and unlawful expropriation, a colourable expropriation, and not for railway purposes at all, but for the purpose of enabling the Government to sink a well and thus obtain water for the working of the traffic of the line. This is the main ground upon which the declaration is founded, and the first question we have to decide is whether or not this ground was *bona fide* required for railway purposes. There are decisions of this Court to the effect that water cannot be considered a material necessary for the construction of a railway line, and that ground cannot be expropriated merely for purpose of obtaining water. I think, however, after hearing the evidence of Mr. Solly, that this ground was not expropriated for the purpose of obtaining water, but for the purpose of erecting a station and other necessary buildings, and to secure room for sidings and the like. There is the further point that although notice of expropriation was given and possession taken in May, it was in October that for the first time the question of sinking a well was brought to the mind of the engineers. The plaintiff says that this sinking of the well was unlawful, and although not clearly alleged in the declaration, it was in argument contended that whether the expropriation was lawful or not, it was unlawful for the Government to sink this well, at any rate until the ground had been transferred. It

is not denied that the Government can demand transfer, but the question is whether or not the property vested in them before that was done. Under the old Roads Act, if land or material was required for roads the Commissioner might take the land upon giving notice of expropriation, and if no terms were agreed upon as to how much should be paid, they could pay the amount offered into a bank, but under the Railways Act the Government is absolved from paying the money into the bank, and can take the land before compensation is settled, pending arbitration on the subject. It has been the custom of the Government latterly to take transfer of land expropriated, but this is to strengthen their position, and also to secure themselves against subsequent purchasers of the property, who might be ignorant of the expropriation. The land itself, however, after expropriation becomes vested in the Government. As it has not in this case been expropriated merely for the purpose of obtaining water, it was not an unlawful expropriation. Of course, if the expropriation had not been originally *bona fide*, there might have been grounds for the action, but I think the expropriation was *bona fide*. The expropriation of land, though compulsory, is a sale, and when effected the ordinary results of the transference of ownership follow as a matter of course, just as in a voluntary sale and purchase. Judgment would be given for the defendants with costs.

Maasdorp and Solomon, J.J., concurred.

Plaintiff's Attorneys, Messrs. Scanlen and Syfret; Respondent's Attorneys, Messrs. J. and H. Reid and Nephew.

In re THE PETITION OF MRS. BOJE

Mr. Burton moved in the petition of Jan Johannes Michau, an attorney of the Court, who stated that one Mrs. Boje was a daughter of Jotham Joubert, M.L.A., who had resided in the district of Aliwal North. During the occupation of that place by the Free State military forces the said Jotham Joubert left his farm and proceeded to Pretoria, where he probably was at present, leaving Mrs. Boje in charge of all his live-stock and to carry on the operations of the farm. The petition went on to state that the said Jotham Joubert was a British subject, and so far as the petitioner was aware had not taken up arms against the Queen's forces. In consequence of certain threats held out by the Officer Commanding Her Majesty's

forces at Burghersdorp, Mrs. Boje came to town to consult her lawyers. The threats held out were that the officer had said that he would sell, by himself or his servants or those acting under his authority, the live-stock, horses, goats, etc., of the said Jotham Joubert. In support of his petition, Mr. Michau stated that a telegram had been received from Burghersdorp that afternoon stating that the said sale was to take place the following morning. He therefore prayed for an interdict restraining the Officer in Command of the Forces in Burghersdorp, either by himself, his servants, or agents, from selling or disposing, or in any way dealing with the live-stock, pending an action to be brought in the Supreme Court.

[Buchanan, A.C.J.: What *locus standi* has the petitioner?]

Mr. Burton: He represents this lady, who has been left in charge of the live-stock, Mrs. Boje, Joubert's representative.

[Solomon, J.: It does not appear that he has been appointed her attorney for that purpose.]

The circumstances are exceptional.

[Buchanan, A.C.J.: At whose risk will an order be given? Who will be answerable for the order?]

Mrs. Boje. Michau has been instructed to apply in this matter if the circumstances which have now occurred make it necessary. The circumstances here are different to Fourie's case. We are entitled to a rule nisi. Mrs. Boje has been in Cape Town for the last fortnight, having come here with regard to the threats to sell the stock, but yesterday she went on a visit to Worcester, and it was therefore impossible for her to be back here in time after the news of the intended sale was received and make an affidavit herself.

[Buchanan, A.C.J.: Is this district still under martial law?]

I believe so.

[Maasdorp, J.: Mrs. Boje has made no affidavit. The affidavit put before us is made on evidence given to Mr. Michau second or third hand.]

Buchanan, A.C.J.: No order can be made on this application on the simple ground that the applicant before the Court has no *locus standi*. The petitioner, J. J. Michau, an attorney of this court, alleges that a lady, Mrs. Boje, has informed him that she

had been left in charge of somebody else's property, and that that property is to be interfered with and sold, but it is clear that J. J. Michau has no *locus standi*.

Maasdorp and Solomon, J.J., concurred.

SUPREME COURT

[Before the Hon. Mr. Justice BUCHANAN (Acting Chief Justice), the Hon. Mr. Justice MAASDORP, and the Hon. Mr. Justice SOLOMON.]

PROVISIONAL ROLL.

DU PLESSIS V. STAPELBERG. } 1900.
May 17th.

Mr. Upington applied for provisional sentence on a promissory note for £78 7s. 6d., due December 27, 1899, with interest and costs.

Provisional sentence as prayed.

WARD AND CO. V. ENDLEY.

Mr. Gardiner, for the plaintiffs, asked that this matter be allowed to stand over, as defendant had put in an affidavit which required answering.

Mr. McGregor appeared for the defendant.

The matter was postponed until the last day of term.

CAMPBELL AND CO. V. LOIS GOLDSTEIN.

Mr. Buchanan applied for provisional sentence upon a judgment given in the Magistrate's Court at Wynberg on May 7, 1900, for the sum of £100, for goods sold and delivered. A writ of execution had been issued, and a return of *nulla bona* made. A further sum of £2 1s. 1d. costs was also asked for. The defendant had also been called upon to show cause why certain moneys due and payable or to become due and payable to defendant under and by virtue of a policy of fire insurance should not be declared executable and attached to satisfy the said judgment.

Provisional sentence granted as prayed; the money declared executable.

DE KLERK V. D. J. JORDAAN.

Mr. Buchanan applied for provisional sentence on a judgment given in the Magistrate's Court at Steynsburg for the sum of £70 7s. 3d., purchase price of goods sold and delivered, together with £1 19s. 7d. costs, a writ of execution having been issued and a return of *nulla bona* made. Defendant was also called upon to show cause why a certain half-share of erf No. 271, situated in the village of Steynsburg and belonging to him, should not be declared executable and be attached to satisfy the balance owing on the said judgment.

Provisional sentence granted as prayed; and the property declared executable.

LEVENKIND V. JOHANNES JACOBUS DU PLESSIS.

Mr. P. S. Jones applied for provisional sentence on a mortgage bond for £225, with interest at the rate of 6½ per cent. from September 14, 1898, with costs of suit; and also that the property specially hypothecated be declared executable.

Provisional sentence granted as prayed, and property declared executable.

ILLIQUID ROLL.**SMUTS AND KOCH V. H. J. VAN DER WEST. HUIZEN.**

Mr. McGregor moved, under Rule 329d, for judgment for the sum of £378 4s. 7d., balance of account owing for goods sold and delivered.

Judgment granted as prayed.

ROSE V. T. J. POOLE.

Mr. M. Bisset moved, under Rule 329d, for judgment for the sum of £35, goods sold and delivered.

Judgment granted as prayed.

TOWN COUNCIL OF CAPE TOWN V. BOMBERG

Mr. Gardiner applied, under Rule 329d, for judgment for the sum of £31 19s. 2d., arrear rates due to plaintiff, and also for the sum of £57 2s. 5d., being balance of the amount due on the construction of certain drains by plaintiff for defendant.

Judgment granted as prayed.

VAN ZYL AND BUISSINNE V. SMUTS.

Mr. Buchanan applied, under Rule 329d for judgment for the sum of £156, being amount due to plaintiffs for professional services rendered and for disbursements made on behalf of defendant between the years 1898 and 1899, with interest *a tempore morae*, and costs of suit.

Judgment granted as prayed.

MITCHELL AND CO. V. ROUX.

Mr. Buchanan applied, under Rule 329d, for judgment for the sum of £122 14s. 3d., goods sold and delivered by plaintiff to defendant between the months of August and October, 1899, with interest *a tempore morae*, and costs of suit.

Judgment granted as prayed.

GENERAL MOTIONS.**AFRICAN BANKING CORPORATION V. SEARELLE.**

Mr. Maskew applied that certain funds, amounting to £322, attached by the Sheriff under an order of Court, be declared executable, to satisfy a judgment granted in favour of the Corporation against Searelle by the Court on May 10 last.

Granted.

**GILLIS V. KLEYN. } 1900.
} May 17th.**

This matter, which had been before the Court on May 1, and had been postponed in order that notice of the application should be given to the executors of the will, which required interpretation, was again brought up. Notice having been given as required by the Court, the matter was allowed to be proceeded with. The application was one for an order authorising the Registrar to pass transfer from the respondent to the applicant of certain property forming part of the quitrent farm Mistkraal, situate at Oudtshoorn. The grounds of the application, as stated in the notice of motion, were that the property had been purchased by Gillis from Kleyn, one of the heirs under the mutual will of the latter's parents; that Kleyn had obtained transfer of the said property from the surviving testatrix free from any conditions of the will of the first dying; that no burden of *fidei commissum* was imposed by the said will. The affidavit of the applicant stated that he had purchased the property from Kleyn for the sum of £1,010, but that the

Registrar of Deeds had rejected the deed of transfer in consequence of a letter addressed to him by T. J. C. Kleyn, brother of the respondent, T. J. Kleyn, from whom applicant had purchased; that by the will was bequeathed to the five heirs (of whom T. J. Kleyn was one) certain shares of ground; that the surviving spouse had transferred to T. J. Kleyn his share, free from any conditions as to the burden of *fidei commissum*; that having purchased from T. J. Kleyn, he was desirous of having transfer passed to him, but that the Registrar of Deeds had refused to pass the transfer deed, because he was in doubt as to the true construction of the will.

The letter above referred to stated that by the will the property was bequeathed to T. J. Kleyn, provided he paid into the estate after the death of the survivor the sum of £200, together with the appraised value of the buildings; that it was further provided in clause 5 of the will that, on the predecease of one or more of the testator's sons, their shares shall pass over to their lawful descendants, and in the event of there being no lawful descendants then their ground shall fall to the son whose ground is situated nearest to it.

That up to the present T. J. Kleyn has no descendants, and in the event of a clean transfer being passed to Gillis great injustice might be done.

The will in the third clause thereof bequeathed to each of the sons certain portions "to be assumed and possessed by them after the death of the survivor of us, subject however to the conditions and stipulations, as described herein.

The fourth clause said: "It is the wish and desire that after the death of the survivor of us the buildings standing on the portions bequeathed shall be separately appraised," and the value of the buildings added to the amount to be paid by each of the heirs for his share, and the collective sums "shall, after the death of the survivor of us, be paid into the joint estate by our sons respectively, and the proceeds divided amongst our joint heirs."

The fifth clause provided: "In case of predecease of one or more of our sons, his or their portion shall devolve upon their lawful descendants, and in case there is no issue, the ground shall fall to the son whose ground lies nearest it, subject to the same conditions hereinbefore set out, but in case the son shall refuse or not make known his intention to take possession thereof within one month

after the death of his brother, in that case the same shall fall to the still surviving sons in equal shares for the same sums and subject to the same conditions as originally set forth."

The survivor and the children were appointed heirs to all the other property. The Registrar of Deeds reported that the clauses 3 and 5 of the will were of doubtful construction owing to the difficulty in interpreting the expression "predecease." If it was intended to refer to the death of the survivor then the property was subject to a *fidei commissum*, but if it referred to the death of the first dying, then there was nothing to prevent transfer being passed.

F. J. C. Kleyn, one of the sons, opposed the application, as he was the son to whose ground the land in question was nearest situated. He alleged on affidavit that he had not known of the fact of a clean transfer having been passed to T. J. Kleyn.

Mr. Innes, Q.C., for the applicant.

Mr. Buchanan for the respondent.

Mr. Innes, Q.C.: There are three clauses in the will in question. The man from whom the applicant bought had a vested right at the time of the sale. Clauses 3 and 5 are the important ones. Each son get a specific portion on the death of the first dying. Clauses 3 and 5 are somewhat inconsistent. If 3 had stood alone there would be an out and out bequest to the son after death of the survivor who would have a life usufruct. Therefore from the death of the first dying we have a vested interest immediately the survivor adiates. The survivor has since given up her life interest.

[Buchanan, A.C.J.: That is a question. Is there any allegation to that effect?]

Whether there has been an abandonment of life interest or not we have a vested interest. The will must be interpreted in any case. True, clauses 5 and 3 are somewhat contradictory, but we submit that the bequeathing clause is No. 3, which gives each son a vested right. We might give one of these sons, therefore, at least a vested right. The bequeathing clause should prevail, and not the clause dealing with the administration and substitution in case of predecease. Clause 3 should overrule the others. The testators, when they spoke of "predecease," seem to have had in view the death of a son before the death of the first dying. The testators meant to make an absolute bequest to the children, and therefore the man from whom he bought had a vested interest at the time of the sale.

The survivor meant to give up her life interest. She passed transfer to her son, thinking he had a vested right, otherwise she would not have passed transfer as she did. She was a party to the will under discussion, consequently her conduct with regard to it is important.

[Buchanan, A.C.J.: But the transfer is not in her name.]

[Maasdorp, J.: If there is no vesting, then there can be no claim for transfer.]

The survivor should not if there was no vested right have passed transfer.

[Maasdorp, J.: If the will gives no vested right until death of the survivor, then the clauses 3 and 5 read consistently.]

Just so. But in spite of that we can't get away from the bequeathing clause, which gives us a clear vested right.

[Buchanan, A.C.J.: Mr. Buchanan, do you contend that the will should be annexed to the transfer?]

Mr. Buchanan: We want a copy of the will annexed to the transfer. The survivor was not right in passing this clean transfer. We contend that there is no vested right. This application is premature.

[Buchanan, A.C.J.: What construction do you put on the will?]

There is either an ordinary or a fidei-commissary substitution. The whole question depends on the word "predecease" in clause 5; it refers either to the death of one or both of the testators; the latter is utterly unnatural, and is not relied on by the applicant. It is not meant so here. Clause 5 makes this impossible. It cannot mean "predecease of survivor," since there is the same difficulty in this case as in the former, viz., the finding out of the contents of the will. Even if it does mean this, it is a case of ordinary substitution. There is no vested interest in the predeceasing son. This is clear from the terms of the will. There is no out and out bequeathing of the property to the sons. The two sections must be read together, or otherwise they are inconsistent. The bequest is made in section 3 subject to certain conditions as put forward in section 5. "Predecease" means "predecease of son before his own descendants." The whole terms of the will show that the testators wanted distribution after the death of the survivor. A clean transfer as asked for will defeat the terms of the will. Gillis bought merely a *spes successionis*.

The testatrix should not have passed this clean transfer. The deed should have referred to the terms of the will.

[Buchanan, A.C.J.: It does refer to the will.]

Yes, but the salient points should have been extracted or the whole will annexed. Whatever the decision of the Court, we must not be condemned in costs.

[Buchanan, A.C.J.: Mr. Innes, have you looked at the codicil?]

Mr. Innes: Yes. But that refers to some land which has not been bequeathed in the will. The word "predecease" refers either to the death of both the testators or of first-dying. If clause 5 is impracticable, as contended by respondent, then we must interpret the will according to clause 3. If clause 3 governs, then Kleyn, from whom we purchase, had a vested right at time of death of first-dying provided "predecease" refers to first-dying. Survivor does not claim her life interest. She had notice of this application and does not appear to oppose.

C.A.V.

Postea (May 18).

Buchanan, A.C.J., said: This is an application by Mr. Gillis for an order for the registration of a transfer of certain land bought by him from one Kleyn. Kleyn is an heir under his father's and mother's will, and obtained from the executor of his parents' estate the transfer of certain property for the purpose of giving effect to the provisions contained in the will. Looking at the will, it is not at all easy in my opinion to ascertain the intention of the parties who made the will, and it is the intention of the parties that must govern the decision of the Court. Mr. Innes contended that when the survivor transferred the property she abandoned the life interest, but even if that be so, it was admitted that there were other provisions of the will that tended to show that each son took not an absolute right in this property, but only a contingent vested right. On reading the clauses of the will through, there are some that would be meaningless and unnecessary if Mr. Innes's contention were right. I think, taking the will and codicil together, that the intention of the parties was that the sons should have a right to this property, subject to the condition that they survived the survivor, but that if they predeceased the survivor, the rights were to go over to their children. This being an application for an unrestricted transfer, free from the restrictions of the will, the Registrar of Deeds was justified in refusing to register the same unless the will was attached. The application cannot be

granted, and Mr. Gillis must pay the costs. The judgment is: No order, applicant to pay costs.

Maasdorp and Solomon, J.J., concurred.
[Applicant's Attorney, Mr. Gus. Trollip;
Respondent's Attorneys, Messrs. Fairbridge,
Arderne and Lawton.]

IN THE MATTER OF THE PETITION OF KATHERINE MARIA } 1900.
LOUISA JEFFREY. } May 17th.

Mr. Gardiner moved in this matter, which was for an order authorising the Registrar of Deeds to cancel a certain mortgage bond. The petition set forth that the mortgage bond was for £225, in security of which certain house and furniture were mortgaged to one Vossmer, who was in the South African Republic. The applicant wished to pay off the bond, but from affidavits and letters put in it appeared that Messrs. Fairbridge, Arderne, and Lawton, who were acting for Vossmer, could not communicate with him owing to the war for the purpose of securing his power of attorney to cancel the bond. The applicant offered to pay the costs of the application.

Buchanan, A.C.J., said there was ample authority in the letters written by the mortgagee for Messrs. Fairbridge, Arderne and Lawton to receive the money on his behalf, and the Court granted an order for the cancellation of the bond upon payment of the principal and interest to the attorneys for the mortgagee.

BARRON V. HUNTER.

This was an application for an interdict restraining the respondent from interrupting the free use by the applicant of a certain lane or passage.

From the petition and affidavits put in it appeared that the parties were the owners of adjoining properties at Woodstock, and the applicant alleged that by mutual agreement he cemented the passage between the houses, which was necessary for the use of the sanitary contractors. Recently, however, the respondent had placed an obstruction in the passage. The applicant said that for some time past the respondent had been badly disposed towards him because he would not purchase his house, and he had assaulted him. He said his house would become uninhabitable if the obstruction placed in the lane by the respondent was not removed. The respondent denied that

he had come to any agreement with the applicant as to the use of the passage, and that he derived no benefit from the cementing of the passage. He stated that he was not indignant because the respondent would not purchase his house, and that the applicant had no right to the lane.

In the course of argument by counsel it was stated that a part of the application with regard to restraining the respondent from making a hole for the purpose of passing certain pipes through applicant's property would not be pressed, respondent having stated that he did not intend to put the pipes there again.

Mr. Searle, Q.C., appeared for the applicant.

Mr. Graham, Q.C., appeared for the respondent.

After argument,

Buchanan, A.C.J.: I think it is unreasonable of the respondent suddenly and without notice to applicant to stop the use of this lane, and the applicant has in consequence been put to great inconvenience, but I think Mr. Graham's suggestion is fair, that an interdict should be granted restraining the respondent from using this land pending an action to be brought by the applicant. I hope, however, that in the meantime the parties, who seem to have quarrelled, will come together again, and let bygones be bygones, and resume the good-fellowship that existed before. An interdict will be granted restraining the respondent from interfering with the due and reasonable use of this lane pending an action to be instituted forthwith for a declaration of rights.

Maasdorp and Solomon, J.J., concurred.

IN THE ESTATE OF THE LATE GEORGE THORNE.

This was an application for leave to sell certain property.

Mr. Buchanan appeared for the petitioner, the executor testamentary under the will of the late George Thorne and curator of Richard Thorne, the afflicted son of the testator, and who under the will enjoyed the life interest of certain property at Rondebosch. It was stated that this property was in a dilapidated condition, and only about £51 per year was available for the maintenance of the said Richard Thorne.

There was a small cottage and a house in the estate, the former being occupied by the said Richard Thorne, while an offer of £2,000 having been received for the latter, it was desired to sell the same. This sum would provide an income of £100 a year for the said Richard Thorne, and leave him the cottage as a residence, while the capital of £2,000 and the remaining property would be secured to the revisionary heirs.

The consent of the major heirs was filed, while the minor heirs were represented by the petitioner.

The order was granted.

WILLCOCKS V. WILLCOCKS.

This was an application on behalf of Mrs. Annie Dawson Willcocks (born Dean), for leave to sue her husband, Albert Henry Willcocks, for restitution of conjugal rights by edictal citation.

The application of the petitioner showed that the parties were married at Uitenhage in 1896. After marriage they lived at Port Elizabeth and afterwards in the district of Queen's Town. There was one child of the marriage, who was now two years and nine months old. The petitioner stated that her husband deserted his home in May, 1899, and was alleged to be at present in London. The defendant was sentenced in August last in England to six months' imprisonment for obtaining money by false pretences, and the six months had now elapsed. It was not known whether the address in London which was given was that of the defendant before his imprisonment or since.

Mr. Buchanan, for the petitioner, asked that an order for alternative service might be given in case it was impossible to serve the citation on respondent at the address given.

The Court gave leave to sue by edictal citation, but directed that personal service should be effected, failing which further information would have to be placed before the Court for the granting of alternative service. Leave was also given to serve the intendent and notice of trial at the same time.

IN THE INSOLVENT ESTATE OF JOHANN GEORGE GADOW.

Mr. Burton moved for an order authorising the necessary steps to be taken for the appointment of a new trustee in this estate, the trustee appointed at the second meeting having died, and it being believed that there were a number of outstanding debts which might be collected.

An order was granted as prayed.

IN THE MATTER OF THE PETITION OF MARTHA BOLDMAN.

This was an application for leave to the petitioner to pass transfer of a certain property without the assistance of her husband, whose whereabouts were unknown.

Mr. Buchanan appeared for the petitioner, who stated that she was married in community of property to one W. Boldman, but shortly after their marriage he disappeared, and she had not heard of him for three years. She desired to sell a certain piece of perpetual quitrent ground at Kokstad for £30 to one Piet Joubert, buying from the said Joubert another piece of land in the same village, and accordingly made this application.

Buchanan, A.C.J., said this was more in the nature of an exchange, and that marital rights would not be interfered with, and the Court granted an order as prayed.

IN THE ESTATE OF THE LATE } 1900. HARRIET TEMPLEMAN. } May 17th.

Will—Loss of original—Copy—Affidavit—Rule nisi.

Where evidence on affidavit was adduced showing that though a will had not been cancelled, the original had been lost, the Court, on application being made for an order authorising the Master to accept a copy thereof made by the agent who drew up the will, granted a rule nisi calling on all persons concerned to show cause why this copy should not be accepted by the Master in place of the original will.

This was an application for an order authorising the Master to accept a copy of a certain will in place of the original, which had been lost.

The petitioner, the husband of the late Harriet Templeman, stated that they were married in community of property in January, 1884, and in April of that year they made a mutual will. After the said will had been signed the agent handed him a copy of it, but to the best of petitioner's recollection the will itself was left in the said agent's possession. On the death of the said Harriet Templeman petitioner went to the said agent, but found that he had not got the will. The said Harriet Templeman knew the contents of and was perfectly satisfied with the said will, and he was positive she had not made another will or destroyed the original. He therefore prayed for an order calling upon all those concerned to show cause why the Master should not be authorised to accept this copy of the will in lieu of the original one, which had been lost.

An affidavit was also read from the agent who drew up the original will, in which he stated that he was in the habit of sometimes keeping wills in his office, but although he had made diligent search, he was unable to find the will in question. He, however, certified that the copy in question was a true copy of the will, and if the late Harriet Templeman had wished to destroy that will or make another one, she would most probably have consulted him, as he had acted as her agent, as well as that of her mother and brother, for many years.

Mr. Gardiner, for the petitioner, referred to section 3 of Ordinance 104 of 1833. This section, however, was not directly in point, because the copy mentioned there was authenticated by the Magistrate. *The Master v. Berrange* (S.C.B. 68). The Master may register a notarial gross in case of loss of the original. See for English law *Brown v. Brown* (8 Ellis and Blackburn, 876).

[Buchanan, A.C.J.: In that case *viva voce* evidence was given on a thorough inquiry.]

Yes; but we don't want probate granted now. We merely ask for a rule *nisi*. *Sugden v. St. Leonards* (1 Probate Division, p. 154 [1875-1876].)

[Buchanan, A.C.J.: The question here is whether you ought not to proceed by action.]

We ask for a rule *nisi*; if an attempt is made to oppose the rule being made absolute, then the Court might decide whether an action should be brought or not.

Buchanan, A.C.J., said: In England wills are established by an action for probate in the Probate Court, but here the original will must be produced to the Master of the Supreme Court, who grants letters of administration thereunder. Under both procedures a case may arise, however, where the original will has been destroyed or lost, or otherwise cannot be produced, although not cancelled or set aside. If the absence of the document can be satisfactorily accounted for, and the fact that it has not been cancelled established beyond doubt, the Court may give effect to the contents without the production of the will itself. In this case the applicant has produced an original copy made by the agent who drew up the will, and no doubt this copy, made at the time and handed to the applicant, is a true and correct copy of the will. I do not think the Court should lay it down as a precedent that evidence on affidavits will be sufficient in every instance, as it may be very necessary in some cases to have the parties examined orally before the Court to prove the loss of the will and its contents. In this case, however, we have this copy, and, moreover, the will does not depart from what would be the distribution of the property in intestacy. Under these circumstances I think we should grant the rule asked for. A rule *nisi* will therefore be granted in terms of the prayer of the petition, calling upon all persons concerned to show cause why this copy should not be accepted by the Master in the place of the original will; this rule to be served personally on the major children and upon the guardian of the minor children, and also to be published once in the "George and Knysna Herald" and once in the "Government Gazette."

Maasdorp and Solomon, J.J., concurred.

CROWDER V. WHELAN.

This was an application for leave to the defendant Whelan to purge his default and to plead.

Mr. Molteno appeared for the applicant.

Mr. Graham, Q.C., appeared for the defendant.

The affidavit of applicant's attorney stated that the applicant being a very illiterate man, was not able to give him certain information that he required for the purpose of instructing counsel to draft his

plea, but he had now supplied that information, and the plea could be drafted. In deponent's opinion the defendant had a good defence to plaintiff's claim.

Mr. Graham, Q.C., did not object to removal of bar, provided all costs incurred in consequence of the bar were paid by applicant.

The Court granted the application, the plea to be filed within 48 hours; costs incurred in consequence of the bar to be paid by the applicant, and costs of the motion to be costs in the cause.

IN THE ESTATE OF THE LATE JENODIEN.

Mr. Burton applied for leave to mortgage certain property.

Granted, subject to the Master's supervision.

IN THE MATTER OF THE FAIRFIELD BRICK AND LAND COMPANY.

Mr. Searle, Q.C., presented the liquidator's report for confirmation.

The report was confirmed, and the liquidator's remuneration fixed at 2½ per cent. of the assets.

SUPREME COURT

[Before the Hon. Mr. Justice BUCHANAN (Acting Chief Justice), the Hon. Mr. Justice MAARDORP and the Hon. Mr. Justice SOLOMON.]

COHEN V. FALCONER. { 1900.
May 18th.

This was an action for the recovery of £45 12s. 6d. brokerage on a certain sale. The declaration alleged that both parties to the sale reside in Cape Town. On the 11th August, 1899, plaintiff, acting as defendant's agent, sold certain ground with buildings at the corner of De Villiers and Hanover-streets for £1,825. There was due as brokerage £45 12s. 6d., which defendant refused to pay. Plaintiff now claimed £45 12s. 6d., with interest to date.

The plea admitted the formal allegations, and admitted the sale, and that the sum of

£45 12s. 6d. was due in respect of the sale, and that the defendant refused to pay, but said that he was justified in so doing because on November 16, 1899, the sale arranged by the plaintiff was cancelled by mutual agreement of the parties with the consent of the plaintiff, who agreed to forgo his commission on the said sale. Another sale was, however, arranged, and plaintiff agreed to take commission thereon in lieu of the commission for the cancelled sale. Plaintiff had been paid the commission on the second sale.

Mr. Upington appeared for the plaintiff, Mr. Gardiner for the defendant.

Robert A. Falconer, the defendant, examined by Mr. Gardiner, said he was a builder, and in August last year wished to sell certain property. Mr. Cohen came to witness and asked to be employed as broker. Plaintiff said he knew a man named Koppel who would buy the property, and witness eventually sold the property to Koppel for £1,825. The broker's note (produced) was passed. At the time the property was sold there was a lease on the property which had four months to run. Witness told Cohen this. Cohen was to get the usual commission if the sale went through, and was to be paid on the receipt of the purchase price. The sale was eventually cancelled as Koppel did not want to take transfer owing to the lease. At first there were negotiations about the lease, but eventually the sale was cancelled at Cohen's request. Plaintiff told witness that he could sell Koppel another property in Hanover-street if witness would cancel the sale. Witness eventually agreed to cancel the sale on that understanding, plaintiff saying he would get his commission from the other side.

Cross-examined by Mr. Upington: Witness could not remember whether there was an occupation certificate, but letters had passed between Koppel and himself on the matter. He was quite sure that the absence of the occupation ticket did not lead to the cancellation of the sale. Witness denied telling plaintiff that a month's notice would be sufficient to turn out the lessee occupying the house. The lease was broken, and Koppel told witness that he wanted the property for rent-producing purposes.

Thomas P. Pearson, formerly manager of the Cape Town Club, said the defendant transacted his business at the club, where Cohen frequently came to see him. Witness remembered a meeting between them in the bar, when Cohen asked defendant to cancel the sale of the property, and after some talk they agreed to cancel the sale.

Abraham Cohen, licensed broker, examined by Mr. Upington, said he had had nothing to do with any cancellation of a sale. Witness was negotiating for the sale of both properties to Koppel at the same time. Witness got the brokerage on the second sale. Witness never heard about an agreement to forego his commission until the present case came on.

Cross-examined by Mr. Gardiner: When witness saw defendant about the property he asked him about the lease, and defendant told him there was no lease. Witness denied that he had ever spoken in the bar at the club about the cancellation.

John Koppel, general dealer, now living in the Hanover-street property, examined by Mr. Upington, said that Cohen had nothing to do with the cancellation of the first sale. Witness was prepared to have bought other properties whether he had bought the property from Falconer or not.

Cross-examined by Mr. Gardiner: Witness was not prepared to say that he had £1,800 available to buy another property. Some of his money was tied up in the Free State. It was at witness's request that the sale was cancelled. Cohen was present at the club when witness and defendant agreed to cancel the sale, but Cohen had nothing to do with the cancellation.

After argument,

Buchanan, A.C.J., said that the simple question was whether the plaintiff agreed to forego his commission on the sale of the property. The plea alleged that by mutual agreement the plaintiff consented to take commission on the sale to Koppel in lieu of the first sale. He thought that the defendant had altogether failed to prove that the plaintiff agreed to forego his commission. In answer to the Court, defendant had said that plaintiff did not say that he had given up his commission, but that he (defendant) assumed that he had done. On this simple point he thought defendant had failed, and judgment would be given for the plaintiff with costs.

Maasdorp, and Solomon, J.J., concurred.
[Plaintiff's Attorneys, Messrs. Van Zyl and Buissine; Defendants' Attorney, Mr. C. Brady.]

JONAS V. MAAETENS. { 1900.
May 18th.

Slander—Plea of privilege, truth and absence of malice—Ordinance 7 of 1843, section 9—Kerkeraad.

The defendant in an action for slander, for words used at a Consistory Court, having admitted the use of the words laid to his charge, pleaded "privileged occasion, truth and absence of malice," and on being ordered by the Magistrate to substantiate his plea, undertook to do so, but did not himself give evidence of bona fides. During the hearing, the Magistrate held that there was no privilege. Subsequently, on the Dutch Reformed Church Ordinance being quoted, he changed his opinion, and held that Ordinance to be an absolute bar, and refused to allow plaintiff to lead evidence of malice and granted absolution from the instance.

Held on appeal, that the Magistrate should have allowed the plaintiff to lead evidence of malice. The case was remitted to the Magistrate to take evidence of both parties and decide on the merits.

Keyter v. Le Roux and Weber v. Van der Spuy, discussed.

This was an appeal from a decision of the Resident Magistrate of Matatiele in an action in which the appellant claimed £1,000 damages for defamation of character in respect of the following language used by the respondent in the Kerkeraad at Cedarville: "I say that Jones and Gideon Joubert stole the wire."

The defendant filed the following plea: "Defendant admits the use of the words complained of in the summons on the occasion therein alleged, but denies malice, and

further says that when he used the words he had every reason to believe that they were true, and still has every reason to believe that they were true, and further, denies that plaintiff has suffered damages claimed, and further, pleads the general issue."

At the trial the Magistrate ruled that the defendant having pleaded justification, must proceed to prove his plea. The defendant thereupon called the evidence of several native witnesses, who alleged that they had seen the plaintiff's servant carry certain Government wire to plaintiff's farm in plaintiff's wagon in the month of September, 1898. Other evidence called was in conflict with the account given by these natives. The defendant closed his case without having given any evidence on his own behalf. Forrester, a detective officer, said that he had been informed that some wire was missing, and made inquiries. Three of the native witnesses referred to had given him some information, which information he had passed on to the defendant with the request that the latter would make further inquiries, but Forrester did not state what the actual information was which he had imparted to the defendant.

The plaintiff's evidence and that of his witnesses went to show that there was no ground for the allegation made by the defendant, and that the wire he was accused of stealing was really not stolen by anyone at all, but had been taken away by the Government wagon-driver. It was also alleged that the defendant had on more than one occasion previous to the slander complained of been told that plaintiff had not taken the wire, and had the whole matter explained to him. The plaintiff himself said: "On the 10th June there was Nachmaal at Cedarville, and as defendant and I were not on speaking terms the Kerkeraad called us together in order to settle it, and there defendant made use of the words complained of, and after I had called him a — liar." He said, further, that if the defendant would pay the costs of the action and withdraw all the imputations against him he would be satisfied. It appeared that defendant had apologised to Gideon Joubert, but not to plaintiff.

During the progress of the case, the Magistrate was asked for a ruling as to whether the place where the words were

uttered was a privileged place or not, and he ruled that the place, viz., the Kerkeraad, was not privileged. Further evidence was taken, and the case postponed for further evidence. On a further date the plaintiff's attorney asked for a further postponement in order to get the evidence of an absent witness, and the defendant's attorney referred to Ordinance 7 of 1843 (Dutch Reformed Church Ordinance). Section 9 provides: "That no person or persons composing, complaining to, or giving testimony before any duly constituted judiciary of the said church shall be liable to any action, suit, or proceeding at law, civil or criminal, at the instance of any member of the said church for or on account of any matter or thing written or spoken by any such person or persons *bona fide*, and without malice, in reference to or upon the occasion of any scandal, offence, or other matter, real or alleged, which by the rules and regulations of the said church for the time being should be reported to such judiciary, and which such judiciary is empowered to investigate." The case was then again postponed, and on resuming some weeks later the Magistrate pointed out that in view of the ordinance above quoted he was not prepared to proceed with the case. The plaintiff's attorney protested, and claimed the right to call a member of the Kerkeraad to prove that the statement was not made *bona fide* by the defendant, and that it was an informal meeting of the Kerkeraad; he said he had not closed his case, and had the right to call any witnesses duly subpoenaed.

The Magistrate declined to take further evidence, and gave absolution from the instance with costs.

The plaintiff appealed.

Mr. Howel Jones appeared for the appellant.

Mr. Graham, Q.C., for the respondent.

Buchanan, A.C.J.: If it were not for the evidence of the plaintiff there would be no case for the defence.

Mr. H. Jones: Section 9 of Ordinance 7 of 1843 is the basis of the Magistrate's decision. Once we proved that the words were actionable *per se*, judgment should have been for plaintiff unless the defendant should prove "privilege." The defendant must prove that the Kerkeraad had been duly constituted, and that the matter was one which the Kerkeraad could take cognisance of.

[Buchanan, A.C.J.: Can they inquire into any scandal or matter of church privilege?]

If there are any regulations to show that, the onus of proving them lies on the defendant. He has not done so. The Magistrate has not found that the words were used *bona fide*.

[Buchanan, A.C.J.: The presumption is that they were *bona fide* used; but the Magistrate has not allowed you to adduce evidence of malice.]

Yes. We want to produce further evidence.

[Solomon, J.: The Magistrate seems to hold that section 9 is conclusive.]

Yes. We should have been allowed to produce further evidence, but even without that I submit that the evidence adduced has proved malice. The plea is practically one of justification, and the calling of witnesses by defendant to bolster up his case goes to show this.

Defendant must prove that there were four deacons, two elders, and one minister present, and that the duty of making the statement was incumbent on him—a legal, moral, or social duty.

[Buchanan, A.C.J.: Irrespective of the Ordinance, was this not a privileged occasion?]

Keyter v. Le Roux (3 Menzies, 23). Defendant must show just and reasonable grounds for belief.

[Buchanan, A.C.J.: The damages may be aggravated by setting up a plea of justification.]

The Magistrate was wrong in refusing to allow further evidence to be adduced.

Mr. Graham, Q.C.

[Solomon, J.: Do you say that it is sufficient to prove that the words were uttered in the Kerkeraad? Surely you must go so far as to prove they were uttered *bona fide*?]

In the plea raised before the Magistrate the words "still believes them to be true" is mere surplusage. "Believed them to be true" is sufficient to cover privilege.

[Maasdorp, J.: General issue is sufficient to cover privilege.]

Yes, so far as the plea is concerned it is good to cover privilege. Justification is not pleaded. The summons says that the words were uttered at the Kerkeraad.

[Buchanan, A.C.J.: Was not the onus on the defendant to prove that he believed the words to be true?]

Yes; but not to prove justification.

[Buchanan, A.C.J.: Has he proved that the words were uttered *bona fide*?]

Plaintiff's evidence proved that. On the point of privilege, see *Weber v. Van der Spuy* (2 Searle, p. 40); *Burgers v. Murray* (1 R. p. 258); *Van Graan v. Hope Town Consistory* (J 4, 131).

[Solomon, J.: *Weber v. Van der Spuy* is a very old case.]

But it has often been cited as an authority. If the defendant had good reason for believing the truth of what he said, no action will lie. The only thing the Court can now do is to remit the case to the Magistrate. And in event of a remittal, we are not liable for costs. The Magistrate's chief mistake was in thinking the plea was one of justification. If remitted, costs should be left to stand over until the Magistrate has given judgment.

Mr. H. Jones in reply: The Court might decide the case at once by giving judgment for plaintiff with nominal damages. The whole matter turned on defendant's plea, which was one of justification. If it was not, the defendant could have amended his plea. See *Weber v. Van der Spuy* (2 S., p. 40). Defendant has to prove a duty and then plaintiff must prove malice. The defendant has not proved just and reasonable belief in the truth of his statement.

Buchanan, A.C.J., in giving judgment, said: This is an appeal from a decision of the Resident Magistrate of Matatiele in a case in which the plaintiff sued the defendant for damages for slander. In the summons it is alleged that the slanderous words were used at a meeting of the Kerkeraad. Defendant admitted the use of the words, and pleaded that he denied malice, and that he believed at the time he uttered them that they were true, that he still believed them to be true, and further, he denied that plaintiff had suffered any damage. When this plea was filed the Magistrate held that the onus lay upon the defendant to substantiate his plea. This was not perhaps quite a sound opinion in all respects, as the words were admitted to have been uttered on what was *prima facie* a privileged occasion. The defendant, however, undertook to prove his defence. His defence substantially was, privileged occasion, truth, and absence of malice. Now as far back as the case of *Keyter v. Le Roux* was laid down that a statement made to a Consistory Court would be privileged if made *bona fide* and upon reasonable and probable grounds. When an action is brought for words uttered on such an occa-

sion, the defendant must satisfy the Court that at the time he made the imputations he had just and reasonable grounds for believing that the facts as stated by him were true. This is quite in accordance with the law afterwards stated in the case of *Weeber v. Van der Spuy*, though in that case the judges differed in the conclusions they drew from the facts. Mr. Justice Bell, who was in the majority, pointed out that the section of the Ordinance relied upon neither imposed a liability nor gave an immunity, but only gave a caution that the law as it previously existed was left untouched. His lordship said: "In order to get the benefit of this section, the party pleading it must not only plead that what was done was done in a Church Court, but he must be prepared to prove, so far as the law, independently of that section, lays such a burden upon him, that what was done in the Church Court was done *bona fide* and without malice." In support of his plea, the defendant led a mass of evidence, some of it quite unnecessary and utterly irrelevant, to prove the allegations which he had made against plaintiff's character to be true. But he failed to prove the essentials that the words were uttered without malice on a privileged occasion, and that he had reasonable grounds for believing them to be true. He did not even go into the witness-box himself and allege his *bona fides*, and if the case had stopped there the duty of the Magistrate would have been to have given judgment for the plaintiff. The plaintiff then went into the witness-box, and made certain statements which helped defendant's case. While the plaintiff's evidence was being heard the Magistrate was asked to rule whether this was a privileged occasion, and he then laid down that it was not, and hence absolved plaintiff from the necessity of proving malice. After several postponements defendant's agent quoted the Dutch Reformed Church Ordinance, and the Magistrate thereupon changed his opinion, and seems to have considered the Ordinance an absolute bar to the success of the action. He refused to allow the plaintiff to lead evidence of malice. Here again the Magistrate erred, and altogether the case has not been dealt with upon its merits. The real issues have not been tried and no decision given upon them. The case ought therefore to be remitted to the Magistrate to be heard upon its merits. Those merits are, whether these words were uttered on a privileged occasion, and

whether when they were uttered the defendant was actuated by malice or not. Whether or not the defendant had reasonable and probable grounds for his statement would affect the question of malice. Both parties should be permitted to give evidence before the Magistrate. In remitting the case we are perhaps dealing somewhat more leniently with the defendant than we might have done under certain circumstances. There is enough evidence before the Court to justify us in giving nominal damages to the plaintiff, but on the whole I think it will be better to remit the case to the Magistrate. The appeal will be allowed, and the Magistrate's judgment set aside with costs, with leave to both parties to the suit to call evidence.

Maasdorp and Solomon, J.J., concurred.

[Appellant's Attorneys, Messrs. Findlay and Tait; Respondent's Attorneys, Messrs. Van Zyl and Buissonne.]

SUPREME COURT

(Before the Hon. Mr. Justice Buchanan (Acting Chief Justice), the Hon. Mr. Justice Maasdorp, and the Hon. Mr. Justice Solomon.)

REVIEW.

{ 1900.
May 22nd.

Solomon, J., said: A case has come before me from the Special Justice of the Peace within the area Vlakteplaats, in which one H. W. Schoeman was charged with contravening section 4 of the Vagrancy Act, in that he was found loitering in an enclosed camp the property of P. A. Schoeman, without the permission of the owner, and did wander about the said camp. Accused pleaded not guilty, but was found guilty and sentenced. Accused was a farmer and shopkeeper, and his farm adjoined that of P. A. Schoeman, in whose camp he was charged with loitering. The facts were that accused and another farmer had lost ostriches, and they suspected that these ostriches were in the enclosed camp of P. A. Schoeman. Thereupon they went to P. A. Schoeman's farm in order to see

his manager, Mr. P. A. Schoeman not living on the farm himself. The manager was away from home, and they saw his wife and asked for her permission, but she could not give it in the absence of her husband. This did not appear to be on account of her being against them going into the camp, but she was afraid they would not find the right way to enter. Accused and his companion then found a servant, who directed them to the right place, and they entered the camp and actually found the ostriches there. Under these circumstances, to charge a man with loitering in or wandering about the camp, or with being a disorderly person, is absurd, and the conviction must be quashed.

COLONIAL GOVERNMENT V. (1890.
TOWN COUNCIL OF CAPE TOWN.) May 22nd.

This was an application upon notice given calling upon respondents, the Town Council of Cape Town, to show cause why an interdict should not be granted by the Court restraining them from trespassing on or erecting certain buildings in connection with the electric light works on certain reclaimed ground on the foreshore of Table Bay, duly expropriated by the Colonial Government.

Mr. Ward appeared on behalf of the Colonial Government.

Mr. Innes, Q.C., appeared on behalf of the respondents

An affidavit of Mr. Elliott, General Manager of the Cape Government Railways, was read, in which it was set forth that by Act 20 of 1888 a certain portion of the foreshore of Table Bay was vested in Her Majesty the Queen in Her Colonial Government, and by section 55 of Act 36 of 1896 it was provided that all such land vested in Her Majesty the Queen in Her Colonial Government should be deemed and taken to be under the management of the Table Bay Harbour Board. The affidavit further stated that the Town Council had from time to time, with the consent of the Colonial Government, been allowed to deposit material on the foreshore, but the Government on September 6, 1896, under the Act of 1874, gave notice that they would in their discretion expropriate such portion of the foreshore east of Waterkant-st. as might be required for railway purposes, the object

being to have a perpetual right of expropriation. It was also stated the Town Council intended to erect certain buildings on the land they had reclaimed, and an interdict to prevent them doing so was now sought. Correspondence which had taken place between the Commissioner of Public Works and the Town Council was then read. In one letter the Commissioner stated that after making further inquiries it had been ascertained that the whole area enclosed by the Council for electric lighting works was land shown on a plan as reserved for railway purposes.

For the respondents, a short affidavit made by Mr. C. J. Byworth, the Town Clerk was read, in disputed the right of the Government to expropriate such land, and denied its right to give notice of expropriation. The plan referred to had never been brought to the notice of the Town Council, and further, the land in question had been reclaimed at the expense of the Town Council.

Mr. Innes said that the position they took up was that they had had no time to put their case before the Court, notice of motion having been given to them only last Saturday, while Monday was a public holiday. The case was one of considerable importance and intricacy, and could not be decided on motion. The Council, however, would consent to a formal interdict in the meantime on the understanding that the Government would consent to go to trial at once, and the Council to have the right reserved to them to claim in reconvention any damages they might sustain by reason of the interdict.

Mr. Ward said that would suit the Government, as they only wished to prevent valuable buildings being erected on this land.

The Court granted an interdict pending an action to be brought by the Government forthwith, leave being reserved to the Town Council to advance a claim in reconvention for any damages they may suffer in consequence of the interdict; the matter to be heard next term, and costs of this application to be costs in the cause.

[Applicants' Attorneys, Messrs. J. and H. Reid and Nephew; Respondents' Attorneys, Messrs. Fairbridge, Arderne and Lawton.]

COLONIAL GOVERNMENT V. } 1900.
WINTERBACH. } May 22nd

Tender—Conditional—Under protest
—Lien—Section 8 of Act 19,
1861—Non-payment of carriage.

Where a defendant to an action had made a tender of the amount due under protest, stating that he had a counter-claim for damages. Held, that such a tender was conditional, and therefore the defendant was liable in costs.

The Government has a right of lien over animals and goods carried on the railway if the costs of the carriage of animals or goods previously carried have not been paid.

This was an action to recover £33 0s. 4d., being carriage on 100 ostriches.

The declaration alleged (2) that on the 11th May, 1899, the defendant through his agent, P. Theron, delivered to the Railway Department of the Colonial Government 100 ostriches to be by the said Railway Department carried at the tariff of charges then in force for the carriage of such animals upon the Cape Government Railways from Hanover-road Station to Worcester, and the said Railway Department received the said ostriches upon the terms and for the purposes aforesaid.

3. The said Railway Department thereupon duly carried the said ostriches from Hanover-road to Worcester, where they arrived on the morning of the 13th May, 1899.

4. Upon arrival at Worcester Railway-station the said ostriches were taken possession of and removed from the premises of the said Railway Department by the defendant without the knowledge or consent of any duly authorised officer of the said department, and without payment of the charges for carriage due in respect thereof.

5. The charges for the carriage of the said ostriches, according to the tariff referred to in paragraph 2 hereof, amount to £33 0s. 4d., for which sum the plaintiff claimed judgment and costs.

The defendant in his plea alleged (2) that in or about May, 1899, he purchased from one J. P. Theron, of Hanover, 100 ostriches

at a price of £2 4s. 6d. each, to be delivered by the seller at Hanover-road Railway-station, and thereafter to be conveyed at his (defendant's) cost to Worcester by rail.

3. The said ostriches were duly delivered to the plaintiff at Hanover-road Railway-station, but the plaintiff wrongfully and unlawfully, and in breach of the Railway Regulations, in that behalf, caused them to be placed in one bogie truck and two ordinary trucks, and on or about the 13th May they arrived at Worcester in the said trucks.

4. Fifty of the said birds were placed in the bogie truck, which was opened and uncovered, and the said birds were injured by the above mode of carriage, in consequence of the cold and wet, and arrived at Worcester in a weakly and miserable condition, and through the above negligent and improper treatment by the defendant twenty of them died on or about the 15th May, and others were much depreciated in value.

5. Defendant, on the arrival of the said birds, and when he received the same protested against the above negligent and improper treatment of them, and declined to pay the carriage on them on account of his having a valid claim to recover damages from the plaintiff by reason thereof.

6. The proper amount of the said carriage according to the regulations is the sum of £21 4s., and not the sum demanded, and the defendant is willing and hereby tenders to pay the sum of £21 4s., but the plaintiff insists on the full sum demanded. Save as above, he denied the allegations in paragraphs 2, 3, 4, 5, and 6.

The defendant claimed in reconvention £110; £70 in respect of twenty ostriches which died through injuries received in transit, and negligence of the department at £3 10s. each, and £40, being loss on eighty birds through depreciation owing to injuries at 10s. each.

And for a further claim the plaintiff in reconvention said: That on or about 10th July, 1899, the defendant in reconvention undertook to convey from Hanover-road Station to Worcester certain fifty-two ostriches, the property of the plaintiff in reconvention, in accordance with the law and Railway Regulations in that behalf.

The said birds arrived at Worcester on or about 12th July, but the defendant in

reconvention refused to deliver them on the ground that the plaintiff in reconvention owed the sum of money in respect of the carriage of the birds mentioned, which is the subject of the claim in convention.

The defendant in reconvention subsequently, to wit, on or about the 13th July, delivered the said birds, but by reason of the delay of the delivery of the same the plaintiff in reconvention was put to great loss and inconvenience, and sustained damage in the sum of £38 5s., and also in the sum of £11 5s. owing to three of the said birds having died through the neglect of the servants and agents of the defendant in reconvention whilst in their custody.

He claimed £159 10s. and costs.

The plaintiff in his replication alleged that the defendant ordered six shut trucks for the conveyance of the ostriches, and that four shut trucks and one bogie or double truck were placed at his disposal. He elected, however, to load up the birds in two shut trucks and one bogie truck.

The plaintiff admitted that the bogie truck was not covered, but he said that such was the usual and proper mode of carrying ostriches, and he denied that they were in any way injured owing to the absence of covering to the truck. If the birds did receive any injury on the journey the plaintiff said that it was through their pecking one another.

The plaintiff admitted that the defendant did complain of the condition in which the ostriches arrived, and refused to pay for the carriage of the same, but such complaint and refusal were made after the defendant had without authority taken possession of the ostriches, and removed them from the railway premises, and after demand was made upon him for the amount due for carriage.

He alleged that the maximum number of ostriches allowed by the regulations to be carried in a truck is sixteen, and the rate per truck is based upon that maximum. If more than sixteen birds are carried in any truck the rate for such truck is proportionately increased.

He denied the claim and further claim in reconvention. Issue was joined on the rejoinder.

Mr. Ward (with him Mr. Howel Jones), appeared for the Government.

Mr. Searle, Q.C. (with him Mr. Buchanan), for the defendant.

The first witness called was

Peter McNab Ramsay, who said that he was stationmaster at Hanover-road in May last, when one Theron applied to him for six trucks for the purpose of carrying ostriches to Worcester. A bogie truck and four short trucks were provided. A bogie truck was equal to two short trucks, so that there was the equivalent of six of the latter. Instead of using them all Theron only used the bogie truck and two short trucks. The loading was done by the consignor. The ostriches were not chicks, but they were not full-grown birds. According to the regulations sixteen ostriches made a load for a short truck, and thirty-two for a bogie truck. This consignment numbered 100 ostriches. Witness saw them after they had been loaded up, and there was no overcrowding. Witness considered the loading safer than if there had been the regulation number of ostriches in each truck, as there was less space for them being knocked about. Witness pointed out to Theron that he had only used four trucks instead of six, but the latter said that was all they required, and witness agreed with him that they had sufficient room. Witness told him that the charge would be the same whether he used four or six trucks. He made no objection to using the bogie truck. They loaded many ostriches at Hanover-road, and witness considered loading them up in bogie trucks perfectly proper. They had frequently done so, and no complaint had been made except in this case.

By Buchanan, A.C.J.: Short trucks were specified when the application was made.

By Solomon, J.: Three of the short trucks were closed in, but witness could not remember whether the other short truck was also covered in.

Examination continued: Witness understood that Theron bought stock on commission, and he had frequently loaded up stock at Hanover-road.

Cross-examined: Witness was perfectly certain loading was not commenced before all the trucks were provided. Every cattle truck was fitted with drainage, and this bogie truck was a cattle truck,

Re-examined: If two trucks were applied for, they either supplied two short trucks or one bogie truck, whichever was available.

Edmund Ashton Garrett, stationmaster at Beaufort West, said he recollected in May of last year seeing a consignment of ostriches for Worcester. The ostriches appeared to be in a ravenous condition, and were tearing away at each other's neck. They were not overcrowded, and the manner in which they were carried was in every respect proper. The journey between Hanover-road and Worcester would occupy about thirty hours. The Railway Department did not undertake to feed stock *en route*, and would not do so unless specially asked.

Cross-examined: Witness's attention was drawn to the birds because he saw there was something wrong with them. He made no report, as it did not concern him, as his was a wayside station. It was about four months after this that witness first heard about this case.

Re-examined: Witness had previously heard about the matter at the beginning of June.

By Solomon, J.: Witness's experience was that open trucks were preferable for carrying ostriches, chiefly on account of the ventilation. That applied to all kinds of stock.

William Hinchcliffe said in May last year he was stationmaster at Prince Albert-road, and remembered the consignment of ostriches in question passing through that station. They were properly loaded so far as the Railway Department were concerned. Witness fed the ostriches on account of the manner in which they were pecking at each other. He did that at his own expense. A bogie truck was much better than two small trucks.

Cross-examined: The birds were all hungry, and witness divided the mealies equally among them. At that time it was not raining at Prince Albert-road, and had not rained there for two years.

Robert Milne said he was guard on the train which carried this consignment of ostriches from Beaufort West to Touw's River. The birds were in very bad condition, being very hungry and picking at each other's necks. He saw the last witness feeding the birds; in fact, he had drawn that

witness's attention to the condition of the birds to see if he could give them anything to eat. The birds were properly packed and not overcrowded.

Cross-examined: Witness could give no reason as to why the birds in the close trucks should arrive in much better condition than those in the bogie truck.

Thomas Fisher Brownridge, foreman at Worcester Station, stated that on May 13 last he went on duty at seven o'clock in the morning. Witness found the ostriches were off-loaded, and when he returned from seeing about the railway charges the ostriches were all gone. Witness saw Mr. Winterbach at a distance at the time, but did not speak to him, nor did Mr. Winterbach make any complaint. Witness never gave any authority for the ostriches to be removed.

By Buchanan, A.C.J.: Witness was the party from whom permission should have been obtained.

Edward L. Barker, the booking clerk at Worcester, said on the morning of May 13 last year defendant came to him about ten o'clock in the morning, and said he had come to pay for three trucks of ostriches which had come from Hanover-road. Witness could not find the invoice, and on asking defendant, the latter said there were three truckloads upon which witness said the charge would be £15 18s. Defendant thereupon turned to a man with him and said, "You had better pay." Witness said to this man, "Surely you know how many ostriches you have bought," and the latter said, "Yes, a hundred." Witness then said that altered the case, and made out the charges at £33 0s. 4d. Defendant said he would not pay that, and the other man put his money back into his pocket. The first time any complaint was made as to the damage done to the ostriches was when witness went to collect the account on May 16. Witness remembered a second consignment in July last, and defendant did not demur to pay the charges in that case.

Cross-examined: With regard to the second consignment, defendant demurred at a delay which occurred, the Railway Department insisting that the first lot should be paid for before the second lot was delivered. A shunter named Hull would be on duty at the time the first consignment of birds

arrived. No one had a right to off-load before the foreman came. When witness asked for payment of the railage three days afterwards defendant told witness that eighteen of the birds were dead, and offered to show them to him. Witness asked him where the birds were, and he said three miles away on the veld. Witness did not go to see the dead birds.

Charles Abrahams, foreman checker at Worcester Station, said that on July 12 last year a consignment of fifty-two ostriches arrived at the station, and were taken out of the trucks and put into a kraal. Afterwards he saw them eating on the common, where they had grass and water.

Cross-examined: Witness saw the birds in the kraal about one o'clock, and it was some time after that that he saw them on the common. They were under the trees, about fifty or sixty yards from the station.

Jacobus Meyer, a labourer at Worcester Station, said that on July 12 last year certain ostriches came to the station for defendant. The same afternoon he saw them in the plantation grazing. The next morning about seven o'clock witness took them back from the kraal to the plantation, and had charge of them until defendant came to take them away. They received no injuries while in witness's charge, but a couple of them had broken necks when he took them out of the kraal.

Cross-examined: The grass was fairly good near the station, but while in witness's care the ostriches had no food given them.

Koos Jonkers, another labourer, deposed to the arrival of the consignment on July 12 last year. He first saw them in the kraal that day, and took them out to the commonage, bringing them back at six o'clock in the evening. Witness did not see them receive any injuries during the time they were in his care.

Cross-examined: No food was given to the ostriches while in witness's care.

This closed the case for the plaintiff.

For the defence,

John C. Winterbach, the defendant, said he lived at Worcester, and had been in the habit from time to time of buying ostriches. In May last he bought a consignment of ostriches from Theron. On the morning of May 13 he expected the birds, and on going

to the station found the trucks being shunted. Witness saw a porter named Hull and also Foreman Brownridge. Witness was disgusted with the condition of the birds in the bogie truck. They were standing in water and filth about a foot deep and four or five of them had their wings broken. There was no drainage provision in the bogie trucks. Witness had often had birds before, but never received them in such a condition as those birds, because they had never before been sent in an open bogie truck. Hull asked witness if they would take out the birds at the platform, and witness said, "Certainly, get them out by all means." Witness then drove the birds to a place just outside the station, and began cutting the wing feathers of the birds with broken wings, so as to lighten them. Witness drew the attention of Hull and Brownridge to the birds, and said he was going for damages. Afterwards witness went to pay the railage, but they wanted £33 odd, and witness said they were charging too much for 100 birds, and offered £21, which they would not take. Afterwards witness took the birds away, no objection being raised to his doing so. Three days afterwards when the clerk came about the money witness offered to show him the twenty birds which had died. They were near witness's house at the outskirts of the town, but the clerk would not go, saying he had nothing to do with it. After he took away the birds, witness did everything he could for them, but they were too far gone to recover. Their injuries could not have been caused through their pecking each other in their hunger. Witness had sold forty-four of the birds for £3 10s. each, but had to pay back the money for one bird which died. That same month witness had another consignment of birds of the same class, which he sold for £4, £4 10s., and £5. These birds came in covered trucks, as did the third consignment on July 12, and there was nothing wrong with them. The birds which were in the bogie truck were those which were in a bad condition. With regard to the consignment of birds on July 12, witness saw them at the station early on that morning. He saw the booking clerk and the stationmaster, but they refused to deliver up the birds unless witness paid railage for the May consignment. Wit-

ness said that they knew there was an action pending against the Government, and offered them a cheque in payment of the consignment just arrived, but they refused to accept it. Witness told the clerk that he would forfeit £50 if the birds were not delivered at Swellendam by July 13. It was really £38 5s. witness would forfeit, as he found out afterwards. Witness did not get the birds until a little past ten o'clock on July 13. The birds were a little bit weak, having been kept for thirty hours longer than they ought to have been. Three of the birds died, one of them immediately after witness got them to his house, and the other the following day. Witness claimed £3 15s. for each of these birds. Witness forfeited £38 5s. through not being able to deliver the birds in time. There was nothing for the birds to eat at the plantation where the station people kept them. Witness told Meyer to take them to the veld, but the latter said the stationmaster had told him to keep them at the plantation.

Cross-examined: The birds in the bogie truck were injured by exposure in the open truck, and also because there were too many in the truck. In respect of those in the closed trucks no damage was done by the railway.

P. J. Theron, residing at Hanover, said he sent the ostriches from Hanover-road Station for the defendant. He went to the station on May 11 with the ostriches. Two short trucks and one bogie truck were at that time available, and he applied for more. The stationmaster informed witness that the bogie counted as two trucks. The train left at 5.30. Witness commenced loading at three o'clock. He filled the two short trucks, and he then put fifty birds in the bogie, which was too long for the purpose. He put them there because he could not get any other truck. He had loaded a great many birds, but never in a bogie before. The stationmaster said when the train came from De Aar there would be some more trucks available. When the train did come there was no time to remove the birds from one truck to the other. He had waited two days for the truck. It was rainy weather, and he wanted to get the birds away.

Nicholas Winterbach, a son of the defendant, said the birds of the first consignment which arrived in the bogie truck were in a miserable condition when they arrived. Some of them had their wings broken and some had their legs torn open. After their arrival at witness's father's farm twenty of them died. The birds which were sent in the other trucks were uninjured. The floor of the bogie was very wet, but the floors of the other trucks were not very wet.

Aaron January, a herd employed by the defendant, said that the birds of the first consignment which arrived in the bogie truck were in a trodden condition on their arrival. Many of the birds were injured, and twenty of them died within three days after arrival. Three birds of the second consignment died.

Johannes Stephanus van der Westhuizen, a farmer in the Worcester district, said he had had great experience of ostrich farming. In May he bought forty-four ostriches from the defendant. Witness refused to accept one bird. It was not advisable to carry ostriches in a bogie truck. Witness once despatched birds in a bogie truck and lost £280 by it.

Mr. Ward: On our claim in convention we are entitled to £33 0s. 4d.

[Buchanan, A.C.J.: Can you charge for more than four trucks?]

Yes; under regulation 122 we can. Each truck should only carry 16 ostriches, but if more than 16 are put in one truck we can charge so much for each sixteen ostriches. These regulations are submitted to the public. Either party can claim their enforcement. There is nothing however to prevent the maximum number being exceeded by agreement between the parties. They can, when the birds are small, relax the regulation for the convenience of both parties. We can then charge for the full sum at which we rent the whole truck, viz., £4 4s. for 16 ostriches, and at the rate according to regulation 123 (5) (a) for any animal over and above the number of 16. The regulation does not prevent an official from loading more than 16 in one truck.

[Buchanan, A.C.J.: How can you, once having charged for the whole truck, make a further charge for any number over 16?]

Regulation 122 gives us that right. The tariff is based on the 16 animals, although the charge for the truck is 5 guineas.

[Buchanan, A.C.J.: Your regulations do not clearly show that you can charge for more than a truck.]

That is the custom.

[Mr. Searle, Q.C.: We deny that. It is not pleaded.]

[Solomon, J.: Your case is based entirely on tariff.]

I submit that the regulations, especially 122, bear out our case. We can charge for six trucks and the extra birds beyond 16 that were packed in each truck. The regulation is only framed as a maximum basis, and not as an unchangeable rule. The parties can vary the maximum rule.

With regard to the claim in reconvention, (1) the birds were carried in a proper manner. The evidence is clear that there was no negligence. (2) We claim a lien on the birds for the payment of the carriage, under section 8 of Act 19 of 1861. They tendered for three short trucks only. Our detention only lasted 24 hours. If any damages are to be given against us, it can only be such loss as might have been occasioned by a change in the price of the ostriches.

Mr. Searle, Q.C.: We are both bound by the pleadings. We tendered the amount actually due under the regulations before action was taken.

[Maasdorp, J.: But you don't tender in your plea with costs, nor do you do so in the correspondence.]

Plaintiff's witness admits that we offered to pay for four trucks.

[Solomon, J.: Defendant says in section 5 of the plea that he declined to pay.]

Defendant was going to pay under protest.

[Solomon, J.: Is that a valid tender? He would be entitled to bring an action to recover the amount so paid.]

He admitted his liability for the railway charge, but had a counter claim for damages.

See on the question of tender, *Fraustadt v. Sauer and Another* (9 Juta, 512).

Plaintiff, in the declaration, founds on the tariff then in force, and not on any agreement made at Hanover-road.

On the claim in reconvention: (1) Although six trucks were ordered, the birds were put into four trucks. We were forced to do so because there were only four trucks forthcoming. Two of the six trucks were not there at a time when the arrival of the train was imminent. On whom was the risk?

[Solomon, J.: If there was any risk, why didn't you take the birds back? See Regulation 121. You accepted the risk.]

[Buchanan, A.C.J.: Your agent put the birds into the four trucks.]

He was forced to do so by failure of the Government to produce the six trucks as ordered.

(2) Government had no right to retain the birds. We are entitled to some damages. We had previously offered to pay the carriage. Three of the birds died. We also lost a sum of money owing to our not being able to deliver the birds as agreed by contract. Government was the cause of our inability to deliver. They had had notice of the contract. Government, by subsequently giving the birds up, admitted they had no right to detain the birds.

Buchanan, A.C.J., said: As I read the railway tariff book the rate of carriage is based upon the mileage per truck, irrespective of the number of animals carried therein. The Railway Department, in this case, claim that they are entitled to claim for six trucks, but only four trucks were supplied to the defendant's agent, Theron, reckoning the bogie truck as equal to two short trucks. Under the regulations, only four trucks could be claimed for. If there had been a special contract in this case to carry the ostriches at so much per head there might have been some ground for the Government's claim, but as the ostriches were carried per truck load the Government could claim only under the regulations for the four trucks supplied. The tariff rate for these trucks amounted to £21 4s. As to the claim for damages, the evidence shows that the defendant's agent, Theron, asked for four trucks to be placed at his disposal, and he accepted a bogie truck as one of the trucks, and he entrained the birds in this bogie truck. The defendant says that owing to its size a bogie truck was not a proper truck in which to carry ostriches, and that in consequence injury resulted. But the Government and the Railway Department, are not responsible for any damage or injury which resulted from Theron's action. Indeed I am doubtful if the birds injured were injured as a result of placing them in the bogie truck. They had been without food for two days before they were entrained, and were ravenous, and injured each other by pecking and pulling strips off one another's necks. The defen-

dant provided no food for the birds on their long journey, but at one place, seeing the state they were in, a kindly stationmaster threw some mealies to them. Therefore that claim against the Government must fail. As to the question of costs, in respect to the £21 4s., the defendant in his plea alleges that he was always prepared to pay, and did make a tender, but from the correspondence put in and the evidence of the defendant himself, it does not appear that the tender was unconditional, but that it was offered under protest. The tender of the defendant being insufficient, the defendant is not entitled to escape from the costs in the action. As to the claim for damages for the detention of the birds in July, the Government was entitled under the law to detain the birds on the ground that no sufficient tender had been received for payment of the carriage of the birds entrained by the defendant's agent in May, and therefore this claim in reconvention must also fail. Judgment will be for the plaintiffs for £21 4s. with costs.

Maasdorp and Solomon, J.J., concurred.
[Plaintiff's Attorneys, Messrs. J. and H. Reid and Nephew; Defendants' Attorney, Messrs. Walker and Jacobsohn.]

SUPREME COURT

[Before the Hon. Mr. Justice BUCHANAN (Acting Chief Justice), the Hon. Mr. Justice MAASDORP, and the Hon. Mr. Justice SOLOMON.]

STEPHEN FRASER AND CO. V. 1900.
PORT ELIZABETH HARBOUR } May 23rd.
BOARD. } June 1st.

Carriers—By sea and by land—Negligence—Peril of the sea—Harbour Board—Sections 30, 31 of Act 36, 1896.

Carriers, whether by land or by water, are not insurers, but will be liable in respect of any goods entrusted to them for injury arising from the negligence of themselves or their servants. The exercise of all reasonable care will exempt

them. No exact definition can be given of a peril of the sea, and any definition must be taken with some limitations, dependent on the special circumstances of each case.

This was an action brought for damages in respect of injuries sustained by certain goods while they were being landed at Port Elizabeth in the month of August, 1899, by the Port Elizabeth Harbour Board.

Mr. Innes, Q.C. (with whom was Mr. Gardiner), appeared for the plaintiffs.

Mr. Searle, Q.C. (with whom was Mr. McGregor), appeared for the defendants.

The declaration set forth that the plaintiffs were Messrs. Stephen, Fraser and Co., a limited liability company, and the defendants were the Port Elizabeth Harbour Board, incorporated as such by Act 36 of 1896, and by virtue of the powers conferred on them the Harbour Board performed the work of landing goods from vessels at Port Elizabeth, which work it was common cause they had by a subsection of the Act given over to the Associated Boating Company to be done on their behalf. Proceeding, the declaration stated that on August 19 and 20 the Harbour Board or their duly appointed agents were landing a cargo from the steamship Gascon by means of lighters, known as No. 13 Red, and by the negligence of defendants on the evening of August 19 the lighter on which were goods belonging to the plaintiffs came into collision with another lighter. Notwithstanding this the lighter was moored for the night in the bay, and on the following morning while the anchor was being hoisted it struck the boat on the starboard bow, with the result that the water got in, and the goods were damaged to the extent of £68 1s. 9d., which amount the plaintiffs now claimed from the defendants.

The plea admitted that under the Act the defendants did all the landing of goods at Port Elizabeth, and they also admitted that water entered the lighter and damaged the goods while they were in their custody, but denied any negligence with regard to the collision, which they said was a slight one, caused by an accident of the sea, and resulted in no damage to the

lighter or goods. Proceeding, the plea stated that the lighter was properly moored for the night, and that on the morning of August 20 the ordinary crew of the lighter were engaged in bringing it alongside the jetty, when owing to the heavy swell and danger of the sea the fluke of the anchor struck the lighter, but this was not due to any negligence on the part of the defendant's servants, being due to an act of God or peril of the sea, and specially pleaded that under the rules and regulations made under the Act they were not liable for any damage caused to goods in their custody or control when such was due to the act of God or peril of the sea.

Mr. Innes said the issue was narrowed by the fact that there was common cause as to the amount of damage done, and contended that as it was now admitted that the defendants had control of the landing of goods, and that the goods in question were damaged while in their custody, the onus of proof that the goods were not damaged through negligence rested upon the defendants.

Mr. Searle submitted that it was necessary for the plaintiffs to prove the negligence they alleged, but he had no objection to leading his evidence first.

Mr. Searle then called

Captain William Edward Clift, who said that for the last two years he had been superintendent of the Associated Boating Company, and before that he had experience of Algoa Bay since 1883 as an officer of the Castle Line of steamers. All cargo at Algoa Bay was discharged by means of lighters by the Boating Company, which acted as agents of the Harbour Board. They had forty-eight lighters and four tugs. Lighter No. 13 Red was the latest addition to the lighters, and was manned by an experienced crew. The lighters stopped work at five o'clock each day, and at that time took up their anchorage in the bay, and next morning they either went back to the ship or came to the jetty to discharge, accordingly as they were fully loaded or half loaded, or were wanted for something else or not. In the morning the lighters picked up their own anchors, and then the tug came and took them wherever they had to go. On the morning of August 20 last witness saw Lighter No. 13 Red lying alongside the

jetty, and saw that it was leaking, and on examination he found a jagged hole in it. The fluke of an anchor going into the boat would cause such a hole as he described. He did not think it could have been caused by a collision between the lighters. The hole was below the water-line. Witness went forward in the lighter and saw the water rushing in. At that time there was enough water in the forepart of the boat to cover his ankles, and in the afterpart the water was about eighteen inches deep. Witness tried to stop the hole from the outside, but owing to a swell there was on at the time he was unable to do so. Thereupon they started to take the cargo out of the boat, pumping and bailing the whole time. If the boat had sustained the injury mentioned the previous night it would undoubtedly have sunk during the night. The water in the boat was clear, and if the hole had been caused the previous night that would not have been the case, owing to some coloured goods lying about. The boat was temporarily repaired and again at work that afternoon. This accident happened on a Saturday, and on the Monday she was beached preparatory to being permanently repaired. Then the shipping clerk of plaintiffs and two surveyors came to survey the lighter. That was just before she was beached, and was lying alongside a wharf, but being empty the hole was above water.

Sidney Domingo said he was the coxswain of the Lighter No. 13 Red on the day in question. Witness had been in the Boating Company's service for about twenty years. The crew consisted of five men besides witness, all experienced men. On the evening in question they stopped work at the Gascon at five o'clock. The tug picked up several of the lighters, and while they were crossing Lighter No. 2 Blue touched No. 13 Red. After the bump witness and another man jumped on to No. 2 Blue to examine No. 13 Red, but could see no damage, and witness also examined her before he left after they got to the anchorage. Next morning witness went off to No. 13 Red to bring her in, as she had enough cargo. She was in the same condition as the night before, and he did not think she was any deeper in the water. They commenced to lift the anchor. There was

a bit of a swell on at the time, and witness heard the anchor grating against the side. As they neared the jetty the hatches were removed, and witness noticed water in the boat. He knew she was not leaking the previous night, and at once hailed the tug to take them straight to the jetty. About half an hour elapsed between the hoisting of the anchor and their arrival at the jetty. Witness went down below and found a hole through which the water was coming fast. The pumps were set going, and pumped until the cargo was all discharged, which took them until eight o'clock. When the cargo was discharged the hole was above water level, and they temporarily repaired the damage. Witness made a protest. He was not now in the company's service, having left about six or seven months ago. His leaving had nothing at all to do with this case.

Cross-examined: When his boat bumped against another boat witness always jumped on to the other boat to see what damage had been done to his. Boats bumped every hour, more or less. Witness had worked in much rougher weather than that day, and he had hoisted the anchor also. On this day they hoisted the anchor in the same way as they did in calm weather. He did not leave the anchor below the boat, as they did on days when there was a heavy swell, because he thought there was no need for that on this occasion, although there was a swell. A similar accident had never before happened to witness's boat. Witness had never at any time said a word to Mr. McArthur about the accident.

William Steed said he was foreman of the North Jetty at Port Elizabeth. On the morning the accident happened witness was on the jetty, and directly the lighter came alongside, about ten minutes to six, he went on board. He went below and saw the hole. It was a jagged hole such as could be made by the fluke of the anchor. The water was coming into the boat fast, and witness was unable to stop it, although he tried to do so with some sacks.

Assam said he was one of the crew of the Lighter No. 3 Red, and was in the bow of the boat on August 19 and 20. It was impossible for the collision to have made the hole. With regard to the hoisting of the anchor, that was done in the same way on

August 20 as it was done on any other day. After they first discovered the water it began to come in very rapidly.

George, another one of the crew, gave corroborative evidence to the effect that no damage was done by the collision, and that the anchor was hoisted in the usual manner.

William Logan King, the coxswain of Lighter No. 2 Blue, said that on the day in question they were cast adrift from the Gascon shortly after five o'clock. After they were picked up witness's boat drifted across the other lighter's lines. Witness was at the tiller at the time. It was impossible for the stern of witness's boat to have struck No. 13 Red in such a manner as to produce the hole in the position mentioned. There was a nice little swell on at the time, but it was a good working day.

Captain William Hoseason said he was a retired sea captain, and now lived at Port Elizabeth. He had had about forty years' experience of the sea. He and Captain Gowan surveyed the lighter and made a report.

This report was then read. In it witness said that he was of opinion that the damage could only have been done by the "peak" of the boat's anchor, caused by the anchor striking heavily against the bows while the heavy swell was knocking the boat about.

Examination continued: Witness had known of similar accidents occurring.

Cross-examined: It was impossible to guard against the anchor knocking against the side of the boat.

Re-examined: He had heard of many instances of anchors going through a ship's bows. The manner in which the anchor was heaved on this lighter was an ordinary manner of doing so.

Captain S. H. Palmer said he had resided at Port Elizabeth for nine years. He was formerly a captain in the Clan Line, and his firm now acted as agents for the Clan Line. He was acquainted with landing cargo, and as he was generally afloat he was acquainted with lightering. The method of hauling up anchors as described by previous witnesses was the only method of which he knew. It was necessary to bring an anchor above the water-line to see that it was entire. He believed that in this

case the accident was caused by a fluke in the anchor. There was frequently a swell in Algoa Bay. No precaution could have avoided the accident. He considered that nobody could be blamed for the accident. There was always a risk that damage might be done when the vessel was rolling.

By the Court: He had known a similar accident occur to a seagoing vessel in Natal. He would be smarter in hauling the anchor in rough weather than he would be in the case of a smooth sea.

Captain C. H. Young, Harbour Master of Port Elizabeth, said he inspected the boat in question when she was being repaired on the beach. He thought that the damage was done by the anchor. The manner in which the anchor was pulled up was the usual manner. When there was a swell on the anchor would jolt from side to side. There was always a swell in Algoa Bay, but the lighters worked in all weather except bad weather. Steamers were frequently dented by anchors, and holes were sometimes made.

Cross-examined: The extent of the damage done by an accident of this kind depended upon the angle of the anchor in striking. An anchor might strike a dozen times and yet do little damage.

James Searle, M.L.A., said he was manager for the Boating Company at the time the accident happened. He built all the lighters. The boats were not insured, and every precaution was taken to make them fit. The boat in question was one of the best boats of the lot, and its crew consisted of expert men. He believed that the accident occurred while the anchor was being raised. He could suggest no other method of raising the anchor.

James MacArthur said he was a shipping clerk in the employ of the plaintiffs. The goods in the vessel had been badly damaged by the water.

Nicholas Thomas Nichol, in the employ of the Union Steamship Company at Port Elizabeth, gave evidence as to the position of the lighters. There was a slight swell on at the time.

George McLaren Robertson, a shipping clerk in the employ of the Union Steamship Company, said the collision was considerable. There were from 18 inches to 2 feet of water in the boat next morning.

Captain Gowan said the damage could have been done either by the anchor or the collision.

Cross-examined: In his report he said that the damage was caused by an anchor.

William Messina, a boat proprietor in Port Elizabeth, said he saw No. 13 alongside the jetty shortly after half-past six, when she had about 2 feet 6 inches of water in her. He could see a hole in her side. It was possible that the injury might have been caused by the collision, but he did not think that the injury could have been caused by an anchor, judging by the weather on the following morning. He had never seen similar injury caused by an anchor.

Cross-examined: He had never worked as a lighterman. He saw the damage done from the top of the jetty.

Henry Forbes, a broker, residing at Port Elizabeth, said the goods of the vessel were saturated with salt water. The cotton goods had evidently been in the water for several hours.

Cross-examined: He could not say how many hours.

John George Walker, assistant wharf master at the North Jetty, Port Elizabeth, said he saw water in the lighter and a hole in her side, but as he took no notice he could not say how long it would have taken the water to enter the lighter.

Ernest Bertram Beck, acting harbour master at Port Elizabeth, and for ten years port master, said his water boats held 13 tons. They were fed by a 24-inch pipe from the main at considerable pressure, and at that pressure it took 1 hour 25 minutes to fill one of his water boats.

Cross-examined: He could not compare the pressure upon these pipes, supplied with water from Van Staden's, with the pressure of the sea.

Captain Olans Stranger, general surveyor for the Norwegian Veritas, residing in Cape Town, said he visited Port Elizabeth about three weeks ago, when he saw the lighter. He could not see the nature of the injury, but he saw a copper plate on the outside. The injury could have been caused by a collision or by anchor pitched over the side. He did not think the injury could have been done in hauling up the anchor in smooth weather.

Postea (June 1, 1900).

Mr. Innes, Q.C.: Section 30 of Act 35 of 1895 constitutes the power to be exercised by the Harbour Board. Defendants were bound to land these goods for us. They admit that the goods were damaged while in their hands. It is common cause that the defendants are common carriers by statute, that they took the goods for us, and that while they had them, the goods were damaged. The Court will presume negligence, therefore they must prove that there was none.

[Buchanan, A.C.J.: Is there no distinction between carriers by land and carriers by sea?]

No, they cannot be distinguished. *Tregidga v. Colonial Government* (7 Sheil, p. 67). See the judgments in that case, which all agree that the onus of proof of diligence lies on the carrier. The principles there laid down are not inconsistent with the English law principles. See *Carver on Sea Carriage* (Part I., Chap. III., Section 78, at page 88). Defendants must show negligence. The facts are within their knowledge. I must admit that the Harbour Board Regulation 53 is applicable in this case.

[Solomon, J.: Do you admit that the Board can by their regulations limit their liability?]

I think I must, if they are reasonable and within the scope of the Act. This regulation does not go beyond the common law, because although "perils of the sea" are mentioned, those perils must not be furthered or accentuated by negligence. Now what is a "peril of the sea"? See *Story on Bailments* (section 512a). A carrier is only exempt from liability in the case of a "peril of the sea" if he can show that there was no negligence, no matter how great the peril be. See *Carver on Sea Carriage* (Part I., Chap. III., section 87); *Wilson, Sons and Co. v. Owners of Cargo per Xantho*. Law Reports 12, Appeal Cases, 503. See the judgment of *Herschel, L.C.*, at p. 508 *Thames and Mersey Marine Insurance Company, Limited* (12 Appeal Cases, p. 484; See also p. 492, per *Bramwell, L.J.*). As to the facts, we ask what caused the damage. We were very much in their hands when the accident happened. The man in charge of the lighter in his protest says there was a collision on the 19th August, and a mishap with the anchor on the 20th August. The fact that both crews took the precaution to examine their boats after the collision goes to show in conjunction with mention of it in the

protest that it was no slight collision, although the crew say it was so slight that it could not have caused the damage. Then we have evidence of another severe collision, which is said to have caused the damage. In whatever way the damage was caused we say there was negligence. The soaked state of the cargo goes to show that the lighter was damaged on the evening of the 19th August. The amount of water in the lighter points to the same view.

Now, turning to those witnesses who say the anchor caused the damage, we find three theories advanced: (1) that it was a mere wash of the anchor; (2) that the anchor was being catted at the time of damage; (3) that it was being hauled. However, if the damage was caused by the anchor, it should not have happened in the weather as described by the reports put in. There must have been some negligence if the damage was caused by the anchor; the negligence could consist in a jerk being used in hauling the anchor. We rely on the third theory. The real point is: "Is the Court satisfied, after hearing the defendants' evidence, that the accident could not have been avoided by the exercise of ordinary skill and prudence?"

Mr. Searle, Q.C.: The Roman-Dutch law applies. The General Law Amendment Act of 1899 does not cover a case of this kind. On a question of a "peril of the sea" the English law would apply. See *Stretton v. Union Steamship Company*. (1 E.D.C., 315). See judgment of *Shippard, J.*, at pp. 336, 337.

[Buchanan, A.C.J.: That case was governed by English law.]

Now, if the regulations apply (as is admitted), then we must ask 'What is a peril of the sea?'

[Buchanan, A.C.J.: The English law must apply.]

The English law is more severe on carriers than the Roman-Dutch law. See *Nugent v. Smith* (45, Law Journal, C.P., 697; also p. 702). This is a *casus fortuitus*, and its equivalent in the regulations is a "peril of the sea." *Stretton on Charter Parties and Bills of Lading* (176, 7, 8); *Carver on Carriers* (section 37).

[Buchanan, A.C.J.: Does not the whole matter come down to a question of fact? (1) What was the approximate cause of the accident? (2) Was there negligence?]

See *Angell on Carriers* (p. 148). There is nothing to show that the power given under Sub-section 8 of Section 30 of Act 36 of 1956 was exercised. The plaintiffs were not bound to employ the Harbour Board.

On the question of negligence:—The lighter 13 Red was the best in the Bay. The crew on board it were very experienced. The lighters were not insured, therefore they were in a very good condition. The method used on this day has been in vogue for many years. It was the proper mode. The sea was in a nasty state; there was a considerable swell. Not a single witness on either side can state that the crew did anything which might be described as negligent and careless. The damage was not caused by the collision of the 19th, otherwise the lighter would have sunk during the night. We have led expert evidence on that point. The evidence leads to the view that the accident happened on the morning of the 20th, and therefore was caused by the anchor. The evidence of the defendants is positive evidence, while that of plaintiffs is merely theoretical. The circumstances bear out the statements of eye-witnesses. The anchor caused the accident, and this being so, the Court will find that this is a peril of the sea. Therefore the plaintiffs ought to suggest (which they do not) how this accident could have been avoided.

Mr. Innes, Q.C., in reply: The onus of proof is thrown on the defendants, and any doubt in the matter goes against them. They have not discharged that onus. We would rather rely on the collision as the cause of the injuries.

Buchanan, A.C.J., in giving judgment, said: The defendants in this case, the Port Elizabeth Harbour Board, are a body constituted under the Harbour Boards Act, No. 36 of 1896. The 30th section of this Act authorises the Boards constituted thereunder to land, warehouse, deliver, and ship goods at the different ports; and the 31st section allows the Boards to make regulations regulating the landing, shipping, and transferring of goods. Under this authority regulations have been duly made and sanctioned by the Governor, which are admitted not to be *ultra vires*. By these regulations the defendants are protected against any damage done to goods whilst in their custody through injuries arising among other things from perils of the sea. In this case it appears that the Harbour Board, acting as landing agents, received certain goods from the steamer Gascon, then lying at the anchorage at Port Elizabeth, for the purpose of delivering them to the plaintiffs. The plaintiffs allege that while these goods were in the custody of the Harbour Board they were, through the carelessness or negligence of the Harbour Board, their agents or servants, injured. In reply

the Harbour Board say that no injuries were caused through the carelessness or negligence of their agents or servants, but through perils of the sea. The law as to the liability of carriers has been very much discussed in our Courts in several cases, and especially in the case *Tregidga v. Szeuright* (7 Sheil, 67). The deduction from that case is that carriers, whether by land or by water, are not insurers, but will be liable in respect of any goods entrusted to them for injury due to the negligence of themselves or their servants, but that they are not liable so long as they take all reasonable care in the performance of their duties. However, there is little dispute about the law here, because the case turns upon two questions of fact. The one question of fact is, was the injury caused by a peril of the sea? and the other question of fact is, was there any negligence or carelessness on the part of defendant's servants? I think a fair definition of what is a peril of the sea for the purposes of this case is that cited by Mr. Innes. No definition in such a matter can be perfect, and every general definition must be taken with some limitations dependent on the special circumstances of each case. This definition is that a peril of the sea may be said to be damage caused by the action of the sea during transport on the sea, not resulting from nor the fault or negligence on the part of the carrier. The damage that was done to the goods in this case occurred on the sea and from sea water. It is alleged to have arisen from one of two causes, viz., either from a collision between two boats belonging to the defendants, or through the striking of the bow of one of these boats by the anchor while being hoisted on deck. The collision in question took place on the day the goods were placed on the lighter, and if the collision caused such damage to the lighter as to cause it to leak, and the damage to the goods resulted from this, then the fact that the boat after this collision was moored out in the roadstead all night and allowed to remain there until next morning before unloading, would have been very strong evidence of negligence, which it might have been very difficult for the Harbour Board to overcome. But considering all the evidence led in this case, I have come to the conclusion that the leakage was not caused by the collision. The evidence shows that after the collision the coxswains of both boats looked to see if any damage had been done, and found none, while when the boat was taken to the jetty next morning immediately after weighing anchor, it was found

that the water was rushing in at a considerable rate. The evidence further shows that if the damage had been done by the collision the previous night the boat would probably have sunk during the night—during the twelve hours she was lying in the anchorage. I think it seems to be more reasonable to conclude that the damage was done by the "pea" of the fluke of the anchor. If that was the case, we must now consider whether there was such negligence on the part of the servants of the Harbour Board when heaving up the anchor, as to make the Harbour Board liable for the injuries sustained to the goods. It has been shown that the boat was a new boat, and that it was well manned. It has been shown that the crew manning it was an experienced crew, and the witnesses were unanimous that the anchor was weighed in the usual way next morning by this crew. It has also been shown that accidents of this kind sometimes did happen. They have happened before, and there are circumstances under which they might happen again, although they could not reasonably be expected to happen on ordinary occasions. I am assuming that the onus is on the Harbour Board to show that there was no negligence, and looking at the evidence, I have come to the conclusion that the defendants have discharged this onus on the part of their servants. There was a suggestion, that the collision caused the damage, and not the anchor, in that the gudgeon of the one boat may have struck the bow of the lighter, and so made the hole through which the water rushed. But looking at the models produced, and also bearing in mind the evidence, it appears that the rudder of the boat which was struck was so placed that it must have been smashed or very severely injured if held in the ordinary way; and we have the evidence of the coxswain, who was at the tiller at the time, to the effect that, for the rudder to escape injury, he must have been holding the tiller in such a way that he would have been thrown into the sea. The coxswain has said that the tiller was not struck, that he was not thrown into the sea, and that he was holding the tiller in the ordinary way, and there is nothing to discredit his evidence. This also supports the view that the injury was caused by the anchor, and not by the collision. Assuming that the Harbour Board would have been answerable for negligence, looking at all the circumstances of the case, I have come to the conclusion that this was one of those casual things ordinarily classed as an accident, and not the result of carelessness or negligence. If an accident,

it was caused on the sea in the performance of ordinary seamanship operations, and consequently a peril of the sea, liability for which is specially excluded by the regulations of the Harbour Board. Admitting fully the arguments for the plaintiffs that the Harbour Board are responsible for the negligence of their servants, I think in this case they have discharged the onus laid upon them of proving that these injuries were due to a peril of the sea, and not the result of negligence or carelessness on the part of the crew. That being so, there is no need to discuss the amount of the damages, and judgment must be given for the defendants with costs.

Maasdorp and Solomon, J.J., concurred.

[Plaintiffs' Attorneys, Messrs. Van Zyl and Buissonne; Defendants' Attorneys, Messrs. Scanlen and Syfret.]

SUPREME COURT

[Before the Hon. Mr. Justice BUCHANAN (Acting Chief Justice), the Hon. Mr. Justice MAASDORP, and the Hon. Mr. Justice SOLOMON.]

PROVISIONAL ROLL.

ALGOA TANNING COMPANY V. RAUTENBACH. 1900. May 28th.

Mr. Buchanan applied for provisional sentence on a promissory note for £30.

Granted subject to production of a certificate of presentment, the note being payable at the Bank of Africa.

COTTERELL V. S. VAN AARDE.

Mr. P. S. Jones applied for provisional sentence on a promissory note for £343 7s. 6d., with interest.

Granted.

COTTERELL V. J. G. VAN AARDE.

Mr. P. S. Jones moved for provisional sentence on a promissory note for £357 9s., with interest.

Granted.

STRYDOM AND OTHERS V. STEENEKAMP.

Mr. Close applied for the final adjudication of defendant's estate.

Granted.

SCHWEIZER V. SMIT.

Mr. P. S. Jones applied for provisional sentence on a promissory note for £292 1s. 1d.

Granted.

GENERAL MOTIONS.

IN THE MATTER OF THE PETITION OF PEREIRA.

Mr. Molteno moved that the rule nisi granted under the Titles Registration Act be made absolute.

Rule made absolute as prayed.

COLONIAL GOVERNMENT V. LOGAN AND CO. LIMITED.

This was an application by defendant for the removal of bar and for leave to plead to a declaration in an action by the Colonial Government for the recovery of money due for work done.

Mr. Upton appeared for the defendant.

Mr. Ward appeared for the Government, and raised no objection to the bar being removed provided the defendant paid the costs incurred by reason of the bar.

The Court granted defendant leave to plead within ten days, at the same time ordering him to pay the costs of the bar.

WEBSTER'S EXECUTORS V. SOLOMON.

1899.
Nov. 23rd.
1900.
May 28th.

This was an action for an order declaring the plaintiffs' right to use a certain passage for surface drainage, for an interdict, and for damages. The plaintiffs were the Board of Executors and Mrs. Webster in their capacity as executors of the late Francis J. Webster, who died in 1867, and under whose will certain property was held by Mrs. Webster during her lifetime. The property was situated at the corner of Roeland-street and Buitenkant-street, and was purchased by the late Mr. Webster in 1853 from one Ross, and along with the property a servitude was given over a certain three-foot passage leading

into a common four-foot passage which led into Roeland-street. This servitude was to the effect that Webster should have the right to allow the rain-water from his yard to flow down a gutter in that passage. Ross was also the owner of the adjoining ground, over which the servitude was given, and that ground was now in the possession of defendant, who had erected certain houses thereon. The servitude was mentioned in Webster's transfer, but not in that of defendant, who, however, admitted in her plea that when she bought the ground she was aware of the servitude. It was alleged that the defendant had raised the level of the passage to such an extent that the water could not flow from the yard down it, and thereby damage was caused to the premises of the plaintiffs by flooding during wet weather. An order was asked for compelling the defendant to restore the passage to its original condition, an interdict restraining defendant from interfering with the free use by plaintiffs of the passage for the purpose mentioned, and £100 damages were also claimed. The defendant's plea was in effect a denial that the level of the passage had been altered.

Mr. Innes, Q.C. (with whom was Mr. Graham, Q.C.), appeared for the plaintiffs.

Mr. Searle, Q.C. (with whom was Mr. Joubert), appeared for the defendant.

Pierre Francois Marillac, who said he was Mrs. Webster's agent, and had known the property in question since 1876, and had occupied it from 1876 until nearly 1888, described the servitude passage. The water then flowed into a V-shaped gutter, from there into another V-shaped gutter, and thence into the street. There used to be a wooden step, but about January or February last witness saw a cement wall, which had been constructed on the opposite side towards defendant's property. This blocked up all water in the yard. The level of the passage had been raised. The pipes in the passage had been laid by plaintiff's orders some eight or ten years ago. The kitchen floor of defendant's property was at a lower level than the yard, and consequently if the water was blocked, and could not get out by the yard door, it would flow into the house.

Cross-examined: The open trap was put into the yard about eight or twelve years ago, and all water falling in the yard went into it, and was carried off by the pipes underneath the passage.

By the Court: Nobody stopped the laying of the pipes. Plaintiffs had the surface rights, and thought they could go underneath the ground as well.

George Frederick Piper deposed that he had lived in the house in question up to fifteen months ago. Storm-water then escaped through the foot of the door, and flowed down the passage to the street. He believed the drain was made of bricks.

By the Court: The water had come back into the kitchen even in witness's time, when the grating underneath the door became blocked.

Ludovic William Wentzel stated that he had laid the drainage pipes mentioned. He did so at Mrs. Webster's request eight or twelve years ago. When witness laid the pipes he saw a V-shaped brick gutter. This he lifted and afterwards replaced when the pipes were laid. Witness was there nine or ten months ago, and at that time there was no cement sill at the yard door.

Adam Kamis, a Malay mason, deposed that he used to work for Mrs. Webster. He gave evidence as to the previous condition of the passage.

Mrs. Alice Webster stated that the property in question had been left to her for her lifetime, but it still remained in the name of her late husband's estate. Witness had had the use of the passage since 1852. She protested, shortly after the adjoining property was purchased by Mr. and Mrs. Solomon, against their levelling the passage and covering up the drain for carrying off the stormwater.

Cross-examined: Witness had lived in the house fifteen or twenty years ago. She had afterwards returned to the house about ten or twelve years ago. Witness had seen the cement sill.

William Thomas Olive deposed that on August 1 last he made a sketch showing the respective positions of the properties before the new buildings were erected. Witness inspected the place on June 17, 1899. Mrs. Solomon's house was then built, but he did not know if it was completed. In Mrs. Webster's yard he saw a small grating on the yard side of the door, underneath the sill, and satisfied himself that the fall of the ground was towards that. At that time there was no cemented sill on the other side of the gate. There was some new rough brickwork forming a step, which was not at that

time cemented. The rough ground of the passage was lower than the yard, but it was impossible for water to flow into the passage on account of this brick step. When witness next saw the passage it had been cemented up to the level of the brickwork. If the grating became blocked in any way then the stormwater would flow into the house, which was at a lower level than the yard.

Cross-examined: The plan witness put in was simply a rough sketch and not correct as to measurement. Witness was clear there was a small grating underneath the sill of the yard door on June 17 last. It could only have been removed from the yard side.

By the Court: The extent of the yard was 18 feet by 9 feet, but the rainwater from the roofs also discharged into the yard. The quantity of stormwater would be greatly in excess of what the Municipal Regulations would allow to be taken into the sewer. Witness did not think the pipe, which he had learnt was a 6-inch pipe, would carry off all the rainwater.

Robert Caw, a plumber, said he was not connected in any way with the parties to this action, but on June 14, 1899, he was called in by Mr. De Marillac to inspect the underground pipes in this passage. When he went there with his workmen the following day to take up the pipes and inspect them Mrs. Solomon would not allow him to open up the passage. Witness went into plaintiffs' yard, but he could not remember whether or not there was a grating under the sill. Witness opened the ground in the yard to see which way the pipes of the main drain ran. On the passage side of the door there were a number of loose bricks, but no cemented step at that time. The loose ground had been levelled up to the bricks, but no cement or concrete had been put on. Witness could see that the bricks had been newly placed there. Witness had since seen the place. The passage was now cemented up to the level of the bricks. It would cost between £24 and £30 to take up the cement and give a surface drain from the door sill into Roeland-street.

Gus Trollip, the attorney for the plaintiffs, said that shortly before proceedings were taken in this action and just after Mrs. Solomon's house was completed, he went

to the plaintiff's yard. There had been a heavy rain, and witness found that the kitchen was flooded. He examined the sill of the door and found a small iron grating. He went into the passage and found it was filled up above the level of the sill of the door with building rubbish, etc., but he did not notice whether or not there was a cemented step, that matter having arisen later on.

James Freeman said he knew the property belonging to Mrs. Webster, and Mrs. Solomon's property adjoining it. He had originally owned the whole property, but sold it to Ross, arranging with the latter at the time that the use of the passage should be reserved to Webster; the second sale being in contemplation at the time. Witness remembered the wall being built and the door put in. Underneath the sill there was a grating through which the water flowed into a V-shaped drain in the passage, and then down that to Roeland-street. That was many years ago. The passage was paved with cobble-stones.

Cross-examined: Witness was speaking of thirty years ago, and until recently he had not seen the place for many years. At the time there was no underground drain. This closed the case for the plaintiffs.

For the defence,

Carl Frederick August Pfeiffer, an agent practising in Cape Town, deposed that he acted for Mrs Solomon in connection with the purchase of the ground, and the correspondence between the parties. Witness had known this property for seven or eight years. Mrs. Solomon purchased this property, together with other property on the opposite side of the 4-foot passage in November, 1897. When Mrs. Solomon bought the property the cement door sill was in existence outside Webster's door. That cement door sill was actually on Webster's property. It was flush with the wall of Webster's property. The level of the ground was the same, to within half an inch, as that of the door sill. Witness knew nothing about the underground drain having been made. When Mrs. Solomon's house was being built witness gave special instructions to the architect and the builder to retain the same level. On November 23 last year witness, Mr. Cherry the architect, and others, in consequence of evidence given when the case then came on, went

to Webster's yard to look for the grating mentioned, but found none. There was no sign of any grating having been removed, and the place was cemented right up to the door sill. It had been broken down since, but no grating had been discovered.

Fred. Cherry, an architect practising in Cape Town, said he was the architect of Mrs. Solomon's house, one Smith being the builder. The house was practically completed by the end of June or beginning of July last year. When witness went to measure up the ground it was waste ground. The cement door sill was there at that time, and they built up to it. At that time the ground was about three-quarters of an inch below the level of the cement sill. The bricks of the jamb of the door of Webster's wall looked decayed, and the cement sill looked old. The sill was about nine or ten inches above the level of the door when witness saw it in January, 1899, before any building was commenced. Witness was in Webster's yard in November, and then there was no grating on the door sill, the cement in the yard being flush up to the underside of the wooden sill of the door. The gully trap in the yard was three-quarters of an inch lower than the bottom of the sill, and there was a fall of 3½ inches from the kitchen door to the gully.

Cross-examined: The passage must have been cemented some time in May last, lowered to allow the water from the yard to flow down it, witness believed the drain pipes of Mrs. Solomon's house would have to be lowered also.

Martin E. Smuts, a Government land surveyor, said that in August or September, 1897, he made a survey of the whole place, and from that survey he had for the purposes of this case made the plan put in. When witness made the survey the cement door sill was already there. It was wholly on the property of Webster. The ground was about the same level as the top of the step.

Cross-examined: On the plan made in 1897 witness did not show the sill because there was then no dispute about it. It did not show the three-foot passage because he did not know where it was. He took no levels, so that he was speaking purely from memory when he said the ground was about the same level as the sill.

Re-examined: There was nothing on the diagrams to show where any three-foot passage was, but the four-foot one was marked on the diagram of Somerset House.

Frederick Visser, a builder, who had lived on the property, said that when he was there there was never any indication of a three-foot passage. He could not tell if the ground had been raised. The sill seemed to him to be a dozen years old. He noticed that the wooden sill was almost level with the present yard.

By the Court: To construct a V-shaped drain would cost about £25.

Mrs. Rosie Solomon, the defendant in the case, said she purchased Somerset House and the piece of ground on which she had built in November, 1897. Witness afterwards saw Mrs. Webster, who told her she had a right to a three-foot and a four-foot passage, and Mrs. Webster insisted on a door being left open which witness wished shut, as people came up the passage in the night. As far as witness was aware, her builder and architect had not built any cement wall on Mrs. Webster's property. She knew nothing about any sill.

William Milner Blackburn said he was in the service of the Corporation of Cape Town, and his duty was to inspect the laying of drains. The drains of Mrs. Solomon's property were laid in June and July. There was no sign of any other drain except a cobble-stone drain along the four-foot passage. He had visited the property previous to March 17, and then there was no grating under the sill of the door of Webster's yard. He could not say whether there was a step there, but the level of the ground was higher than that of the yard. He had been there again in November with Mr. Cherry and the others, and found no grating there.

In his evidence, taken on commission in November, 1899, Joseph Smith stated that he was a contractor and builder, and contracted to build the house for Mrs. Solomon. Upon the plans and specifications a three-foot way was drawn. On March 4 or 5, 1899, witness commenced the foundations of the house. Witness noticed a door step level with the ground at the door of Mrs. Webster's yard. In making the excavations he did not interfere with the step. According to witness's ideas the step must

be seven or eight years old. In November last he went to Mrs. Webster's yard to see if there was a grating there, but found none.

Mr. Innes, Q.C.: The servitude is admitted on the pleadings. Defendant admits she bought with knowledge of the servitude. They admit our rights of way. But they say we cannot have pipes and surface drainage also. They on their own admission brought about the changed circumstances, but they say they were justified in so doing. Have they a right to change the level of the property without challenging our servitude rights. It is not probable that we would have built the sill and then come to Court to ask defendants to take it away. On the evidence they should put matters *in statu quo ante*. They make no legal defence to our claim for a removal of the obstruction of the servitude, which they admit.

Mr. Searle, Q.C.: Plaintiff abandoned the system of surface drainage ten or twelve years ago, and substituted for it a system of underground drainage.

[Buchanan, A.C.J.: Having been stopped in the underground system, can they not go back to the surface system?]

They must abandon the underground system. They can't use both systems. If they want surface drainage they must restore things to the former state.

Mr. Innes (in reply): The correspondence showed that the plaintiffs did not fail to act with promptitude, and were not lying by. Defendant's attention was drawn to the alteration of the level of the passage before it was cemented.

Mr. Trollip was recalled, and stated that a letter was written by him on June 16, before the passage was cemented, to defendant's agent, calling attention to the fact that the level of the passage had been altered.

Mr. Pfeiffer, defendant's agent, recalled, stated that he had never received that letter.

Buchanan, A.C.J., in giving judgment, said: The plaintiffs in this case are the executors of the estate of the late Francis J. Webster, who was the owner of a lot of ground No. 31, situated in Roelandstreet, while the defendant was the owner of the half of lot No. 32 adjoining this. The plaintiffs claim that they have a right of passage over the defendant's property three feet wide, leading into a common passage four feet wide, running down the side of

the property. The plea admits this right of passage, and refers the Court to the deed of transfer to ascertain its exact terms. Referring to the deed of transfer, it appears that Webster was to have a right of passage three feet wide leading into a common passage four feet wide, and that all water which should come from Webster's lot was to pass over this passage, which the said Webster was to have paved and kept clean. Apparently from the levels the ground of Lot 31 stands at a higher level than that of Lot 32, which now belongs to the defendant, in consequence of which rainwater would naturally have to flow from Lot 31 to Lot 32, and on this account the servitude mentioned was probably given. The defendant admits the servitude, and that she bought the ground with the knowledge of its existence. It appears that the servitude was arranged for between the former proprietors by Mr. Freeman, who was at that time the owner of part of the property. Mr. Freeman says that at that time there was a grating under the sill of the door leading from plaintiff's yard, through which the water ran, there being at that time no underground drainage. There is a curious conflict of testimony about this grating. People have actually testified to having seen it under the door sill only a few months ago, while others who were on the spot declare that it was not there at all. However, from Mr. Freeman's evidence, which appears to be reliable, there is no doubt that originally there was this grating, and that it was used to lead the water into the passage. Some ten or twelve years ago the plaintiffs had an underground drain placed under the yard into the three-foot passage, down to the common passage, and from there into Roeland-street. This carried off the rainwater which fell, but in consequence of recent regulations of the Municipality, the plaintiffs could no longer use this drain for carrying off the rainwater, and they therefore wished to revert to the surface drainage. Now, it appears that last year, when Mrs. Solomon built on her property, the level of the passage was raised in such a way that water could no longer flow over the surface, as under the servitude Webster was entitled to have it flow. It is admitted that the plaintiffs can claim to have the water flow over the passage, but the defendant pleads that Webster's executors having taken this underground pipe, cannot now insist upon the water flowing over the surface unless they themselves restore the passage to its original level,

take up the pipes, and do everything necessary to restore the passage to a level such as will enable the water to flow over it. Undoubtedly in some circumstances, if a person does nothing and lies by and allows work to go on he may put it out of his power to claim redress for any injury he may suffer through work done with his tacit permission. but in my opinion this is not such a case. The correspondence between the attorney for the plaintiffs and the agent for the defendant shows that objection was at once taken to the filling up of this passage in the way it was done. Though she denies it, I think the filling up of the passage has been proved to have been done by defendant, because the evidence shows that the pipes laid by Mrs. Webster ten or twelve years ago were only some eight inches under the ground, and that after these pipes were laid a V-shaped drain was placed above them for the surface water to flow down. Mrs. Solomon has had pipes of six inches diameter laid, one witness says above Webster's drainage pipes, and these pipes are ten inches underground, while above that there are several inches of cement, and therefore the surface of the ground has been considerably raised since the laying of these pipes. The laying of these pipes seems to have raised the passage ten or twelve inches above the level of the yard. Mrs. Webster has not herself lived on the property for ten or twelve years, but I think there has been sufficient promptitude on the part of the executors through their attorney in objecting to the raising of the level of the passage to prevent them being estopped from exercising the right reserved to them under their servitude. Holding as I do that this lane has been raised by defendant, I think that an order must be granted on the defendant to restore the passage to the proper level, so as to enable the water from the plaintiff's yard to flow down it. I do not think that it has been clearly proved that Webster ever paved this lane, and I therefore think that when the proper level is restored the paving must be done by Webster's estate. The judgment of the Court will therefore be—no damages having been proved, and nothing whatever said about them in argument—for an order calling upon the defendant to restore the three-foot passage to such a level as to enable the water to flow over the surface from the yard, and defendant to be interdicted

from interfering with the plaintiff's free use of this passage for rainwater; this judgment to carry costs.

Maasdorp and Solomon, J.J., concurred.

[Plaintiff's Attorney, Mr. Gus Trollip; Defendant's Attorney, Mr. D. Tennant, jun.]

SUPREME COURT

[Before the Acting Chief Justice (the Hon. Mr. Justice BUCHANAN), the Hon. Mr. Justice MAASDORP and the Hon. Mr. Justice SOLOMON.]

ISAACS AND OTHERS V. DE
MARILLAC. { 1900.
May 29th.
„ 31st.

This was an action for declaration of rights and for damages. The plaintiffs were David Isaacs, George Cunningham, Egbert A. Buyskes, William George Fairbridge, and David Tennant, jun. (in his capacity as executor testamentary of the estate of the late Samuel Snell Mills), and the defendant was Ernst Anton Marie de Marillac.

Mr. Innes, Q.C. (with whom was Mr. Gardiner), for the plaintiffs.

Mr. Graham, Q.C. (with whom was Mr. Close), for the defendant.

The plaintiffs' declaration was as follows:

1. The parties in this case are all resident at Cape Town; the plaintiff David Isaacs is the cessionary of one Sydney Isaacs, and the plaintiff David Tennant is the executor in the estate of the late Samuel Snell Mills, likewise an original member of the syndicate hereinafter referred to

2. In or about the month of November, 1897, the plaintiffs and the defendant entered into an agreement to prosecute a joint adventure for certain purposes as hereinafter set out; and they constituted themselves an association or "syndicate" called "The Lillian Syndicate."

3. The main terms of the said agreement were as follows: (a) The objects of the syndicate were to be the acquisition of mineral rights in the North-western dis-

tricts of the Colony and the equipment and despatch of an expedition in that connection under the charge of the defendant; (b) all rights acquired by such expedition or by any of the parties to the agreement in connection with the further development of the syndicate were to be held and acquired on behalf thereof; (c) the interest of the defendant in such rights was to be 5-20ths and that of each of the plaintiffs or their predecessors 3-20ths; the interest of the defendant being given as remuneration for his services, and the remaining members contributing sums amounting in all to £750; (d) no member of the syndicate was to be bound thereafter to make further contributions, but those members who did so contribute were to have a further proportionate interest in the rights of the syndicate; (e) in all matters affecting the syndicate a majority (according to the proportionate shares held) was to decide all disputes. The remaining terms of the agreement are not here material to be set out.

4. The plaintiffs thereafter contributed the said sums and equipped the said expedition, and certain rights were acquired on behalf of the syndicate.

5. The members of such syndicate subsequently from time to time held meetings, and were active in developing the joint adventure, and from time to time agreed on further contributions, which were duly paid in cash by the plaintiffs and devoted solely to further the objects of the syndicate.

6. In consequence of the agreements arrived at in such meetings, and the moneys so paid in from time to time, changes were effected in the nature of the interests of the several parties in the rights of the syndicate, whereby ultimately the relations of the parties to the joint adventure became established as follows: (1) The defendant became entitled to be paid at some future time an amount reckoned at the rate of £60 a month as and for household expenses, while from time to time travelling and engaged in the work on behalf of the syndicate; such amount being payable out of any profits accruing to the syndicate after a refund to the other members of the amounts theretofore paid in by them. (2) In respect of the several interests of the parties the defendant was to be entitled to an interest equivalent to the ratio be-

tween the sum of £2,000 (being a moiety of £4,000 theretofore paid in), and the total amount contributed less the said sum of £2,000, saying to him, however, his right to join in making further contribution, subject to readjustment as hereinafter in sub-clauses (3) and (4) set out. The amounts now paid in by the plaintiffs amount to £3,830, and the defendant's interest in the rights and assets of the syndicate (subject as aforesaid) is in the ratio of £2,000 to £3,830. The plaintiffs annex hereto a statement "A" showing the said interests of the defendant on the one hand and the plaintiffs on the other. (3) In the case of a certain option in respect of the farm Eendoorn, belonging to one Kennedy, the defendant's interest was to be one-third, but was for working purposes to be taken at one-half, subject to subsequent readjustment. (4) There was to be a future deduction of £250 out of profits accruing to the defendant in the future.

7. From time to time various leases have been acquired for the syndicate, a list of which leases is, hereunto annexed marked "B," to which the plaintiffs crave leave to refer. In the said list they have also inserted the farm Eendoorn hereinbefore referred to.

8. The said leases have been severally made out, for the sake of convenience, in the names of individual members of the syndicate; but they all are leases made and executed on behalf of the syndicate, and the members thereof are entitled to an order: (a) Declaring that the said leases are held in trust for the said syndicate or its members; (b) declaring and adjusting the rights severally of the plaintiffs on the one and the defendant on the other hand; (c) declaring that the voting power of the members should be in proportion to the interests of the parties herein, as aforementioned.

9. The defendant wrongfully and unlawfully refuses to recognise any rights of the plaintiffs in and to the said leases, and in the premises generally, and is in possession of and refuses to hand such leases over to the syndicate, but claims the right to deal with them for his own benefit; and it has become necessary and the plaintiffs are entitled to claim that a trustee be appointed

to take cession of and to hold the said leases and option and the assets generally in trust for the members.

10. By reason of the premises and particularly of the wrongful action of the defendant as in the last paragraph set out, the plaintiffs have been hindered in dealing with the said leases, and have been damaged at the hands of the defendant in the sum of £1,000.

The plaintiffs claim: 1. (a) An order declaring and adjusting the rights generally of the plaintiffs and the defendant respectively in respect of the said syndicate and the leases and option referred to in annexure "B" hereto; and declaring that the interests of the parties hereto in the aforesaid rights are as set out in annexure "A." (b) An order declaring that the plaintiffs are entitled to be repaid out of the first profits of the said syndicate the sum of £5,830 already advanced by them; and that thereafter the defendant shall be entitled to be paid out of the said profits such sum of money as may be proved to be due to him for household expenses as aforesaid. (c) An order that the said leases, option, and rights (as set out in annexure "B") are held in trust for members of the Lilian Syndicate who are interested therein to the extent of their respective holding or share in the said syndicate. (d) An order that the defendant is not solely entitled to the said leases and rights, and compelling him to produce and deliver the titles thereof, and to cede and assign such as are in his name to a trustee for the syndicate. (e) An order declaring that the voting power of the members should be in proportion to the interests of the parties as in annexure "A" set out. (f) An order appointing a trustee to take cession of and to hold the said titles, leases, and assets of the syndicate in trust for the members. (g) Such further or other order as may be necessary to adjust the rights of the plaintiffs and the defendant. (2) Payment of the sum of £1,000 as and for damages by them sustained in the premises. (3) Alternative relief. (4) Costs of suit.

The defendant's plea was as follows:

1. The defendant admits paragraph 1, but denies paragraphs 2, 3, 4, 5, and 6, and says that the agreement in paragraph 2 refers to a syndicate called the De Marillac Syndicate, which has ceased to exist.

2. In or about the month of October, 1897, the parties entered into an agreement to prosecute an adventure for certain purposes, and for that purpose formed a syndicate called the Lilian Syndicate, and it was agreed between the parties in consideration, *inter alia*, of moneys expended by the defendant, and properties belonging to him being put into the syndicate, as well as his work and labour, that the defendant should be entitled to one-half of the proceeds and profits; that the defendant should receive the sum of £60 per month from the start on his first journey while engaged on the business of the syndicate, which should be paid out of the profits accruing to the plaintiffs after the deduction of all moneys paid by them into the syndicate. Thereafter it was agreed between the parties that the defendant's share of Eendoorn was to be one-third.

3. The plaintiffs from time to time contributed moneys to the syndicate, and thereafter it was agreed that for any sums required above £4,750 the defendant should be liable *pro rata*, but that the amount due by him should be deducted from his profits.

4. The defendant admits paragraph 7, and admits that the leases have been made out in the names of individual members, and that they belong to the syndicate, but he denies the other allegations in paragraphs 8, 9, and 10, and says that the said leases were handed to him for the purpose of dealing with them.

5. Thereafter in or about the month of February, 1899, the parties agreed to form a company called the Lilian Syndicate (Limited), the memorandum and articles of association being signed in February, 1899, and the company duly registered, one of the objects of which is stated to be to acquire the leases aforementioned from the defendant, and to enter into an agreement with the defendant for the purpose.

6. The plaintiffs in breach of their said agreement refuse to recognise the rights of the defendant, and claim the right to dispose of the said leases to the aforesaid company, including the defendant's rights, in such a manner as they shall think fit, and without the consent of or any agreement with the defendant, and the defendant disputes their right so to do.

Wherefore the defendant prays the plaintiffs' claim may be dismissed with costs, and

for a claim in reconvention the defendant says: (1) He begs to refer this Honourable Court to the matters in convention set forth; (2) by reason of the premises and the wrongful action of the plaintiffs the defendant has been hindered in dealing with the said leases, and has been damaged in the sum of £5,000.

Wherefore the defendant prays for an order declaring (a) that his interests are as set forth in paragraphs 2 and 3 of his plea in convention; (b) that the plaintiffs are not entitled to dispose of the said leases without the consent of or an agreement with the defendant; (c) payment to the defendant of the sum of £5,000 aforesaid; (d) alternative relief; (e) costs of suit.

The first witness called was

William George Fairbridge, one of the plaintiffs, who said that towards the end of 1897 defendant approached witness about forming a syndicate to get up an expedition to prospect for minerals in Namaqualand. He said the cost would be about £500, but witness said they would make it £750 to be on the safe side. It was agreed that there should be five members of the syndicate exclusive of defendant. The latter was to pay nothing of the £750, but was to go on the expedition and secure mineral rights. For that he was to receive a full quarter interest in the syndicate. It was suggested that probably further capital would be required, and it was agreed that while no member would be compelled to contribute more than his share of the £750, those who did would have their shares proportionately increased. Witness drew up a memorandum embodying these terms, and defendant took it away and brought it back with the signatures of some of the plaintiffs on it. Witness did not notice the omission of defendant's signature from this memorandum until last year. There was no other agreement drawn up in connection with the syndicate, which they agreed to call the Lilian Syndicate. There never was any bank account opened in the name of the De Marillac Syndicate. In December, 1897, defendant went on the expedition, the syndicate providing the money for equipment. He returned in March, 1898, having found copper-bearing properties on Crown lands, but before they could obtain mineral rights they had to have the farms surveyed

and secure a lease. That required about £600 additional. Then there began to be a little friction, defendant thinking he ought to get a greater share. Informal meetings of the syndicate were held, at which witness took short minutes. At one meeting it was resolved, with regard to certain two farms about which defendant had secured information, that defendant's share in those farms should be one-half, and afterwards it was suggested that as his share in the syndicate generally was one-fourth, to avoid confusion a subsidiary syndicate should be formed to deal with those two farms. Afterwards, however, defendant's share in the syndicate generally was increased to one-half, and the De Marillac Syndicate became merged in the Lilian Syndicate, as it had served the temporary purpose for which it had been formed. Proceeding, witness gave evidence as to the various increases in the capital. They resolved that £4,000 should be the limit up to which the capital should be raised without defendant having to contribute directly. After that defendant was to contribute his *pro rata* share. It was further agreed that if any member of the syndicate did not pay the call made, any other member could pay the call, and his share would be proportionately increased. Defendant refused to pay up his *pro rata* share, saying in the first place that he was not liable for it, and secondly, that as he had acquired properties of such enormous value he ought not to be asked for it. At the end of 1898 defendant insisted upon being sent to England, saying that if he was not sent he would smash up the whole thing. He said he could float the properties in a week, as capitalists would be running after him when they knew he had copper properties. At last they consented to his going, and subscribed £250 for his expenses, he saying that whatever it cost him more than that he would pay himself. He returned without doing anything, leaving the leases behind him in the hands of a solicitor in England. They knew the leases were in safe hands, but still they ought to have been out here. In correspondence in December, 1899, defendant claimed the leases as his own, and said he was to dispose of them for his own benefit, but he did not now do so in his pleadings. Matters had now reached such a point that it was im-

possible to work with him. At meetings when what were considered the syndicate's rights were mentioned, he used most abusive language, and had sent abusive letters to members of the syndicate.

George Cunningham, another of the plaintiffs, said he was asked to join the syndicate by defendant, who put it to him that as he had not been very successful in a former speculation with defendant, he would let him in this one as a special favour. Witness signed the document produced, which was brought to him by defendant. Witness was at some of the meetings, and agreed with the evidence given by Mr. Fairbridge.

Cross-examined: Witness specially remembered that document, because the syndicate was held out to him as such a glowing concern.

Egbert Buyskes, also one of the plaintiffs, deposed that he joined the syndicate on defendant's representations. He signed the document produced, which he believed was brought to him by defendant. Witness kept the accounts of the syndicate, and the accounts put in were correct. The amount paid by the shareholders, exclusive of defendant, was £5,830. In April, 1899, witness wrote to defendant asking him to take up his share of the call over £4,000. Defendant refused to take up the call, contending that he was not liable. Defendant wrote some very abusive letters, and witness broke off communications with him.

Cross-examined: Defendant had altogether actually received £3,677 from the syndicate, and he had to account for that. He had paid Johns, but had debited the syndicate with the amount.

David Tennant, one of the executors of the late S. S. Mills, a shareholder in the syndicate, put in a letter from defendant to Mills, in which the former said he would only hold the latter responsible for a half-share, although he had had to sign for a whole share. Witness had been chairman at a meeting of the syndicate. Defendant was a very difficult man to work with.

Certain correspondence, and the evidence of David Isaacs, taken on commission, which corroborated that of Mr. Fairbridge and other witnesses, was put in.

E. A. M. de Marillac, the defendant, stated that the agreement was entered into in 1897. The members of

the syndicate were all the plaintiffs and Mills. Witness proceeded to Namaqualand in December, 1897. Before that meetings had been held for the purpose of making arrangements for the syndicate. He had never seen the document produced until three or four days ago. He wrote a letter from Namaqualand asking for a copy of the agreement, which he signed. The document produced was not the agreement which he signed. Witness proceeded to Namaqualand across country from Victoria West. On arriving in Namaqualand he spent three weeks in tracing lodes, and in the course of his exertions his health became seriously affected. The witness then gave evidence as to how he acquired Johns' lease. Proceeding, he said it was agreed that he should receive a salary of £60 a month. He made four trips to Namaqualand, and he had rendered the accounts to Mr. Fairbridge. He was quite willing to pay out of his profits after the £4,750 had been settled. No call had ever been made upon him to contribute anything above the £4,750. He had been prevented from floating a company, and had therefore sustained considerable damage. He claimed all the leases in order to force the matter into court.

Cross-examined: He would have been satisfied with a half-share. He did not know what his attorney did.

Mr. Innes: You claimed £125 for climbing the mountains?

Witness: Yes, in 125 degrees of heat.

Cross-examined: He was satisfied with the resolution, but he said that they would never get any money out of him.

John Edward Paul Close, an accountant, residing in Cape Town, said he inspected the books of the old Lilian Syndicate. The amount of £250 for the defendant going to England was included in the £5,830. He could not trace £50 as having been deposited by De Marillac in 1896. The books were kept in a very loose manner.

Cross-examined: £5,830 had been paid in calls. He did not see the books of the Lilian Syndicate (Limited).

Buchanan, A.C.J., in giving judgment, said: Towards the latter end of the year 1897 the parties to this suit formed a syndicate for the purpose of acquiring mineral rights in the north-western districts of the Colony. The idea seems to have been that the plaintiffs, five in number,

should find the means, and that an expedition should be equipped by these means and despatched under the charge of Mr. De Marillac, the defendant, and that all rights acquired by the expedition or at any time in connection therewith or through the development or exploitation of the same, should be held to be acquired on behalf of the syndicate. The original idea was that the plaintiffs should raise the sum of £750 and that the defendant should not contribute anything towards this amount, but was to go on an exploring expedition, to have his expenses paid, and to have one-fourth share in consideration of his services of the whole results, and the plaintiffs were to have the remaining three-fourths among them. As often happens in such enterprises, the £750 proved insufficient, and more money was raised, ultimately £2,750 in all, by the five members of the syndicate represented by the plaintiffs. Of this amount nothing whatever was contributed by the defendant. In the meantime there were several discussions, and the defendant seems to have impressed the other members of the syndicate with the idea that something he had secured was so exceedingly valuable or profitable that it was agreed that he should have one-half instead of a quarter interest in the venture. More money still was afterwards required, and at a meeting held on December 9, at which all the parties were present except Mr. Mills, since dead, it was agreed after some discussion that the members of the syndicate, with the exception of De Marillac, should contribute the amount necessary to pay the existing debts, not exceeding £750. This call, added to the previous contributions, made the amount raised by the members of the syndicate £3,500. Up to that time the defendant was entitled to a half-interest, and consequently his proportion of the £3,500 was £1,750, as against £1,750, the interest of the rest of the syndicate. At this meeting an agreement was come to upon which the issues now before us greatly depend. A record of this agreement is to be found in the minutes of the meeting, and these minutes were afterwards confirmed at a subsequent meeting. The minutes give the agreement in the form of a resolution, which after referring to the £750 required for debts, goes on to say that after and up to a further amount of £1,250, all members, including defendant, should contribute *pro rata* in proportion to their interests. Now it is contended by the plaintiffs that

this amount of £1,250 included the amount of £750 agreed upon to be raised at that same meeting, while the defendant says it was to be in excess of that £750. All the members of the syndicate except De Marillac say that it was agreed and understood that they were to raise a sum not exceeding £4,000 in all, while the defendant says that it was £4,750, including that £750. There is thus a difference between the members of the syndicate as to the agreement come to. With this difference of opinion, I think we must take the resolution as recording the agreement actually come to. The minutes seem to me to support Mr. De Marillac that the amount to be raised was £4,750, and as De Marillac was to contribute to the last £1,250 raised, his share on his half-interest would be £2,375, against the £2,375 which the other members of the syndicate would have. But as against this latter contribution the resolution goes on to say that De Marillac's contribution was to be debited to him and to be ultimately deducted from his profits. The resolution then goes on to say that after this last contribution of £1,250 all the members of the syndicate, including De Marillac, should be placed on the same footing with regard to future contributions, that is, that they should be liable to contribute *pro rata* according to their respective interests. Defendant contends in his plea that this meant that although he should contribute *pro rata* to any future calls, his contribution was to be debited to his account and paid out of his profits as before. The resolution, however, does not bear this construction. Therefore with regard to any contributions in excess of the £4,750 defendant was bound to contribute his *pro rata* share in cash. The contributions seem to have been raised by subsequent calls to £5,830, and to this defendant has contributed nothing at all, although according to the resolution he should have contributed £410. As he did not do so, other members of the syndicate did, in accordance with a resolution which provided that if a member did not pay up his call any other member could, and his share in the venture would be proportionately increased. With reference to the original contract, defendant says that the document put in is not the original one, but on the evidence I am convinced that this is the identical document defendant took round for signatures of the members of the syndicate. This original contract contains

a provision for refunding the members of the syndicate the amounts they advanced out of the first profits of the venture. Soon after operations commenced, at a meeting of the syndicate, at which defendant was present, it was agreed that besides his expenses, the defendant, while engaged in the business of the syndicate, should receive £60 per month after a refund to the shareholders of all money contributed by them. A further question has been raised as to the construction of this portion of the agreement, and I think it means that the plaintiffs are first to receive back out of the proceeds of the venture the amounts they have paid, and after that defendant is to receive his remuneration of £60 per month for the time he was employed. I think, therefore, the true agreement, between the parties is that should this syndicate be fortunate enough to realise any of their estate the members of the syndicate are to be repaid the amounts of their contributions, and thereafter defendant is to receive his £60 per month. If defendant had paid his contribution to the amount over £4,750 he would still have had a half-interest in the whole venture, but he has not done so. With regard to a sum of £250, however, we are of opinion that this was contributed by plaintiffs in the nature of a bonus to enable defendant to proceed to England for the purpose of floating the property, and that that therefore ought not to be included in the £5,830. The amount that plaintiffs can therefore legitimately charge against the company is £5,580, and defendant's interest in this is £2,375, and that of the plaintiffs £3,205, which included the additional sum of £830 paid by them. The figures in the annexure of the declaration will therefore have to be amended to that extent, and so amended prayer (a) will be granted. With regard to prayer (b) for an order declaring that the plaintiffs are entitled to be repaid out of the first profits of the said syndicate the sum of £5,830 already advanced by them, and that thereafter the defendant shall be entitled to be paid out of the said profits such sum of money as may be proved to be due to him for household expenses as aforesaid, I think the plaintiffs are entitled to that, but the amount will have to be reduced from £5,830 to £5,580. As to prayer (c) for an order that the said leases, option, and rights (as set out in annexure B) are held in trust for members of the Lilian Syndicate who are interested therein to the ex-

tent of their respective holding or share in the said syndicate, that is common cause between the parties. With regard to prayer (d) for an order that the defendant is not solely entitled to the said leases and rights, and compelling him to produce and deliver the titles thereof, and to cede and assign such as are in his name to a trustee for the syndicate, these leases are the property of the syndicate, although some are in the name of the defendant and some in the name of other members of the syndicate, and I think that defendant having taken them away from the Colony for the purpose of realising them, must bring them back so that he may deliver them up to such person or persons as shall be duly authorised by a meeting of the syndicate to hold the same. An order in these terms can be granted. Prayer (e) is common cause, for once the interests of the parties are decided it will settle the voting power. As to the prayer for damages, I think none have been proved on either side. With regard to the claims in reconvention, there must fall away with the view expressed with regard to the declaration, and no order can be given as to damages, which have not been proved. Judgment will therefore be given for plaintiffs in the terms indicated, and as the plaintiffs have substantially succeeded the judgment will carry costs.

Maasdorp and Solomon, J.J., concurred.
[Plaintiffs' Attorneys, Messrs. Fairbridge, Arderne and Lawton; Defendant's Attorney, Mr. J. C. Berrange.]

SUPREME COURT

[Before the Acting Chief Justice (the Hon. Mr. Justice BUCHANAN), the Hon. Mr. Justice MAASDORP, and the Hon. Mr. Justice Solomon.]

FOSTER V. DE VOS. } 1900.
 } May 3th

This was an action for the recovery of a balance of account for professional services rendered and moneys advanced.

The plaintiff was J. A. Foster, an attorney of the Court, practising and residing at Oudtshoorn, while the defendant was P. W. de Vos, a farmer in the division of Oudtshoorn. The declaration set forth that the defendant was indebted to plaintiff in the sum of £60 15s. 2d., being balance of account for work done and moneys disbursed between the month of May, 1896, and September, 1898. The plea admitted that certain services were rendered and certain moneys were disbursed, but said that the transactions took place between the year 1892 and September, 1898, and there had never been any final statement of account between the parties. The defendant said he was entitled to demand an account from the year 1892, and he was willing to pay any moneys owing on a complete statement of accounts, but, he said, the defendant refused to render such an account. He also disputed certain items in the account rendered for the years 1896-98, including one of £50 commission on sale. He also alleged that between 1892 and 1896 large sums of money were paid by him to plaintiff, and these were not accounted for in the account rendered. The defendant claimed in reconvention an order of Court to have a proper account rendered of his transactions from 1892 to 1898, and if necessary, to have the account debated, and further, that all documents, papers, and writings belonging to him and in plaintiff's possession be delivered up. Plaintiff, in reply, alleged that an account had been rendered from 1892 to 1896.

Mr. Innes, Q.C. (with whom was Mr. Burton), appeared for the plaintiff.

Mr. Searle, Q.C. (with whom was Mr. Upington), for the defendant.

Mr. Searle said that the previous day the parties had gone through the books and satisfactory explanations were given as to the accounts between 1892 and 1896. The defendant was quite satisfied that there were no moneys belonging to him in plaintiff's hands, and therefore did not now press the first claim in reconvention, that for the rendering of a full account. Counsel further stated that there were five items in dispute in the account rendered.

The first witness called was

James Alexander Foster, who stated that he was an attorney of the Court and a no-

tary and conveyancer practising at Oudtshoorn. Defendant formerly had a hotel and general store at Cango. Between 1892 and 1896 witness used to do a little work for him. He kept an account of his dealings in his books, and in November, 1896, rendered an account of these to defendant, showing a balance of ££1 19s. 6d. in witness's favour up to May of that year. Witness twice went over that account with defendant, and therefore he did not think it necessary to recapitulate all the items, but began the new account with a balance of £1 19s. 6d. The account witness now rendered was correct, but three items which he considered a special service had been omitted, and he did not now sue for them. With regard to the items of the account specially objected to by the defendant, the first one was £50, commission on sale of Meiring's property. Witness advertised that property and sold it provisionally, but Meiring was not satisfied with the price offered, £6,400. Mr. Meiring then left the property in witness's hands to sell out of hand, and after negotiations the property was sold provisionally to defendant for £6,450. In the absence of any other arrangement the seller would pay the commission, but witness arranged that Meiring should pay half the commission of £100, and the defendant the other half. At defendant's request witness debited defendant with the amount. With regard to the item of one guinea in connection with calling up a mortgage, witness did not now press that. Proceeding, witness gave evidence as to the work done and moneys disbursed in connection with the other disputed items. The item of £2 2s. was due for drawing a power of attorney; the £9 14s. 11d. was admitted by defendant, and was due by De Vos to witness as being a disbursement by the latter on behalf of De Vos to the Civil Commissioner. (Receipt produced.) The item of £14 16s. was the commission for amounts collected by witness for De Vos, charged at the rate of 5 per cent. With regard to the documents claimed, there were two in witness's office, one of which he handed back on 13th May to defendant immediately he became aware of it. The other, a deed of transfer, he handed back later, on being advised that he had no right to retain it. Witness had no other documents belonging to defendant. So far as he was aware he had delivered up all documents in his possession belonging to

defendant. As to the sums of money which the plea stated he had received on defendant's behalf, but had not accounted for (but which defendant's counsel had stated at the opening of the case had been satisfactorily explained), witness fully explained the transactions. He did not consider that these items ought to be put down in defendant's account.

Cross-examined: Witness did not remember receiving from defendant a bill of one Schoeman for collection.

George Arthur Tiran, a bookkeeper in plaintiff's office, said he had made search in the office and could find no trace of a bill of Schoeman's.

This closed the case for the plaintiff.

For the defence,

Philip Wouter de Vos, the defendant, said he was a farmer and general dealer residing at De Rust, in the division of Oudtshoorn. Between 1892 and 1896 he had a number of transactions with plaintiff, and in the latter year plaintiff became his regular attorney. Before November, 1898, witness had never had a complete statement of the accounts between them from 1892 to 1896, and he did not know how the balance of £1 19s. 6d. was arrived at. On the previous day, however, he went through plaintiff's books with his attorney. Before that he did not know how they stood. The accounts between 1892 and 1896 had now been explained. After giving evidence as to the minor items disputed in the accounts for 1896-98, witness said as to the payment by him of half of the commission on the sale of Meiring's property, that he understood Meiring was to pay the commission. Witness said he objected to paying the £50, because he did not owe the money to plaintiff. The transfer duty and costs were due to Meiring and not to plaintiff. With regard to the £14 16s. he didn't agree to pay any commission on the amounts collected. Plaintiff said he would not charge any commission. The account for such commission was only given to him yesterday. Two guineas was too large a charge for drawing a power of attorney; one guinea was the usual charge.

Cross-examined: Witness could not remember telling plaintiff to debit him with the £50, half of the commission. Witness had not yet paid Meiring the £50 commission. He had had a settlement of accounts with Meiring.

Re-examined: Schoeman's bill was handed over for collection among bills of Hattingh and others. The bill had never been returned to him.

By Mr. Innes: The amount of the bill was £11, and Schoeman was a rich man, and could pay, but witness did not have the bill now.

William Daniel Meiring said he was the seller of a property to defendant through plaintiff. Witness had no objection to the "koop brief" being given up, but he had not given plaintiff authority to do so.

This concluded the evidence in the case.

Mr. Innes: With regard to the £14 16s. commission, 2½ per cent. is charged to clients like the Town Council, and other large clients, but 5 per cent. is charged to ordinary clients. Five per cent. is not an exorbitant charge. Foster would not collect money for a client and not make any charge. Defendant must prove a special agreement not to charge.

Mr. Searle: We abandon our objection to the item of £9 14s. 11d. With regard to the £2 2s., we say £1 10s. is sufficient, as being reasonable. On the commission charge, we say there was an agreement not to make any charge. If any charge can be made, 2½ per cent. is sufficient. Plaintiff has not shown that he did any work in this connection.

With regard to the £50, we say the money is due to Meiring, and not to plaintiff. We had an immense amount of trouble to get the documents; we have not yet got the "koop brief" for the drawing of which plaintiff has made a charge, and refuses to give it up, but offers a copy. The accounts do not contain a full statement of all the transactions.

[Buchanan, A.C.J.: Plaintiff is not bound to bring up in his account any loans raised from De Vos for other people and *vice versa*.]

Buchanan, A.C.J., in giving judgment, said: The plaintiff is an attorney practising at Oudtshoorn, and he sues the defendant on an account for professional services rendered and moneys disbursed, showing a balance owing of £60 15s. 2d. The defendant, in pleading to this account, says that there were transactions between the plaintiff and the defendant as far back as 1892, which went on to 1896, while the account filed in the plea only begins in 1896. Defendant therefore pleaded that he had not been rendered a full account from 1892 to 1898. He also specially says that in the ac-

count as rendered there are certain five items which he disputes, and denies liability for. The first of these items is the balance of £1 19s. 6d. brought forward from the previous account. It appears that from 1892 to 1896 the defendant occasionally engaged plaintiff for certain individuals or separate transactions—all of a trivial nature. In 1896, when this account commences, defendant became a client of plaintiff, and the account sued on commences with that time, but brings up the small balance of £1 19s. 6d. remaining unsettled on the previous transactions. The plaintiff says that previous to 1896 he and defendant twice went over the accounts, and found that the small balance claimed was owing to plaintiff. I think the plaintiff's version of what took place is correct. On the whole, I am inclined to credit his statement, and the defendant having gone over the books and having agreed on the different items, it was unnecessary for the plaintiff to do more than he did do, and it was not necessary for him to go beyond 1896 in his account. Being right, therefore, in this, we have now to deal with the other items to which the defendant objects. The first is commission of £50 on the sale of Mr. Meiring's property. In the correspondence the defendant objected altogether to pay this amount. He did not admit his liability, but seems to have thought that Meiring having paid £50, he did not have to pay any portion of the commission. The plaintiff says that when the sale of land was agreed upon it was also agreed between the parties that the commission should be £100, and that Meiring and defendant should pay £50 each. In ordinary circumstances where property is sold the seller pays commission, but in this case there is a "koop brief," signed by both parties, in which there is a clause which says that the purchaser shall pay the sum of £50 sterling towards the agent's commission on the sale. This writing, therefore, supports plaintiff's statement as to the agreement that defendant should pay £50. Defendant seems to think that as Meiring had paid £50 he should not pay anything at all, or at least that he should pay it, not to plaintiff, but to Meiring. He has not paid that amount to Meiring, who has never claimed it. I credit the plaintiff's statement that defendant asked him to place the amount to defendant's account, and therefore this item must be allowed. The next item is one

guinea for calling up a bond, but this has been abandoned by plaintiff, and must be struck off the account. The third item is in connection with passing transfer, and as there was a lot of trouble in regard to this, I think two guineas is a reasonable amount for the work so done. The next item is the cheque for transfer duty, but now after the explanation given by plaintiff, the defendant admits liability. Then comes the item, 5 per cent. commission for collection of a number of hotel accounts due to defendant, and handed over by him to plaintiff, and amounting to £14 16s. With regard to this charge, the defendant says that when he gave up his business as a hotelkeeper, the plaintiff offered to receive the amounts due to him and make no charge. Plaintiff on the other hand, says that the amounts were handed over to him for collection, and that therefore he was entitled to claim commission on the amount collected. When we come to consider that one portion of the plaintiff's business is collecting money for other people, it seems extraordinary that he should have agreed to carry on part of his business for the defendant without the usual commission. The plaintiff says he charged the commission, and says, moreover, it was agreed he should make the charge. Under these circumstances, I think he is entitled to this item also. This disposes of the claim in convention, and shows £59 14s. 2d. due to plaintiff. The defendant has two claims in reconvention. He says in the first place that the plaintiff has never rendered him a proper account of his transactions from 1892 to 1898, and claims an order of the Court to have an account rendered, and if necessary to have the account debated. However, since then an explanation was given with regard to the different items in that account, and defendant says that as they are agreed upon the matter it is not now necessary to render this account. He also claims that all documents, papers, and writings belonging to him and in plaintiff's possession, be delivered up. At the time the action was brought there were certain papers in the plaintiff's possession, one being the deed of transfer, but before the plea was filed plaintiff gave up these writings and handed over the title deeds. Shortly afterwards he found certain other title deeds belonging to defendant, which he also handed over, and throughout

the correspondence plaintiff offers to give up any papers in his possession, but he knew of none. There is one document, however, which is admitted to be in plaintiff's possession, viz., the “koop brief” between Meiring and defendant. In that transaction plaintiff did not act as defendant's attorney, but was engaged by Meiring. Now this deed, when looked at, has important reservations in favour of Meiring, and under these circumstances I think the plaintiff was entitled to retain that document as Meiring's attorney until Meiring had authorised him to give it up. Meiring now says he has no objection to his giving it to defendant, and it is now at his disposal. There is, therefore, no necessity for making any order on this claim in reconvention. The claim is still relied upon on the question of costs, but even if it was necessary for plaintiff to render a full account, he did so before the action came on. If the defendant wished to place himself in the right, he should have made a tender of the amount owing. He has made no tender, and under these circumstances the claim in convention must carry costs. Judgment will therefore be for the plaintiff for £59 14s. 2d. and costs, and there will be no order as to the claim in reconvention. I may add one remark with reference to certain items, viz., the items connected with loans obtained by plaintiff for other people. In this respect Foster was approached by different clients and asked to raise loans for them. In his capacity as agent for other people he went to defendant to get the money just as he might have gone to others, and in such a case the defendant had no right to call upon plaintiff to render an account of the money so advanced.

Maasdorp and Solomon, J.J., concurred.

[Plaintiff's Attorneys, Messrs. Tredgold, McIntyre, and Bisset; Defendant's Attorney, Mr. Gus Trollip.]

PILKINGTON AND BROTHER V. (1900,
VAN ZYL.) May 30th.

This was an action in connection with a disputed account. The plaintiffs were Charles A. Pilkington and Harry Pilkington, trading together as Pilkington and Brother, and the defendant was Petrus J. van Zyl.

Mr. Buchanan appeared for the plaintiffs. Mr. Molteno (with whom was Mr. Gardiner) appeared for the defendant.

The plaintiffs' declaration was as follows:

1. The parties to this suit all reside at Port Nolloth, Namaqualand.

2. Defendant is indebted to plaintiffs in the sum of £95 10s. 6d. for goods sold and delivered in and about the year 1899, full account whereof has been rendered to defendant.

3. Defendant has refused and still refuses to pay the said amount.

Wherefore plaintiffs pray: (a) Judgment for the sum of £95 10s. 6d.; (b) alternative relief; (c) costs of suit.

The defendant's plea was as follows:

1. He admits the allegations in paragraphs 1 and 3.

2. As to paragraph 2, the defendant says: (a) As to an amount of £41 16s., parcel of the amount of £95 10s. 6d., and figuring as the first account in the said account rendered, he is not indebted in respect of certain articles and items charged against him, amounting in all to the sum of £8 2s. 9d. He says that certain goods appearing in the annexure were paid for, and he denies the receipt of certain moneys as therein indicated; he denies that the remaining goods therein figuring were sold and delivered to him. He admits liability for the balance, £33 13s. 3d. (b) As to the "additional account," amounting to £53 14s. 6d., parcel of the said amount of £95 10s. 6d., he says that he is only indebted in the sum of £2 "for the use of horse to Goutenis." Save as above, he denies indebtedness in respect of all the other items, and denies that they were at any time sold and delivered to him; he says that he never received nor had he the use or enjoyment of any of the articles therein: he says further that he does not owe the plaintiffs anything in respect of agency or of damage done to any kraal or gun of theirs, and he denies that they acted as such agents for him, or that he did any such damage.

3. He says specially that he never agreed to pay any interest in respect of the account in question in this suit. Save as above, he denies the allegations in paragraph 2.

4. He says further that the plaintiffs are indebted to him in the sum of £53 14s., in

respect of services rendered and labour performed to and for the plaintiffs at their instance and request, and goods sold and delivered to the plaintiffs.

Wherefore defendant prays that the plaintiffs' claim may be dismissed with costs.

And for a claim in reconvention the defendant (now plaintiff) says:

5. He craves leave to refer to the matters above by him pleaded.

6. There is due to the defendant (now plaintiff) the sum of £18 0s. 9d., being the balance due on the sum of £53 14s. after deduction of the aforesaid amounts of £33 13s. 3d. and £2.

7. All things have happened, all times elapsed, and all conditions been fulfilled, to entitle the defendant (now plaintiff) to be paid the said sum, but the plaintiff (now defendant) refuses to pay any part thereof.

Wherefore the defendant (now plaintiff) prays: (a) Judgment for the sum of £18 0s. 9d.; (b) alternative relief; (c) costs of suit.

Plaintiffs' replication and plea to claim in reconvention was as follows:

1. For a replication to defendant's plea the plaintiffs say that save in so far as the said plea contains admissions, they deny all allegations of fact and conclusions of law therein contained, join issue thereupon, and again pray for judgment in terms of the declaration.

2. For a plea to defendant's (now plaintiff's) claim in reconvention the plaintiffs (now defendants) say: (1) They deny that they are indebted to the defendant in the sum of £53 14s., or any part thereof, as stated in paragraph 4 of the plea, which is incorporated by paragraph 5 of the claim in reconvention. (2) Plaintiffs deny that they are indebted to defendant in the sum of £18 0s. 9d., or any other sum, as stated in paragraph 6 of the claim in reconvention. (3) As regards paragraph 7 of the claim in reconvention, save that they admit that they refuse to pay the sum of £18 0s. 9d., or any part thereof, plaintiffs deny the allegations therein contained.

Wherefore they pray that the claim in reconvention may be dismissed with costs.

For a replication to the plaintiffs' (now defendants') plea in reconvention, the defendant (now plaintiff) says that save in so far as the said plea admits any of the alle-

gations in the claim in reconvention, he denies all and singular the allegations of fact and conclusions of law in such plea, joins issue thereon, and again prays for judgment with costs.

The first witness called was

Harry Pilkington, one of the plaintiffs, who said that he and his brother carried on business at Port Nolloth, Namaqualand. He had known the defendant for a number of years. Defendant had always had a running account with witness. Accounts had been rendered by plaintiffs to defendant half a dozen times during the last two or three years. Proceeding, witness gave evidence as to the various items in the account. All amounts paid by defendant with one exception had been credited to them. With regard to the claim in reconvention it was understood that defendant should see to the herding of certain live-stock belonging to witness, in return for which defendant was to have the use of certain three wells to water his stock. Instead defendant now charged for herding, while even if it were due the usual charge was 1s. 6d. a head, instead of the exorbitant figure charged by defendant. If he charged for the herding, then witness was entitled to charge £20 for the use of the wells. With regard to £5 for a certain ox, witness admitted that, as it had not been credited. With regard to the hire of a certain cart, that was simply lent out of friendship; £41 16s. was really what witness claimed, and the other items would never have been claimed but for that contra account.

This was all the evidence for the plaintiffs.

For the defence,

Petrus Johannes van Zyl, the defendant, said some time ago he was a farmer living five miles from Port Nolloth. He deposed as to receiving an account from plaintiffs and afterwards sending his contra account. Subsequently he received the additional account. In the account there was an item for cartridges supplied to witness's son, but witness had never authorised plaintiffs to sell cartridges to his son. He had never authorised plaintiffs to supply goods to any of his children and charge against him. Proceeding, witness gave evidence as to the various items in dispute. Witness never used plaintiffs' well. He also gave evidence as to his contra account.

Willem Johannes van Zyl, a son of the defendant, gave evidence corroborating that of his father.

Mrs. Van Zyl, defendant's wife, also gave corroborative evidence as to the arrangement made with plaintiffs as to the herding of cattle at her place. Nothing was arranged as to plaintiffs giving the water, and her husband looking after the stock. She also gave evidence as to other items in the account.

This closed the evidence.

After argument, the Court gave judgment for the plaintiffs for £24 5s. 3d., with costs.

Buchanan, A.C.J., in giving judgment, said the plaintiffs claimed £95 10s. 6d., made up of two accounts, one for £41 16s. and the other for £53 14s. 6d. With regard to the second account, the plaintiff admits that it was only made up in consequence of the counter-claim which he had received from the defendant, and we may therefore leave that £53 out of consideration. Confining our attention to the first account, with regard to two items—cartridges 5s., and poison 2s. 6d.—these were sold to the son, and could not be charged against the father. With regard to an item of cash, £10, of which £5 had been repaid by the son, it appeared that the son was fined £20 for shooting an ostrich. The plaintiffs say that the father borrowed £10 from them to go towards paying this fine, but the father denies this and the son denies it also. It is clear that the money was paid for the son, and as a matter of fact the son has paid back £5, and for any liability on that account plaintiffs must look to the son. The next item is 12s. 9d., for which the defendant has produced a receipt to show that it was paid, and therefore that must go off the account. [After dealing with other items in dispute, his lordship said that altogether on this account £15 17s. 9d. would have to be deducted from plaintiffs' claim, including £2 5s. for hire of wagon to Commaggas.] Judgment will therefore be given for the plaintiffs for £24 5s. 3d.

After hearing counsel on the question of costs, Mr. Molteno submitting that Magistrate's Court costs only should be allowed, as it was really plaintiffs' second account, introducing the matter of the wells, which put the matter outside the jurisdiction of the Magistrate when the case was brought before him the Acting Chief Justice said that

owing to the defendant taking an exception the defendant's counter-claim could not have been heard by the Magistrate, and therefore the case was forced into the Supreme Court. The judgment would therefore be allowed with Supreme Court costs.

Maasdorp and Solomon, J.J., concurred.
[Plaintiffs' Attorneys, Messrs. Fairbridge, Arderne and Lawton; Defendant's Attorneys, Messrs. J. C. Berrangé and Son.]

SUPREME COURT

[Before the Acting Chief Justice (the Hon. Mr. Justice BUCHANAN), the Hon. Mr. Justice MAASDORP, and the Hon. Mr. Justice SOLOMON.]

PROVISIONAL ROLL.

FREEMAN AND CO. V. HEN- (1900.
DRICKS. (May 31st.

Mr. Maskew moved for the final adjudication of defendant's estate, the provisional order having been granted by Mr. Justice Maasdorp on May 26 last.

Mr. P. S. Jones appeared for the defendant, and read an affidavit, in which the defendant admitted that he was indebted to the plaintiffs in the sum of £52 11s. 9d., and that judgment with costs had been obtained against him for that amount, and also that execution had issued. Proceeding, defendant stated that he had not sufficient movable property to satisfy the said judgment, but he was possessed of immovable property situated at Newlands and valued at £1,100, while there was a mortgage on the same for £550. He was trying to sell the property with a view of paying petitioner, and denied that he was insolvent. Counsel therefore asked that the matter be allowed to stand over until June 12, so as to give time to defendant to realise and pay off the debt.

The matter was allowed to stand over until June 12.

[The matter did not come before the Court again.]

WARD AND CO. V. GEORGE ENDLEY.

Mr. Gardiner moved for provisional sentence on a good-for for £37 5s. 4d.

Mr. Buchanan appeared for the defendant, and read an affidavit, in which he opposed the granting of provisional sentence on the ground that the good-for was included in an illiquid claim against him for £106 8s. 10d., which action he intended to defend, having a good ground of defence. He also stated that since he signed the good-for it had been altered. When he signed it there were only two lines of writing, and now there were four or five. He could not read English. He admitted being indebted in the amount of £31 2s. 8d., which he had tendered in full settlement of the claim, including the illiquid claim. In an answering affidavit the plaintiffs admitted that the £37 5s. 4d. was included in the £106 8s. 10d., but said it was absolutely false and untrue that any alteration had been made in the good-for since it was signed. Plaintiffs' bookkeeper corroborated this in a further affidavit.

After argument, the Court refused provisional sentence, ordering the defendant to pay in the £31 2s. 8d. admitted to be owing, costs to be costs in the cause, when the matter of the illiquid claim came before the Court.

SMALBERGER V. SMALBERGER.

Mr. Gardiner moved for provisional sentence for £269 2s. on a promissory note with interest from November 14, 1895, and costs of suit.

Granted.

JACOBSON V. VERBASAMY.

Mr. Gardiner moved for provisional sentence for £550 due on a mortgage bond, together with interest at the rate of 8 per cent. from July 1, 1899. The mortgage bond had become due and payable by reason of the non-payment of the monthly instalments.

Provisional sentence granted and the property declared executable.

OOSTHUIZEN V. A. A. OOSTHUIZEN.

Mr. Gardiner moved for provisional sentence for £298 19s. 4d., money due by virtue of certain promissory notes, and also for judgment under Rule 329d for £38 6s.

4d., moneys paid by plaintiff for and on behalf of the defendant, with interest *a tempore morae* and costs of suit.

Provisional sentence was granted on the promissory notes and judgment on the illiquid claim as prayed.

ILLIQUID ROLL.

FAENHE V. J. R. MARINOWITZ AND ANOTHER.

Mr. Buchanan moved, under Rule 329d for judgment for £92 10s., being rent of part of the farm Vroolijkheid, with interest *a tempore morae*; also for a decree of ejectment against defendant, and costs of suit.

M. COHEN V. GROMAN.

Mr. P. S. Jones moved, under Rule 329d, for judgment for £83, being the purchase price of certain bricks.
Granted.

LITHNER AND CO. V. MARKUS.

Mr. Gardiner moved, under Rule 329d, for judgment for £52 18s. 10d.
Granted.

FEHR AND CO. V. JOTHAM JOUBERT.

Mr. P. S. Jones moved, under Rule 329d, for judgment for £329 11s. 6d., with interest *a tempore morae* and costs of suit.
Granted.

STEVENSON V. SCHACK.

Mr. Maskew moved, under Rule 329d, for judgment for £4,000, being the purchase price of certain land, together with interest thereon at the rate of 6 per cent. from February 22, 1900, and costs of suit. The plaintiff tendered transfer of the property.
Judgment granted as prayed.

INGLESBY V. CAY.

Mr. Buchanan moved, under Rule 329d, for judgment for £22 10s., being rent of certain premises in St. John-street, Cape Town, for the months of December, January, and February last, with interest *a tempore morae* and costs of suit.
Granted.

MORRIS V. MARAT.

Mr. P. S. Jones moved, under Rule 329d, for judgment for £64 for rent, with interest *a tempore morae* and costs of suit.
Granted.

WALSH BROTHERS V. BROWN & CO.

Mr. De Waal moved, under Rule 329d, for judgment for £23 3s., with interest *a tempore morae* and costs of suit.
Granted.

REHABILITATION.

Re BEAR.

Mr. Buchanan moved for the rehabilitation of James A. Bear. The Master's certificate was put in.

Order granted as prayed.

GENERAL MOTIONS.

HEYL V. HEYL.

Mr. Burton moved on behalf of the applicant for a decree of divorce and for custody of the children of the marriage. A rule had been granted in the Circuit Court at Victoria West calling upon defendant to restore to plaintiff her conjugal rights, failing which to show cause why a decree of divorce should not be granted. Notice had been duly served and no appearance made by defendant.

The rule was made absolute as prayed.

IN THE MATTER OF THE PETITION OF CORNELIS PIETER DE LEEUW BEYERS.

Mr. Burton moved for an amendment of the order of Court granted on May 1 under the Derelict Lands Act. The amendment was necessary owing to clerical errors in the original petition.

The Court granted the amendment, Buchanan, A.C.J., remarking that attorneys must be more careful, and that the attorney in this case ought not to charge his client with the expenses of this application.

IN THE ESTATE OF THE LATE DINAH ORSMOND.

Mr. Innes, Q.C., moved on behalf of the executor in the estate of the late Anne Thompson for the appointment of an executor *dative* in the estate of the late Dinah

Orsmond, so that notice of calling up a certain bond might be served. The late Dinah Orsmond died about thirty-five years ago, and her husband, George Orsmond, who was appointed her executor, removed to the Transvaal, where he was said to have died eight years ago. Their children were at present living in the Transvaal, but where petitioner could not say. Mr. Innes admitted that eight years was a shorter period than the Court had ever in such a case taken as presumption of death.

Buchanan, A.C.J., suggested that the difficulty might be got over by the Court issuing an order calling upon the executor of the estate of the late Dinah Orsmond to show cause why he should not be removed from his office, the order to be published in a Transvaal newspaper.

Mr. Innes said there might be a difficulty as to the publication in a Transvaal newspaper unless the Court would give them leave to trade with the enemy to that extent.

The Master suggested that the death notice might be obtained from the Transvaal office.

The matter was accordingly postponed.

EAST LONDON MUNICIPALITY V COLONIAL GOVERNMENT.

Mr. Innes, Q.C. (with whom was Mr. Searle, Q.C.), moved for leave to the petitioners to appeal to the Privy Council against the recent judgment of the Court.

Mr. Ward appeared for the Government to consent.

The order was granted on the usual terms.

KOCH V. KOCH.

Mr. Howel Jones moved, on behalf of the applicant, for a decree of divorce, forfeiture by defendant of the benefits of the marriage, the custody of the children, and costs. A rule had been granted calling upon the defendant to return to his wife or to show cause why a decree of divorce should not be granted. There had been personal service.

Rule made absolute as prayed.

UYLS AND OTHERS V. ESTATE OF UYS.

Mr. Innes, Q.C., moved for an amendment of the order of Court dated December

1, 1899. This amendment was necessary owing to the omission of the name of a minor child, Annie Regina Uys (now a major), as one of those entitled to share in the whole estate.

Mr. Searle, Q.C., for the respondents, agreed to the amendment.

The amendment was granted as prayed, costs to come out of the estate.

IN THE ESTATE OF THE LATE EVERT PETRUS KLEINHANS.

Mr. P. S. Jones moved for leave to the widow of the late Evert Petrus Kleinhans to sell certain five morgen of land in the estate for £15, and also to mortgage certain other property in the estate.

The Master's report was favourable, it being stated that the land was of so little value that it was better to sell it than pay the expenses of having it surveyed and transferred, as would have to be done in accordance with a certain partition transfer then pending.

An order was granted as prayed.

IN THE MATTER OF THE MINOR HITGE.

Mr. Gardiner moved, on behalf of the above minor, duly assisted so far as necessary by his father, for leave to borrow £1,000 for the purpose of paying certain transfer fees, etc., and also to enable him to stock the farm, to pass a mortgage bond for £1,000 upon his half-share of the property, and to sign all documents connected with the said bond, transfer, and sub-division of transfer. The father of the minor was to have had a life interest in the property in question, but he had renounced all his right.

The Master reported that the application of a minor to mortgage the property for the purpose of buying stock was, so far as he was aware, without precedent.

The Acting Chief Justice said the Court must have some evidence as to the applicant's qualifications for farming.

The matter was accordingly postponed until June 12 for the purpose of an affidavit being filed on that point.

LEWIS V. LEWIS.

Mr. P. S. Jones moved, on behalf of the applicant, for a decree of divorce, this being the return day of a rule granted calling upon

the respondent to restore to the applicant her conjugal rights, failing which to show cause why a decree of divorce should not be granted. Personal service had been effected, but the papers were refused by the Registrar, owing to some informality with regard to them. A letter, however, had been sent to the Registrar by the respondent, in which he stated that he had no intention of returning to his wife, and acknowledging the notice.

The rule was made absolute as prayed.

IN THE MATTER OF THE DUTCH REFORMED CHURCH AT MARAISBURG.

Mr. Buchanan moved for an amendment of the order of Court granted under the Derelict Lands Act.

The order was granted, but it was directed that the schedule as amended should be published in the same way as before.

IN THE ESTATE OF THE LATE GEORGE GORDON.

This was an application for leave to transfer certain property in the estate to one of the executors, who was also a part owner of the property, as it was not deemed advisable to put the property up to public auction. The value had been appraised by a sworn appraiser.

Mr. P. S. Jones for the applicant.

The application was granted subject to the consent of a third party interested being filed.

IN THE ESTATE OF THE LATE JACOBUS JOHANNES JANSE VAN RENSBURG.

Mr. P. S. Jones moved for an order authorising the registration of a certain bond. The petitioner was widow and executrix of the late J. J. van Rensburg. It appeared that the deceased before his death was taking steps for the registration of the bond, but died before that could be done.

The order was granted as prayed.

IN THE MATTER OF THE MINOR ELSIE A. VAN DER MERWE.

Mr. Gardiner moved for the appointment of a *curator ad litem* to look after the above minor's interests in connection with the sub-division of certain property. The matter had not been submitted to the Master.

An order was granted that a proper person be appointed, to be selected by the Master, to represent the minor in the sub-division of the property, such sub-division to be subject to the Master's approval. The Court intimated that the matter should strictly have been submitted to the Master for report.

IN THE MATTER OF THE PETITION OF ANDREAS PETRUS GROENEWALD.

Mr. Burton moved, on behalf of Andreas Petrus Groenewald, in his capacity as executor dative of the estate of the late Coenraad Johannes Groenewald, that a rule *nisi* granted under the Derelict Lands Act be made absolute.

Granted.

IN THE INSOLVENT ESTATE OF ANDRIES JOHANNES PETRUS SNYMAN.

Mr. Nathan moved for an order removing respondent from his office of joint trustee of the above estate, and appointing the petitioner (the other trustee) as sole trustee to finally adjudicate the estate. It appeared that the respondent had left the Colony, being now with Brabant's Horse in the Orange River Colony. Notice of the application had not been served upon him.

Buchanan, A.C.J., said that as notice had not been served on respondent, the Court was not in a position to grant the order asked for, but would grant an order authorising the applicant to pay out the amounts found to be due to the creditors on the account already confirmed.

IN THE ESTATE OF THE LATE JOSEPH SWAIN.

Mr. Buchanan moved for leave to transfer certain property in the above estate to one of the executors, who was also a joint owner, it being deemed inadvisable to sell the property by public auction. The property had been appraised by a sworn appraiser.

Granted.

IN THE ESTATE OF THE LATE WILLEM MYBURGH.

Mr. P. S. Jones moved, on behalf of the widow and son of the late Willem Myburgh, the executors testamentary in the estate, for leave to mortgage certain property in the estate.

Order granted as prayed.

IN THE ESTATE OF THE LATE JOZUA
FRANCOIS PETRUS PEROLD.

Mr. H. Jones moved for leave to transfer certain property to the eldest son of the late J. F. P. Perold as part of the inheritance devolving upon him out of the estate of the said late J. F. P. Perold. The application to the Court was necessary by reason of the fact that the petitioner was one of the executors dative in the estate of the deceased, who had died intestate. The property had been valued at £3,750, and this was the price at which the petitioner wished to take over the property. The Master reported favourably.

Order granted as prayed.

In re PRIZE S.S. "MASHONA."

Mr. Searle, Q.C., for the captors, moved for an order declaring certain cases of lubricating oil consigned to the Netherlands South African Railway Company to be a lawful prize. When the matter was last before the Court, the Court ordered that any claims must be filed by May 25, but the company had made no claim, and the condemnation of these goods and an order for their sale was now asked.

There was no appearance on behalf of the Railway Company.

An order was granted as prayed.

IN THE ESTATE OF THE LATE PIETER
HEINRICH KOHNE.

Mr. H. Jones applied for leave to the executor to raise a sum of money on mortgage of the property in the above estate even in the event of fire.

CLINGEN V. CLINGEN.

Mr. Gardiner moved for leave to the applicant to sue her husband *in forma pauperis* for restitution of conjugal rights.

A rule *nisi* was granted calling upon the respondent to show cause why he should not be sued *in forma pauperis*, the rule to be served either personally, or failing that, by one publication in an Oudtshoorn newspaper and the "Government Gazette," and returnable on July 12.

SUPREME COURT

[Before the Acting Chief Justice (the Hon. Mr. Justice BUCHANAN), the Hon. Mr. Justice MAASDORP, and the Hon. Mr. Justice SOLOMON.]

RAPHAEL V. CLUTTERBUCK. { 1900.
June 1st.

Lease — Verbal agreement — Fire —
Destruction of building.

The defendant leased certain buildings to the plaintiff in writing for a period of five years. During the currency of this lease a written lease was entered into between them for an additional period of ten years. It was also verbally agreed that in the event of the destruction of the buildings by fire the defendant should rebuild the premises in a reasonable time and that the plaintiff should continue to pay rent during such rebuilding. The buildings were destroyed by fire during the currency of the original lease.

Held, that the plaintiff was entitled to an order declaring that the original lease was still running and that he was entitled to the further lease for ten years.

This was an action brought by A. Raphael, the lessee, against C. Clutterbuck, the lessor of certain premises, being No. 44, Plein-street, Cape Town, for a declaration of rights under the lease.

1. The declaration alleged that on the 30th July, 1895, the parties entered into a written agreement whereby the defendant agreed to let and the plaintiff agreed to hire for a term of five years, commencing from the 1st July, 1895, subject to a renewal at the option of the lessee for a further period of five years the above-mentioned premises at a rental of £21 per month.

2. The plaintiff entered upon the premises and remained in occupation until the 24th of March, 1900.

3. On or about the 7th of July, 1899, a further agreement in writing was entered into whereby the premises were leased to

the plaintiff for a further period of ten years, commencing from the termination of the above-mentioned lease, at the rate of £25 per month.

4. On or about the 19th October, 1899, it was further agreed that in the event of the destruction of the premises by fire the lessor (defendant) should repair and rebuild the premises in a reasonable time (from three to four months), the lessee agreeing to continue to pay the rent during such building or repairs.

5. The said premises were destroyed by fire on the 24th of March, 1900, since which date the plaintiff has not been in occupation.

6. The plaintiff has carried out all the obligations cast upon him by the agreement, and has tendered the rent since the destruction of the premises, and is still ready to pay the rent.

7. The plaintiff submits that the first lease is still running, and that he is entitled to a further lease commencing from 1st July, 1900, as stated in paragraph 3; that he is entitled to be placed in possession of the premises as soon as they are rebuilt. But the defendant denies this claim for possession, and refuses to rebuild the premises or to accept any rent since the destruction by the fire.

Therefore the plaintiff claims: (a) An order declaring the original lease to be still current, and that plaintiff is entitled to a further lease for ten years upon the conditions of the original lease as modified by the agreements in paragraphs 3 and 4. (b) An order compelling defendant to rebuild the premises and to give plaintiff possession as lessee on 1st July next, or so soon as may be reasonable. (c) Alternative relief. (d) Costs of suit.

The plea admitted (1) the allegations in paragraphs 1, 2, 3, and 5, but denied 4, 6, and 7.

2. It admitted that a proposal was made to insert a clause in the lease to the effect that the lessor should rebuild the premises in the event of the destruction by fire as set forth in paragraph 4 of the declaration. But it alleged that although both parties were willing to insert this clause no agreement to that effect was signed by defendant nor entered into between the parties.

3. The defendant further contended that the destruction of the leased premises by fire put an end to the lease as set out in paragraph 1 of the declaration, the lease thereby becoming of no further force and effect.

Defendant therefore prayed that plaintiff's claim might be dismissed, with costs.

The replication admitted that the clause mentioned in paragraph 2 of the plea was not inserted in the lease nor signed by the parties, but otherwise joined issue on the plea.

Mr. Innes, Q.C. (with whom was Mr. Burton), for the plaintiff.

Mr. Searle, Q.C. (with whom was Mr. P. S. Jones), for the defendant.

The first witness called was

Alfred Raphael, the plaintiff, who deposed that in 1894 the premises in question were let to Mr. Hughes, and witness became a sub-lessee, but in 1895 he became lessee himself. After that witness agreed to pay any increase in the Municipal rates on the property during the latter five years of his lease. At the commencement of 1899 correspondence began as to extension of the lease, and ultimately defendant agreed to an agreement drawn up by witness on condition that two additional clauses were inserted, viz., that witness put in a teakwood double front and pay any increased Municipal rates. Witness put in the teakwood front at a cost of between £200 and £300. In October last year a fire broke out in the house of one of witness's tenants in Hope-street, and this led witness to consider his position with regard to his lease. He went to defendant's house, and mentioning the fire, said it was the first time he knew that a fire cancelled a lease, and defendant admitted himself that he knew nothing about that, and was surprised himself. It was arranged that they should have a further agreement drawn up with regard to that, and it was further arranged that witness should write him a letter on the lines of their conversation. Witness did so, and at the end of the letter set out the agreement that in the event of the destruction of the premises by fire defendant should repair and build the premises in a reasonable time (from three to four months), witness agreeing to continue to pay rent during such building or repair. Defendant had agreed to that before witness sent the letter.

On the same day (October 19) defendant wrote to witness saying that he was quite willing to sign the agreement as desired, but he hardly saw the necessity for it, as in such a case he should naturally repair or rebuild. Nothing more was done in the matter. After the fire of March 24 witness received a letter from defendant in which the latter mentioned accounts he had received or expected to receive in connection with the fire brigade charges, etc., and suggested that as he was insured for so small an amount, while defendant was so fully insured, the latter might settle those accounts. Witness replied that the amount was small, and not worth considering, but later on he would see how far he could meet defendant. Witness sent a cheque for the rent for the month of March, and this was accepted, but on April 25 Mr. Clutterbuck, through his attorney, returned by cheque £4 15s., stating that it was excess of rent paid, the property having been destroyed by fire on March 24, and therefore rent was only payable to date. In further correspondence the position was taken up that the fire had terminated the lease. Witness was willing to pay rent for the premises during the time they were being rebuilt.

Cross-examined: Witness was quite certain he saw defendant at his house on October 19, and discussed the clause in question.

For the defence,

Charles Clutterbuck, the defendant, said he resided at Claremont, and was the owner of the premises in Plein-street, Cape Town, which were burned in March last, and which had been leased to plaintiff. On October 19 last year he received the letter from plaintiff with regard to the lease in case of the premises being destroyed by fire. Witness did not see plaintiff previous to that with regard to the matter. Plaintiff had only once called on witness, and that was several months previous to October, in connection with the extension of the lease for a further five years. That was before the second lease was signed. Witness was an invalid confined to the house, and very seldom came to Cape Town. The matter of a fire had never been discussed between witness and plaintiff. Witness was under the impression that if the premises were destroyed by fire plaintiff's

lease would still have run, independent of the agreement. He had not then consulted anyone on the matter. No clause was inserted in the lease, and nothing was done beyond witness's reply to plaintiff's letter. The premises burned down were insured for £1,000, and their ratable value was £6,000. Plaintiff had not paid any share of the fire brigade expenses, etc., witness having paid all those himself. Witness's position was that he wished his legal rights decided, and he wished if possible to have this lease terminated.

Cross-examined: It would be to his advantage to have the lease terminated because he would get more rent. He was quite sure he had no conversation with plaintiff regarding the clause as to fire, neither did he have a conversation with him in town on that point. Witness believed he was bound in law to rebuild, and therefore he agreed to the stipulation. If witness had started building he would have demanded rent for the time the premises were being rebuilt.

Re-examined: Witness believed that apart from this agreement he was bound to rebuild.

This concluded the evidence in the case.

Mr. Searle, Q.C.: Defendant was under the impression that the lease would continue even in the event of fire.

[Buchanan, A.C.J.: Is there an agreement to rebuild in the letters?]

The question is: did what took place in October do away with the general principle of law "that lease expires on destruction of premises by fire"? On the principle of law, see *Van der Linden* (1, 15, 12); *Pothier on Pandects* (19, 2, Part III., Section 65, commenting on D, 19, 2, 30); *Van Leeuwen* (4, 21, Section 5, p. 175); *Pothier on Obligations* (Section 429, Part III., Chapter 5); *l'oeu*, who is not so explicit (19, 2, 16).

[Solomon, J.: But is there not a special agreement?]

The agreement, if any, depends partly on the evidence and partly on the letters. Defendant's evidence is conclusive, borne out in detail as it is by the letters. Do these constitute such a binding agreement as would override the general principle of law? All the agreements had been in writing: therefore one might fairly conclude that this fire-clause should have been in writing.

Mr. Innes, Q.C., was not called upon.

Buchanan, A.C.J., in giving judgment, said: Certain premises in Plein-street were

leased by defendant to plaintiff on a five years' lease. This lease gave plaintiff the right of renewal for a further period of five years. Before the expiration of this lease the parties discussed several matters connected with the premises, the plaintiff wishing a renewal for longer than five years. Ultimately it was agreed that the renewal should be for ten years, the rent being increased from £21 per month, as under the existing lease, to £25 per month; and the plaintiff undertook to put in a new window frame at his own expense. Most of the negotiations between the parties took place by correspondence. When the renewal for ten years was agreed to, a lease was drawn up and signed by the parties. Shortly afterwards the Town Council apparently proposed to raise the ratable value of the property or to increase the amount of rates, and Mr. Clutterbuck, the landlord, wrote to the plaintiff suggesting that if this was done plaintiff ought to pay the landlord's taxes above the existing rate. Plaintiff agreed to do so, and although there was no special agreement to that effect, the plaintiff himself added a clause at the bottom of the new lease signed by himself. Afterwards, in consequence of a fire which had taken place in another part of the town, in a house of one of plaintiff's tenants, the plaintiff wrote the following letter to defendant: "No doubt you have read in the papers of the fire at one of my tenants' houses, and I have therefore had my attention drawn to an oversight we have made in trying to save money by being our own attorneys and drawing up our own agreement, and I propose therefore to have the following clause inserted, and trust you will agree to it." This clause contained the agreement that in the event of the premises being destroyed by fire the lessor (defendant) should repair and rebuild the premises in a reasonable time (from three to four months), the lessee agreeing to continue to pay the rent during such rebuilding or repairs. To this the defendant sent the following answer: "I am quite willing to sign the agreement as you wish, yet I hardly see the need, as in such a case I should naturally repair or rebuild." Mr. Clutterbuck in his evidence candidly admits that he considers that this agreement exists, and says that he made the agreement because he thought that he was bound by law to have these premises rebuilt in the event of a fire. The question

whether or not he made any mistake as to the law on the subject does not affect this case, for defendant himself goes on to say that if a fire had taken place he considered that under this agreement he could have held the plaintiff liable for the rent during rebuilding. The agreement was a mutual benefit, because apart from the question whether or not a lease was terminated by a fire, during the time the premises were not being beneficially occupied, it was doubtful whether he could claim rent. The contention for the defendant now is, that as this new condition was not put into the lease, or into a formal agreement, in strict law, he was not bound by it. It may, strictly speaking, be that plaintiff would be entitled to bring an action to compel Mr. Clutterbuck to enter into a formal agreement, but in this case it is sufficient to say that, as it is beyond dispute that the parties have entered into this agreement, they are bound by their contract. It is unnecessary to discuss the question of law as to whether the fire terminated the lease or not. In this case I think that the plaintiff is entitled to judgment in terms of his prayer in the declaration, viz., for an order declaring the original lease to be still current, and that he is entitled to a further lease for ten years upon the conditions of the original lease as modified by the agreements stated in paragraphs 3 and 4. It is unnecessary to give an order compelling defendant to rebuild the premises, as he is actually doing so, and he has not been negligent in any way. The only question he has come into court to decide is whether his contract is still in force. We now decide that it is, and consequently judgment will be given for plaintiff in terms of prayer (a) of the declaration, with costs.

Maaadorp and Solomon, J.J., concurred.

[Plaintiff's Attorneys, Messrs. Van Zyl and Buissinne; Defendant's Attorneys, Messrs. Fairbridge, Arderne, and Lawton.]

SUPREME COURT

[Before the Acting Chief Justice (the Hon. Mr. Justice BUCHANAN), the Hon. Mr. Justice MAASDOP, and the Hon. Mr. Justice SOLOMON.]

HUGHES AND ROGERS V. WHITE, { 1900.
RYAN AND CO. { June 5th.

Sale—Delivery—Delivery order.

A. sold to B. certain goods which were alleged to be in dock on board a certain vessel, and an order issued by the agents of the vessel was given by A. to B. directing C., the stevedore engaged to break cargo, to deliver to B. the goods sold. This order was not assigned to B. in such a way as to make it an authority for B. to receive the goods B., however, accepted it and obtained some of the goods under it.

Held, that an order of this kind was not on the same footing as a bill of lading, which is a symbol of the property to which it refers and which by the usages of trade transfers the ownership of the goods on the delivery of the negotiable instrument, nor was it equivalent to what are called "delivery orders" upon warehousemen and the like.

This was an action in which the plaintiffs, who were merchants, carrying on business in Cape Town, claimed the sum of £332 5s. 2d., being the purchase price of 256 sacks of rye and 250 sacks of bran, which they alleged that they sold and delivered to the defendants, who were also carrying on business in Cape Town, on the 24th November, 1899. The goods were sold *ex* steamer Waiwera, C.I.F., the defendants to pay landing and dock dues.

The plea admitted the sale, but denied that the plaintiffs had made full delivery of the goods. It said that on the 24th November, 1899, the plaintiff's handed to the defendants a delivery order of which a copy was attached in the following terms :

"Messrs. A. R. McKenzie & Co., Cape Town, 24th November, 1899. Please deliver the undermentioned goods, *ex* Waiwera, from New Zealand, to Messrs. Hughes and Rogers :

| | |
|---|---------------------|
| "Marks. Nos. Nos. of Pkgs. Description. | |
| B.B. | 250 sacks bran. |
| R.R.R. | 256 sacks rye-corn. |
| Total, | 506. |

Pro W. Anderson and Co.

(Signed) F. Thomas, Agent."

Messrs. William Anderson and Co. were the agents of the Waiwera, and A. R. McKenzie and Co. are landing and dock agents who were engaged in unloading the said ship.

The defendants presented the said order to McKenzie and Co., but the latter failed to deliver to them the full amount of goods so purchased by 136 bags of bran and 44 bags of rye. The defendants have not received the said bags of bran and rye from McKenzie and Co., nor have the latter undertaken to hold that number of bags at the defendants' disposal.

The price of the quantity not delivered, together with duty and dues thereon, is £122 1s. 10d., which the defendants submit they are entitled to deduct from the original purchase price, leaving a balance of £210 3s. 4d., which they admit is due to the plaintiffs.

On 30th January, 1900, they tendered the said sum of £210 3s. 4d., together with taxed costs to that date, to the plaintiffs, who refused to accept the said tender. The defendants have duly paid the sum of £210 3s. 4d. into court, and repeated the tender of taxed costs as aforesaid.

Wherefore the defendants prayed that the claim might be dismissed with costs.

The replication was general.

Mr. Graham, Q.C., and Mr. Buchanan appeared for the plaintiffs.

Mr. Searle, Q.C., and Mr. Howel Jones for the defendants.

The first witness called was

Thomas Hughes, a member of the plaintiff firm, who said they carried on business in Cape Town as merchants. He knew defendants, who also carried on business in Cape Town as merchants. He remembered receiving the bills of lading of the goods mentioned in the delivery note prior to 24th

November, 1899. On that day both the defendants came to see witness and asked for quotations for the rye and bran. Witness quoted the former at 7s. 2d. and the latter at 6s. 2d., C.I.F., that was, cost, insurance, and freight paid. They ordered 256 bags of rye and 250 bags of bran on those terms, and witness sent the bills of lading produced by a clerk named Barker, in his employ, to the agents of the ship, and they were brought back with a stamped endorsement on each of them. The same day witness sent the delivery order with a letter to defendants. Witness did not think it was necessary to demand cash at once, seeing that he was dealing with a reliable firm. The delivery order was accepted by defendants, but on December 4 witness received a letter from the defendants declining to receive the goods, as they had not been discharged at the time of sale, as they alleged witness had then stated. As a matter of fact, witness had never said anything about the goods being discharged at the time of the sale. When the sale took place witness's brother and Mr. Badnell were present. To defendants' letter witness wrote a reply stating that the rye and bran were sold C.I.F.; that the ship as stated by him was in dock at the time of the sale; that they could not see their way clear to cancel the sale, and that a quantity of the rye and bran had been lying on the wharf for three or four days. The expense of taking the goods from the ship had to be paid by defendants. Witness had no control over the goods after he passed the delivery order. Defendants again wrote stating that at the time of the sale witness had stated in their presence that the greater part of the bran and rye was landed. Afterwards witness met Mr. White in the street, and the latter said that he had taken those oats now, but that it was the last transaction they would have with witness. Proceeding, witness gave evidence as to the further correspondence regarding the shortage in the quantity and the tender of £210 3s. 4d. Witness had been in his present business about nine months, but he had been connected with a mercantile business in Cape Town for ten years.

Cross-examined: Witness had never handed the defendants any policy of insurance or bill of lading, but only gave them the delivery note. He relied upon that.

Probably witness did say at the time of the sale that the ship was discharging, but he was certain he did not say that the greater part of the cargo was landed. Witness could not give defendants the bill of lading because there were other goods on it.

Re-examined: When witness gave the delivery note the bill of lading should have been cancelled to that extent.

By the Court: After the goods were landed they came into the custody of McKensie and Co.

Francis Humphrey Thomas, a clerk in the shipping office of W. Anderson and Co., the agents for the Waiwera, deposed that he made the endorsement on the two bills of lading produced. The endorsement was "Bill of lading produced and order granted this day." Witness handed plaintiffs' clerk a delivery order. No complaint was made to witness's firm as to short delivery.

Cross-examined: Witness recognised the plaintiffs in the case, but never stated that he could not recognise the defendants when a delivery order was asked for the goods sold to them.

By the Court: No check being kept at the ship, witness could not say what goods had been landed from the ship, delivered, and taken away, except those he delivered himself.

M. C. Blackwell, one of the examining officers at the Customs-house, said that in December last he delivered certain *pro tem.* orders to defendants. They delivered to witness the delivery order and the invoices, and witness gave them the *pro tem.* order for delivery from the *pro tem.* shed. In the ordinary course of business the tide-waiter would make an endorsement on the back of the *pro tem.* order as to the amount of bags of rye or bran short. In this case it was stated on the order that nine bags of rye and 130 of bran were short, and it was also stated that the same were removed by the military people. There were a lot of goods short delivered by this ship.

Cross-examined: The tide-waiter who had made the endorsement mentioned was now up the East Coast, having left about a month ago.

H. Gleeson gave evidence as to the manner in which delivery of goods was made, A

note signed by the Customs was a check on the quantity of goods going out of the Docks.

Cross-examined: There were some goods for the military authorities on board the Waiwera, but the majority of the cargo was for merchants in town.

Re-examined: The order was the authority upon which delivery was made.

Re-examined: The goods were checked by the tide-waiter at the shed.

Frederick Stroud Lamont, a clerk in the employ of the Harbour Board at the Dock Office, identified the tickets showing the quantity of bags of bran and rye received. He believed those represented all the goods that passed. The tickets showed that 115 bags of bran and 232 of rye passed the Dock gates.

This closed the case for the plaintiffs.

For the defence,

Edwin George White, one of the partners in the defendant firm, deposed as to the purchase of the goods. It was imperative that witness should have delivery of these goods within twenty-four hours, he having already sold the goods, and he sent his shipping clerk, Mr. Parsons, two or three times to pass the entries. At the time witness entered into the transaction, Mr. Hughes told him that part of the goods were discharged on the quay. Witness had never received all the goods, and he had paid for all he had received. They had done all in their power to get delivery of these goods. They had never been put in a position to make a claim against anyone for the rest of these goods.

Cross-examined: If the representations as to the goods being partly discharged had not been made witness would not have entered into the transaction. Witness understood that the goods were to be delivered on the quay. He accepted C.I.F., but there was no distinct agreement about it. C.I.F. made all the difference in the world. Witness did not understand that C.I.F. meant delivery on the ship and not on the quay. He had to pay for the landing. If witness paid C.I.F. without any other arrangement it just meant that he had to take his own chances of delivery. In further cross-examination witness corrected himself by saying that he understood C.I.F. just

meant that he was to pay the landing charges. It was simply a price. He did not buy C.I.F. Witness never asked for the bill of lading, and had not returned the delivery order.

Re-examined: The ship had not recognised witness in any way, and he could not get delivery in any way.

Witness, further examined by Mr. Graham through the Court, said he had made no complaint to the ship with regard to short delivery. A shipping clerk told him that the ship would not recognise him. He did not know which shipping clerk it was, there being two. The ship declined to recognise witness through his attorneys.

Frederick William Thorne, a delivery clerk in the employ of Divine, Gates and Co., said that he applied to A. R. McKenzie and Co. for certain goods. He had a Customs order and an agent's order. The latter he burnt. Witness gave the wagon tickets for 114 bags of bran and 212 bags of rye. There was one ticket for 20 which was not entered in witness's book. Witness believed that the goods were short landed, and were never on the ship at all.

Cross-examined: Witness did not have the tally of goods taken from the shed. He had destroyed or lost the block of counterfoils in the book of wagon tickets. He had looked for it last week and again that morning, but could not find it. The Customs officials stamped a ticket before the wagon was loaded, and then they trusted to witness putting the correct number of bags on the wagon, because there was no tally at the gates. At the gates they only examined the tickets to see if they were stamped. That was not the usual custom, but it was done in this case, owing to the pressure of work at the Docks.

Henry John Travers, a clerk in the employ of the defendants, deposed that he had gone to plaintiffs' shipping agents to get the delivery orders, but they refused to recognise him.

Cross-examined: He did not take any papers with him when he applied for the delivery orders.

Arthur Edward Parsons, a shipping clerk, said that he passed his entry at the Customs, and took out his *pro tem.* orders. A delivery order was handed to him; this he gave to Divine, Gates and Co. His object was to get delivery of the bags. The first load

came up on December 2, and loads continued to come during that month. He made out his account (put in) from the return sent up by Divine, Gates and Co.

Cross-examined: His figures depended entirely on the accuracy of the return sent by Divine, Gates and Co., which he had not tested.

This concluded the evidence in the case.

Mr. Graham, Q.C.: Before we got our delivery order, we had to produce our bill of lading to the mate of the ship. The bill of lading shows that the goods were on board. We rely on the bill of lading. When once we gave the defendants the delivery order, coupled with the letters authorising them to take the goods, and also the invoices, we had made a delivery in law. The delivery was a constructive one. We had given them all our title. There was no necessity to hand in the bill of lading. It had never been asked for. On constructive delivery, see *Story on Contracts* (Section 810).

Benjamin on Sales, pp. 682, 700, 704. Page 704 is an authority directly in point. We been asked for. On constructive delivery, see moment we had parted with our documents of title. McKenzie had all the cargo on the ship at his disposal, and so the defendants will be liable for whatever goods we prove by the bill of lading to have been on board. The signed bill of lading is evidence that the goods were on board. The words C.I.F. mean that the goods are delivered when on board, and will not be brought any further by the seller.

[Buchanan, A.C.J.: Supposing the goods were never on board, would the defendants be liable?]

Yes, certainly. They took the order without raising any objections. They got a great bulk of the cargo by virtue of this delivery order. The transaction was a cash one. We could have demanded cash immediately we gave them the delivery order and the letter. See *Tregellas v. Sewell* (7 H and N., p. 574) on the meaning of the words C.I.F.

Supposing the Court finds that there has been no constructive delivery, we must consider that shortfall in delivery has occurred. We say that the amount tendered is too small by £17, because they have failed to credit us with twenty bags of rye and one bag of bran which have been delivered. Their tender was made in full settlement, but it is too small. The first time they made any complaint about short delivery was on the 15th December. They waited for two months before they complained of short de-

livery. The tickets are conclusive as to the amount of goods which have passed through the Harbour Board gates.

Mr. Searle, Q.C.: (1) Was there a sale and delivery? Plaintiffs say that the moment it is made C.I.F., and the delivery order handed over, we must pay for the goods whether they are there or not. C.I.F. means that costs of freight and insurance are added to the original price of the goods. See *Benjamin on Sales* (4th Ed., p. 574), *Ireland v. Livingstone* (5 L.R., Eng. and Ir., Appeals, p. 406), *Dunlop v. Lambert* (referred to in *Blackburn on Sale* (p. 246), *Farina v. Holme* (6 M. and W., 119; also 6, L.J., Exch., pp. 122 and 123). This last case entitles us to show that we did not receive the goods. See also *Bentall v. Burn* (3 B. and C., p. 423), *Corentry v. Gladstone* (6, Equity, p. 44; also pp. 49, 50). The delivery order gave us no title. Neither the ship's agents nor McKenzie knew us in the matter. We had nothing which would entitle us to claim from McKenzie or the ship. We had no bill of lading, no dock warrant, no policy of insurance. The delivery order was merely an authority from McKenzie to deliver to us. No case can be found where the mere giving of an order such as this has been taken as delivery of possession so as to pass the property. *Imperial Bank v. St. Catherine Docks* (5 Chancery Div., 195). We endeavoured to act on the order, but we could not get the goods. Is delivery of a part delivery of the whole? By taking part, do we intend that all has been delivered? See *Kemp v. Falk* (7 Appeal Cases, 1881-82, p. 586). White, Ryan never intended the delivery of the part to be delivery of the whole. They have made no delivery; they have given no documents by which we could compel delivery. We could not sue anyone for these goods.

[Solomon, J.: Was not the risk with you after the contract?]

The risk may be with us; but we need not pay the price if the goods have not been delivered. They don't show or suggest any damage or destruction as one would expect them to do. See *McKen v. Smith* (2 House of Lords, p. 303). This case distinguished bills of lading from delivery order. [*Vide Lord Campbell's judgment.*] *Scrutton on Charter Parties* collects the cases on the matter at p. 145.

[Solomon, J.: The risk in any case was with you.]

Yes; but the plaintiff has not proved that the goods were on board.

[Solomon, J.: Suppose the goods had been there, but had been destroyed?]

They must show that the goods have perished through some physical act. They have simply left the matter in doubt, and shown no physical cause which destroyed the goods.

Now what amount has been delivered? The question is raised with regard to the one bag of bran and the twenty bags of rye. Thorne's evidence is reliable and conclusive. The tender is sufficient.

Mr. Graham, Q.C., in reply: Defendants seem to argue that if McKenzie had "attorned," then there was delivery. Now I submit that McKenzie had attorned, in that he loaded defendant's goods on to the wagons and was paid by defendant.

[Buchanan, A.C.J.: By "attorning" he would acknowledge that he held the goods; but he only agreed to load up whatever goods he had.]

It is clear that the ship could be sued on the delivery order, and McKenzie became the ship's agent. In *Court v. Mosenthal* (13 S.C.R., 137), it was held that a communication from a warehouseman to a purchaser that he held the goods on behalf of the seller was a complete delivery.

As to the short delivery, the evidence of the tickets shows that we are entitled to a considerable amount in excess of what they tendered.

Buchanan, A.C.J., said: The plaintiffs in this action sue the defendants for the purchase price of 256 bags of rye and 250 sacks of bran, which they say were sold *ex* the steamer Waiwera, C.I.F., for the sum of £332 5s. 2d., the defendants to pay the landing and dock dues. After stating the contract, the declaration goes on to say that on the same date, November 27, 1899, the plaintiffs delivered the said goods to the defendants. The defendants admit the purchase, but deny that any such delivery was made to them. They say that on November 24 they received an order upon Messrs. A. R. McKenzie and Co., who were the agents employed by the ship to land the cargo, to deliver these goods to them, but they say that the said A. R. McKenzie and Co. did not deliver all the goods to them, and that they are not liable to pay for those not so delivered. Before legal proceedings were taken there was dispute between the parties whether or not there had been such an unreasonable delay in delivery as to entitle the defendants to cancel the contract altogether. This issue has not, however, been raised on

the pleadings. The plaintiffs allege that they informed the defendants when they sold the goods that the ship was in dock, while the defendant White says that what they were informed was that the ship was in dock and discharging, and that portion of this cargo had already been landed. The defendants allege that this representation greatly induced them to contract, as when they bought these goods they immediately resold them, and contracted to deliver to their purchasers within twenty-four hours, and that but for the assertion that the cargo was being landed they would never have bought. However, the defendants do not now ask for the cancellation of the contract on the ground of undue delay. They admit that they received a certain quantity of the cargo sold to them, and have made a tender of the purchase price of the portion received. They paid the amount of their tender into court, and that money has been taken out by the plaintiffs. As the defendants deny that they have received all the goods on the form of declaration, the onus is on plaintiffs to prove delivery. They have endeavoured to discharge this onus by saying that they obtained from Messrs. Anderson and Co., the agents for the vessel, a delivery order on A. R. McKenzie and Co., which order was given to and accepted by defendants. This order on the face of it directed McKenzie and Co. to deliver to Hughes and Rogers the goods mentioned therein. McKenzie and Co. were merely the stevedores, the persons engaged to break cargo. There was no assignment of this order by the plaintiffs to the defendants in such a way as to make it an order which would be recognised as an authority for the defendants to receive the goods; but no objection was taken to it, and a quantity of cargo was realised by the agents of the defendants from the Docks. The plaintiffs contend that the acceptance of this order was a sufficient delivery of all the goods. But an order of this kind is not on the same footing as a bill of lading, which is a symbol of the property to which it refers, and which, by the usages of trade, transfers the property or the goods on the delivery of the negotiable instruments, nor is it equivalent to what are called "delivery orders" upon warehousemen and the like. In this case there was no acknowledgment by McKenzie and Co. that they had the goods to deliver, and there is nothing upon this order, on the face of it, that would render McKenzie and Co. liable to be sued by the defendants upon the non-delivery of these goods. The order simply says that

the undermentioned goods are to be delivered to Hughes and Rogers by the landing agent. Business at the Docks seems to be conducted in a most loose and unsatisfactory manner. McKenzie's clerk has been called, and has told us that McKenzie keeps no record of any goods he takes out of the ship or that he delivers to anybody. The only possible check upon the goods taken away is at the Dock-gates, where, after passing the Customs, the wagoners' tickets are collected by the Harbour Board people. Duplicates of these tickets are supposed to be given by the wagoner to the merchant who receives the goods. There is no clear proof that all the cargo sold was landed from the ship, and it has not been proved what quantity was given by McKenzie and Co. to the defendants. It has not been shown that the whole of the cargo was ever shipped. The bills of lading are an acknowledgment that the goods were on the ship, which would bind the vessel to an innocent holder; but though they might be set up as an estoppel in such a case, they are not necessarily conclusive on the question whether or not as a fact the goods were on board. Here it is not proved that these goods were even on board, or that McKenzie and Co. ever landed them. The defendants acknowledge that they received the quantity tendered for, and so far they are liable, and for the taxed costs up to the date of tender. Judgment will therefore be given for the plaintiffs for the sum tendered, £210 3s. 4d., together with taxed costs up to January 30. There remains the question of liability for the balance. It is quite possible that McKenzie and Co. delivered to the defendants a few more bags of rye than they have tendered to pay for. Divine, Gates and Co.'s clerk states that according to his book the tally taken at the Dock-gates is not correct, but on the other hand there is an entry by the Customs-house official which contradicts his books. That entry, however, is not of itself evidence, without the testimony of the Customs-house official who made the entry. I think that if defendants received more than they had tendered for they certainly ought to pay the difference, but in the absence of evidence, there will be absolution from the instance with regard to the claim for goods in excess of the amount tendered for.

Mr. Graham was heard on the matter of costs, submitting that as the pleadings were not filed until after January 30, and it was only in the plea that an unconditional

tender was made, defendants ought to pay the costs of filing the plea as well as the declaration.

The Court accordingly gave judgment for the plaintiffs for the amount tendered by defendants—£210 3s. 4d.—defendants to pay costs up to the date of filing the plea, and plaintiffs to pay costs after that date; also absolution from the instance with regard to the goods alleged to have been delivered in excess of the amount tendered for.

Maasdorp and Solomon, J.J., concurred.
[Plaintiffs' Attorney, Mr. C. Brady; Defendants' Attorneys, Messrs. Findlay and Tait.]

SUPREME COURT

[Before the Acting Chief Justice (the Hon. Mr. Justice BUCHANAN), the Hon. Mr. Justice MAASDORP, and the Hon. Mr. Justice SOLOMON.]

STRUBEN AND PHILLIPS V. } 1900.
THE SURVEYOR-GENERAL } June 6th.
AND THE COLONIAL GOVERNMENT.

Where the description of the boundaries in the original grant differ from the conformation of the ground as represented by the diagram, the description and not the picture must be taken in ascertaining the true boundaries.

In the absence of circumstances to indicate that the words are not to be understood in their ordinary and natural acceptance, the description of land, as extending to the sea shore, must be taken as meaning that the boundary on that side is high water mark.

This was an action for a declaration of rights as to certain boundaries, etc., and for an amended title deed, brought by Hendrik Wilhelm Struben and Louis Charles Phillips against John Templer Horne, the Surveyor-General of the Colony, and the Hon A. J. Herholdt in his capacity as Secretary for Agriculture, and as such representing the Colonial Government.

The plaintiffs' declaration was as follows:

1. The plaintiffs are registered owners in undivided shares of the farm Kogelbaai, in the division of Caledon; the second defendant is Secretary for Agriculture, and is sued in that capacity as representing the Colonial Government.

2. The said farm is described in the original grant thereof, the terms of which are incorporated in the title deeds of the plaintiffs, as "extending west to the sea-shore, south, south east, and east to the mountains, and north to the Steenbrazen River, as will more fully appear from the diagram framed by the surveyor." The ground lying to the south, south-east, and east of the said farm and the ground to the north of the Steenbrazen River was at the time of the grant and still is Crown land.

3. The diagram of the said farm registered in the office of the Surveyor-General does not truly and correctly represent the proper boundaries thereof. The plaintiffs annex hereto a plan showing the boundaries of the said farm according to the said diagram and the proper boundaries thereof as represented by the beacons upon the ground and as actually occupied.

4. The defendants deny that the beacon B upon the said plan is a true and proper beacon of the said farm, but the plaintiffs say that the said beacon has been in existence for longer than the period of prescription, and that they and their predecessors in title have openly, freely, and as a right used and occupied all the land up to the line CB as marked on the plan, and up to the point B1, where the said line produced meets the said river. The plaintiffs say that the beacon B was the original beacon of the farm, but even if it was not they say that they are entitled to the boundary line CB1 by prescription as aforesaid.

5. The plaintiffs further say that the northern boundary of their said farm is the middle of the Steenbrazen River, and that they as riparian proprietors are entitled to a reasonable share of the water of the said river, but the defendants contend that the plaintiffs' boundary runs along the bank of the said river, and that they are not entitled to any share of the water thereof.

6. The plaintiffs also contend that their said farm, according to the true meaning of the said grant and title deeds, runs on its

west side to high-water mark, but the defendants deny this, and wrongfully claim a strip of land of varying width between the plaintiffs' western boundary and the high-water mark.

7. The plaintiffs have duly had the said farm surveyed, and have done all things necessary to entitle them to claim an amended title in terms of Act 9 of 1879, and have in all respects complied with the provisions of the said Act, but the first defendant refuses to issue such title.

The plaintiffs claim (a) an order declaring that the true north boundaries of their said farm are from A, thence along the centre of the Steenbrazen River to B1 BCDEFGHI, and thence along high-water mark to A, as marked upon the plan annexed to the declaration; (b) an order compelling the first defendant to issue an amended title of the said farm showing the boundaries as hereinbefore set out; (c) alternative relief; (d) costs of suit against the second defendant.

The defendants' plea was as follows:

1. The defendants admit paragraphs 1 and 2 of the declaration.

2. As to paragraph 3 of the said declaration, the defendants admit that the actual course of the Steenbrazen River is not marked on the diagram attached to the original grant of the farm Kogelbaai, but they say that except as to this the other boundaries and all the beacons are correctly shown thereon. The defendants deny that the ground outside the boundaries so shown has been occupied as a part of the said farm, and therefore that the boundaries and beacons shown on the plan attached to the declaration are, where they differ from those shown on the said diagram, incorrect.

3. As to paragraph 4 of the declaration, the defendants admit that they deny that beacon B upon the said plan is a true and correct beacon, but they deny every other allegation in the said paragraph.

4. As to paragraph 5 of the declaration, the defendants say that the northern boundary of the said farm extends to the south bank of the Steenbrazen River, and not to the middle of the said river, as claimed by the plaintiffs. The defendants further say that they have never denied that the plaintiffs are as riparian proprietors entitled to a fair share of the water in the said river.

5. As to paragraph 6 of the declaration, the defendants deny that the western boundary of the said farm extends to high-water mark, and they contend that the true boundary, as shown on the diagram referred to in paragraph 2 hereof, is a distance of 200 feet inland from the said high-water mark.

6. As to paragraph 7 of the declaration, the defendants deny that the diagram upon which the plaintiffs claim to have an amended title issued to them is a true and accurate diagram of the said farm. They claim that the correct position of the beacon B is at the point where the line XC on the plan annexed to the declaration intersects the Steenbrazen River.

Therefore the defendants pray that the plaintiffs' claim may be dismissed with costs.

Mr. Innes, Q.C. (with whom was Mr. Gardiner), appeared for the plaintiffs.

Mr. Ward (with whom was Mr. Howel Jones) appeared for the defendants.

The first witness called was

Charles Marais, a Government land surveyor, who stated that in February last year he was engaged by the plaintiffs to survey the farm in question, which they proposed to buy from Mr. Watermeyer. His attention was particularly directed to fixing the north-eastern boundary. He prepared the plan annexed to the declaration, and upon that plan he drew up the papers and applied for an amended title. The nature of the farm was very rugged indeed. There was grazing between the mountain and the sea, but the mountain was inaccessible for cattle. Proceeding, witness gave evidence supporting the plaintiffs' claim with regard to the beacons. The farm would lose 250 morgen, including its most valuable portions, water rights, and access to the beach, if the Government diagrams were accepted instead of the true amended diagram.

Henry Metcalfe, a farmer, residing in the district of Caledon, said he was a son of Richard Metcalfe, who was the owner of the farm in question in 1862. Witness remembered Mr. Kuys coming to make a survey of the farm in 1863. Kuys was on the farm four and a half or five days. At that time witness was sixteen years of age, and had just left college. Witness's father wanted his boundaries fixed. He was very particular about them. The beacon at B which witness pointed out to Mr.

Bell was erected in 1863. Kuys in his survey found that a beacon should be there, and witness fetched the stones and his father put up the beacon. All the time witness was on the farm that beacon was there, and was recognised as a beacon. They used the ground up to the beacon. The farm was sold in 1880, and witness did not again see the beacon until last year; he went there at the request of Mr. Phillips to point out the beacon. Witness had to look about for some time before he found the beacon. He pointed out the beacon to Mr. Bell, and a month later he again pointed out the beacon to Mr. Marais. Witness's father had pointed out the beacons to Versfeld, to whom he sold the farm. Witness agreed with Mr. Marais as to the beacon in the gorge being apparently of recent construction.

Charles Willemse said he was a Kafir, and came to the Caledon district after the cattle-killing in 1856. For some time he lived on Mr. Stanford's farm, which adjoined Metcalfe's. Witness knew the beacon spoken of by the last witness, the late Mr. Metcalfe having pointed it out to him. Witness was cattle herd, and after Mr. Metcalfe had pointed out the line he kept his cattle on Mr. Stanford's side of the line.

John Sparks said he was seventy years of age, and first knew the farm in question when it belonged to Sir Robert Stanford. Witness then lived at Sir Lowry's Pass, but about six months after Mr. Metcalfe bought the farm in 1862 witness went there to look after the cattle and sheep. Mr. Metcalfe pointed out the beacons to witness. Witness corroborated the previous witness as to the position of the beacons.

Theodore Wilfred Bell, a surveyor, said he was assisting Mr. Marais in his work in the early part of 1899. Mr. Metcalfe pointed out a certain beacon to witness.

Louis Charles Phillips, one of the plaintiffs, also gave corroborative evidence. If the farm stopped a couple of hundred feet from high-water mark it would depreciate the value of that portion of the farm very much, as it would interfere with their access to the beach.

This closed the case for the plaintiffs.

For the defence,

Henry van Reenen, Second Assistant Surveyor-General, deposed that the plaintiffs' claim for an amended title in the

ordinary course came into his hands. His department was not satisfied with the claim, their objections being that there was an encroachment on Crown land, that the sea boundary did not correspond with the boundary given in the diagram, and they also objections being that there was an encroachment on Crown land, that the sea boundary as extending to the centre of the river. About the beginning of October last year witness visited the farm, and at the spot B found a pile of stones. The beacon was composed of loose stones. It did not strike him as being a very old beacon. It might have been, but witness should not have said it was from its appearance as he found it. With regard to the work of Noble, who had made the original survey, witness had had numerous opportunities of examining it, and considered that Noble was one of the best of the old school of surveyors.

John Garrett Hallack, a Government land surveyor, deposed that he was engaged by the Surveyor-General to survey a certain section of the farm Kogelbaai. He went out on April 4 last, and with some assistants went to the various beacons. He had a copy of the original diagram with him and also of Mr. Marais' survey. He found a beacon in the gorge. It appeared to be a very old beacon. From its position it was a beacon that might escape notice.

Thomas Nesbitt Roberts, also a Government land surveyor, stated that he made a survey of the Steenbrazen River and Mr. Stanford's farm. He was with last witness when the beacon mentioned was found, and witness having his camera with him, took a photograph of it before it was touched. It seemed to witness to be an old heap of stones, which could not have got there accidentally. From the appearance of the stones they must have been there for some time.

This concluded the evidence in the case,

Mr. Innes, Q.C.: Neither party has clearly shown the true original position of North-east Beacon. The beacon T, alleged by Hallack to be the original beacon, is not the original beacon. The position is too inconspicuous. The place is inaccessible. I submit that B was the original beacon. Line CBB1 is more in accordance with the general conditions of the diagram than CT, the line CBB1 being accessible and easy to follow, whereas CT is not. The unreliability

of the diagram is common cause. Beacon B has been there since 1863. Metcalfe is clear on this point, and the two herds also depose to that effect. This was the beacon down to the time of Versfeld. After that time we can't throw much light on the matter. But down to the time of Struben, the beacon always stood there, and was the recognised beacon. See *De Klerk v. Pinaar* (9 Sheil, p. 385), where the placing of a beacon was held symbolical of occupation. Having put a beacon up as an assertion of ownership, the Court will hold that the same state of things continues, in the absence of any evidence to the contrary. It is true we can't produce evidence after Versfeld's time, but a beacon was there.

[Solomon, J.: When the Crown is the adjoining proprietor, will the prescription run against the Crown? The Crown are not in a position to see that beacon. Any other adjoining proprietor can.]

The Court held in *Blanckenberg's* case that prescription can run against the Crown. Now as to the western boundary of the farm, we find a discrepancy between the grant and the diagram. Our grant is quite clear. See *Milnerton Estates v. Colonial Government* (9 Sheil, 164). This case seems at first sight to be against us. There the Court held that the diagram must be accepted in preference to the grant. But there was a special condition affecting that case. The grant there was made in 1874, and the Act 2, 1860, applied. Here the grant was made in 1843. That case was in favour of the diagram. The circumstances which induced the Court to find in favour of the diagram in that case are all wanting here. In that case there was a particular law in existence. The words of the grant must override the diagram. See *Reed v. Surveyor-General* (Sheil, p. 26). The diagram is only a picture. The grant indicates the wish of the parties concerned. See *De Villiers, C.J.*, at p. 29; *Barrington v. Colonial Government* (4 Juta, 408). The grant gives us the land to the sea, and so we are entitled to the land to the high-water mark.

Where land is granted up to a river, it is granted up to the middle of the river. So we are entitled to land to the middle of the stream.

Postea (June 7).

Mr. Ward (for Colonial Government): We must notice the peculiar circumstances of this grant. It was originally one of the old quitrent grants, following on the Proclamation of 1813 (Sir J. Radock's) secs. 1, 2, 13.

The old quitrent grant was made after an application by the grantee, accompanied by a diagram made by the grantee's surveyor. tion of 1813 (Sir John Cradock's), sections 1, Consequently, if there is any ambiguity between the grant and the diagram, the grant must be construed against the grantee. See *Elphinstone on the Interpretation of Deeds*, p. 99, where the principle is laid down that the King's grant is construed strongly in favour of the King and against the grantee; *De Villiers v. Cape Divisional Council* (Buch., 1875, p. 60. This principle is in force in this colony.

This is the true corner beacon of the farm. It is in the position in which, according to the diagram, the beacon ought to have been. The diagram bears us out in this. B is not an original beacon. Line DC being agreed upon by both parties, CY follows as a matter of course. The diagram is accurate as to the angle. On the question of prescription, see *Blankenbry v. Colonial Government* (11 J., p. 90). The evidence of continuous occupation is wholly insufficient to establish a claim of prescription in favour of plaintiffs. *Barrington's Executors v. Colonial Government* (6 Shiel, p. 505). See Judgment of Uppington, J.

For an English case bearing on the observations made in these cases, see *Attorney-General v. Chambers and Rees* (4 De Gex and Jones, p. 55).

The erection of a beacon at B does not affect us; the documents don't justify the beacon. For prescription, the occupation must be "*nec vi, nec clam, nec precario*." The mere piling up of the stones gives no rights against the Crown. The erection of a fence might be an assertion of ownership. There is no evidence to show that we knew the beacon was standing there as an assertion of ownership. We had no knowledge or notice of the beacon. A resident on the farm from 1862 to 1880 has great difficulty in locating the beacon, although he passed over the mountain once a month. Even if the Crown were under the duty of looking for these beacons, they would not have found them. Prescription will not bind us here, because the beacon was secretly placed there without notice to us. True, the triangle CTB was hired out occasionally, but not after 1880. There is no evidence of user since 1880.

In *Latsky v. Surveyor-General* (Buch., 1877, p. 68), De Villiers, C.J., referred to section 47 of Act 7 of 1865. By that Act recognition by the Crown of the presence of the beacon is required. The

mere presence of the beacon for thirty years is not sufficient. *Frenchhoek Municipality v. Hugo* (2 J., 248); *De Klerk v. Pienaar* (9 Shiel, 385). In this last case the beacon in dispute stood in full view of all the parties concerned. Here the beacon was no notice to us that our rights were contested. Act 7 of 1865 requires something more than a mere heap of stones. There was a similar provision in the Act of 1859. With regard to the claim for the strip of land along the sea-shore, although the grant says "to the sea-shore," yet the diagram, which clearly shows a reservation of this strip along the sea-shore, was in existence when the grant was made. *Miherton Estate v. Colonial Government* (9 Shiel, p. 164). When the grant says "extending to the river," it means to the bank of the river, and not to the middle of the river. Not a single Colonial case has been quoted showing that where a man owns up to a river he can claim to the middle of the stream. *Beaufort Municipality v. Wernich* (2 J., 36). He can, of course, have a reasonable share of water.

Mr. Innes, Q.C. (in reply). With regard to Sir John Cradock's Proclamation, we say that there is no evidence as to whether the first owner held the land as a lease-place or not. The sections of the Act providing for a special kind of beacon are more honoured in the breach than in the observance. Their beacon is rougher and more inchoate than ours. Neither party can show any original beacon. Apparently none were fixed up. The diagram affords us no assistance. It is inconsistent within itself. Land which can be alienated by the Crown can be acquired by prescription. Our occupation was neither *ri, clam, nor precario*. We need only show possession. See *Navigay*, at p. 246; *Burge* (Vol. III., pp. 5, 6); *Digest*, 41, 2, 3. The putting up of a beacon is symbolic of occupation. On the question of the sea-shore, see *Anderson and Murison v. Colonial Government* (8 Juta, 293). The shore between high and low-water mark is common. Immediately above high-water mark the Government is in the same position as an ordinary owner. We only want access to the river, the right to use the water. See *Burge* (Vol. III., p. 419); *Lord v. Commissioners of Sydney*.

Buchanan, A.C.J., in giving judgment, said: The farm is described in the grant as extending west to the sea-shore, south-east and east to the mountains, and north to the Steenbras River. That description exactly followed the words of the diagram, though not the actual figure represented. So far back as the case of *Barrington*, it was laid

down that a grant constituted a contract between the grantor and grantee, and where the terms of the grant were clear, and where the diagram was admitted not to be trustworthy, effect must be given to those terms, even if the diagram referred to in the grant was connected with the words "as will more fully appear," etc. In this case the diagram is admittedly erroneous, both as to length of lines, size, natural indications, and beacons; the northern boundary mentioned on the grant, the Steenbras River, not even being indicated on the diagram. In this case there are three disputes as to the boundaries, namely, on the north, east, and west. Taking the north first, the original diagram shows a line from near the mouth of the Steenbras River, and going towards the east. The line does not in any way follow the line of the river, but would throw the river entirely into the plaintiffs' ground. But the description of this boundary as given in the diagram and in the grant itself is not this line at all, but the Steenbras River itself. So far, therefore, the Steenbras River, and the line indicated on the original diagram, must be taken to be the boundary line on the north. The Government wish to restrict this boundary to the south bank of the river, but that is not in accordance with the terms of the grant; the river, and not the bank of the river, will therefore be declared the northern boundary. The greatest difficulty in the case lies in the eastern boundary. It would seem most likely, as no original beacons were ever placed on the ground, that the surveyor only made a sketch of the ground, and not a diagram framed from an actual survey. There are no beacons seen on the sea-coast, but two prominent rocks seem to have been taken, and the surveyor then indicated the high and inaccessible mountains to the south, and said that between these points and the river on the north they must take their 2,500 morgen. It is utterly inconceivable to suppose that the surveyor ever chose the spot claimed by Government as the corner beacon of the farm. It is not on the river; it is 60 feet away, in a deep defile, which took an hour to climb down, and there are high points round about which would be more likely to be chosen by any surveyor. No other beacon is to be found on the ground, except at the point marked B. That is not an old original beacon, for the evidence shows it was erected in 1863, on a spot indicated by Surveyor Kuys. This beacon has stood for a period of over thirty years, and

though at the time of its erection the ground up to the beacon was used for grazing purposes, there is some difficulty in tracing continuous user for that purpose since 1880. In the absence of any established beacon, it is inconceivable that a surveyor should have cut off cattle and other animals put on the slopes of the mountain to graze away from all access to the river, which would have been the case had Y been intended to be the corner beacon. The beacon B is claimed as a beacon by prescription, but I am not prepared to base the decision of the Court solely upon that ground alone. It is certainly an element in the case that the beacon has stood undisputed for all that time. Some beacon must be fixed upon, and that beacon will give the plaintiffs very nearly the extent of land duly granted. The point Y, which can only be selected because it coincides with the direction of the line shown by taking one angle of a plan incorrect in almost every particular, would reduce the grant considerably below the area mentioned. The ground all round the farm is Government ground, and 2,500 morgen having been granted without fixing the actual limits of the grant, give colour to a claim to have a line fixed which will give the true extent. Under all the circumstances, it will only be just and equitable to declare the line shown on the plan running through the point B as the eastern boundary. The southern and south-eastern boundaries are not in dispute, owing to the high and inaccessible mountains there. As to the boundary on the sea side, the grant says that the line extends on the west to the sea-shore. Two cases have been decided in recent years, involving the question of boundaries on the sea-shore, and in both those cases there were special circumstances which compelled the Court to depart from the usual legal meaning of the word "sea-shore." Except for the special circumstances appearing in the report of those cases, the Court would have been bound to hold the grant extended to high-water mark. There is in this case a line shown on the diagram within the line of rocks which, the Government contend, showed high-water mark. But the fact of the inner line being on the diagram does not force the Court to depart from the ordinary construction of the words of the grant, and I am therefore of opinion that the western boundary must be high-water mark, and not the 200 feet above high-water mark, as claimed by the Government. The plaintiffs

are entitled to have their boundaries fixed in accordance with prayer (a) of their declaration. They are also entitled to a reasonable share of the water of the Steenbras River, and to an amended title on the boundaries as now fixed. The plaintiffs are also entitled to costs.

Maasdorp, J., concurred.

Solomon, J., also concurred, although he said that he found some difficulty in deciding as to the boundaries on the sea-shore and the north-eastern beacon, or the corner of the farm. As regarded the sea-shore, there were various discrepancies between the terms of the grant and the diagram attached to the grant, and the ruling in such cases was that the terms were to prevail in the absence of special circumstances to show that the diagram was intended to express the intention of the grant. Not one of those circumstances existed in this case, and in their absence the Court was bound by the ruling. The more difficult question was whether the beacon B or Y should be taken as the corner of the farm. There was no satisfactory evidence that there ever was an original corner beacon, but the Court could not take B on the showing of the plaintiffs themselves, and there were many difficulties in accepting Y. On that point the case exemplified in the most unfortunate way the difficulty of coming to any satisfactory conclusion in these matters upon purely expert evidence. They had the most direct conflict of evidence between two expert witnesses, who both saw this pile of stones at the point Y. One said it was evidently a very old beacon, and the other said he was absolutely certain it had only been there for a very short time. There was no clear evidence of prescription or adverse user for a sufficient period, and there certainly had been no acquiescence on the part of the Government in the fixing of a beacon at that point. But the Court had to fix a line, and there was this fact in favour of the point B, that if it were taken as the north-eastern corner the area of the farm corresponded much more nearly to the amount of land actually granted than if the point Y were adopted.

Judgment for the plaintiffs, with costs.

[Plaintiff's Attorneys, Messrs. Fairbridge, Arderne and Lawton; Defendants' Attorneys, Messrs. J. and H. Reid and Nephew.]

FYNE V. LEE.

1907.
June 6th.

Appeal—Slander—Public interest—
Privilege—Act 20 of 1856, section 33.

Where a defendant in an action for slander in alleging certain acts of immorality to have been committed by the plaintiff pleaded that the allegations were true and made for the public benefit but did not fully prove the truth of the words complained of although he did prove to the satisfaction of the magistrate that plaintiff was an immoral man, and that the words used were in substance true, though not in actual details,

Held, on appeal, that the defendant not having fully proved the truth of the actual words used, the plaintiff was entitled to succeed. To support a plea of privilege a defendant must show that it was his duty or interest to make the communication to a person having a corresponding duty to receive it.

— — —
This was an appeal from a decision of the Assistant Resident Magistrate of Cape Town in an action in which the plaintiff (appellant) sued the defendant for £20 damages for slander. The summons set out that Lee had called certain persons to him, and speaking to them of the plaintiff, had said that the plaintiff kept a house of ill-fame; thought nothing of walking up the street with the biggest prostitute in Cape Town; that he was thrown out of Plein-street for bringing bad women there; and that Lee had advised one of the persons so summoned to him to leave the employ of the plaintiff, and not to work another hour for him. The defendant denied the allegations as set out in the summons, but admitted that he said plaintiff was in the habit of taking women of ill-fame into his room in Lelie-street for immoral purposes, also that he had been seen in the streets with women of ill-fame, and was not a fit and proper person for a young orphan girl (meaning one of the persons to whom he had spoken) to work for. He pleaded that the statement was true, and for the public benefit, and that the circumstances were privileged.

To prove his case, the defendant called the plaintiff, who denied the statements made against him, and also the persons to whom he (defendant) had spoken the words which he pleaded were true. The plaintiff called no witnesses.

In giving judgment for the defendant, the Assistant Magistrate said that although the words which the defendant admitted having uttered were different from those contained in the summons, the difference was more in form than in substance. The allegation against the plaintiff was that he was a man of immoral character, and as such unfit for a respectable woman to be associated with. The defendant had proved to his satisfaction the truth of these allegations, and that it was for the public benefit that the charges were made in the manner they were.

From this judgment the plaintiff appealed.

Mr. Graham, Q.C., appeared for the appellant; Mr. Buchanan appeared for the respondent.

Mr. Graham, Q.C.: I don't argue the point of variance between the words in the summons and the words proved to be justified. The Magistrate does not hold that the statements were made on a privileged occasion. The statements were made to several persons, even to children.

[Solomon, J.: It was for the protection of these children who were in the plaintiff's employ.]

The communication was not a privileged one; the Magistrate found no privilege. Even if privileged, there was sufficient malice to rebut privilege. The parties were rival photographers. The publication made was sufficient to show malice. The statements were made in the presence of persons not interested in the matter. The Magistrate finds justification. He must, however, find *all* the allegations true, in order to hold justification. There are three distinct allegations: (1) "Keeps house of ill-fame"; there is nothing to support this in the evidence. (2) "Walking up street with prostitutes"; no evidence to justify this. (3) "Thrown out of Plein-street"; no evidence to prove this. The plea of justification fails. All the persons who gave evidence have had quarrels with the plaintiff. The defendant gave no evidence; he did not deny malice. But even if the allegations were true, they were not made for the public benefit.

[Buchanan, A.C.J.: One of the girls was in plaintiff's employ, and an orphan.]

The words were maliciously uttered. To make these disclosures to a little girl of fourteen and her sister in the presence of three

men was a gross proceeding. This Court can assess damages. Defendant must justify the whole, and not merely part. See *Sparks v. Hart* (3 Menzies, 3). The plea of justification must be made to the whole of the slander, and there must be an absence of *animus injuriandi*. *Sutherland v. McDonald* (3 Menzies, 6); *Botha v. Brink* (8 Buchanan, 128).

[Buchanan, A.C.J.: Mr. Buchanan, do you say there was privilege and total justification.]

Mr. Buchanan: Respondent was *in loco parentis* to the girls. One girl had only been twelve days in the employ of appellant. As to other persons being present, the communication was not meant for them, and therefore the communication does not cease to be privileged. *Botha v. Brink* (8 Buchanan, p. 128); *De Villiers on Roman Dutch Law of Injuries*, as to privilege. *Pollock on Torts*.

As to public benefit, where a social duty rests upon a person, "public benefit" is very widely extended. *Folkard on Libel and Slander* (p. 525). In England it is not necessary to prove public benefit where justification is pleaded. Here it is.

[Buchanan, A.C.J.: The law is very clear.]

The statements made are substantially justified.

Buchanan, A.C.J., said: The defendant admitted using words substantially the same as those complained of, but said they were true and uttered in the public interest without malice. To support a plea of privilege a person must show that it was his duty or interest to make the communication to a person having a corresponding duty or interest to receive it. The facts proved do not support the plea of privilege; nor were the three specific charges made against the plaintiff proved to the full. The Magistrate found that plaintiff was shown to be an immoral man, and that, as that was so, the defendant was justified in the public interest in making the charges. The Magistrate did not sufficiently consider the fact that the defendant did not meet the whole case, and that the plaintiff was therefore entitled to a judgment in his favour, though his character was such that the damages ought to have been nominal. Under the Magistrates' Courts Act, section 33, this Court has power to speedily and inexpensively decide cases of this kind. The judgment of the Magistrate will be set aside, and in place thereof there will be judgment

for the plaintiff for 1s. damages, each party to pay his own costs, but plaintiff to have costs of the appeal.

Maasdorp and Solomon, J.J., concurred.
[Appellant's Attorney, Mr. C. Brady;
Respondent's Attorneys, Messrs. Silberbauer,
Wahl and Fuller.]

GROSSMAN V. LEWIS. { 1900.
June 6th

Appeal—Slander—Theft—Innuendo
—Malice.

A parcel of goods sent from the shop of which the appellant was the manager, was not delivered at the place to which it had been addressed, and was believed by the appellant to have been delivered at the respondent's house. Upon the respondent subsequently visiting the shop the appellant, in the presence of other persons and in reply to a question put by the respondent, used the following words:—"I have positive proof that the parcel was left at your house: and what is more, there is the driver and Kafir boy and others from the neighbourhood who can prove that it was, but I have nothing further to do with you."

The respondent sued, and recovered damages for libel in a Magistrate's Court.

On appeal, the judgment was reversed.

This was an appeal from a decision of the Resident Magistrate of Cape Town in an action brought by the respondent against the appellant for £20 damages for slander. The summons set out that a parcel containing certain articles of wearing apparel was sent from the store of Stuttaford and Co. (Limited), and that this parcel went astray. The goods were supposed to have been delivered in error at the house where plaintiff resided with her father. Inquiries were made, and when plaintiff subsequently visited the store with her sister for the purpose of making certain purchases, the defendant (appellant), who was one of the managers of the company, said to the plaintiff, in the presence of an assistant and

others, "I have positive proof that the parcel was left at your house; and what is more, there is the driver and Kafir boy, and others from the neighbourhood who can prove that it was; but I have nothing further to do with you; the matter is in the hands of the police," meaning that plaintiff had either stolen the goods or was *particeps criminis*.

The defendant's evidence went to show that the plaintiff had, on appearing at the store, asked the defendant whether he thought she had stolen the parcel, but that he had said "No," and then used the words complained of. He had not done so voluntarily, nor did he insinuate theft.

The Resident Magistrate gave judgment for the plaintiff for the sum of £5 as damages and costs. In his reasons, the Magistrate said: "It appears that a parcel containing skirts was delivered at the wrong house, and the driver informed his employers that it had been left at the plaintiff's house. This statement was not correct, but at the time the slander was uttered the defendant believed the driver, as the error had not then been discovered." He found that the plaintiff went to the store subsequently for the *bona fide* purpose of making purchases, and that even if he accepted the defendant's statement as to what occurred, he would have some difficulty in finding the defendant blameless. The inference to be drawn from the words used was that the plaintiff was in some way connected with the disappearance of the parcel. The charge was untrue, and was uttered with a reckless disregard in the centre of a large establishment."

Against the decision the defendant appealed.

Mr. Graham, Q.C., for the appellant.

Mr. Buchanan for the respondent.

Mr. Graham, Q.C.: The words used were not defamatory, and could not possibly be understood to be so.

Mr. Buchanan: The Magistrate's judgment should be upheld. The slander was a direct imputation of dishonesty against everyone residing in the house, which imputation the plaintiff had the right to resent.

Buchanan, A.C.J. (after reviewing the evidence), said: The defendant has been somewhat careless in his conduct, which was not at all what it should have been in a person in his position. The bystanders might well have taken it that he implied dishonesty against the plaintiff or her family, and the Magistrate, after hearing the evidence, also came to the same conclusion. I think it possible for the words to support the innuendo. My brethren, how-

ever, do not, but consider that the plaintiff and her sister put a meaning upon them which would not have been suspected by people who had no inner knowledge of the facts. The manager believed at the time that the parcel had been left at the house, and perhaps, holding that belief, was a little more emphatic than he should have been. I do not hold a strong opinion on the question, and as there is room for a doubt, I will not differ from the view taken by the rest of the Court. The appeal will therefore be allowed, with costs.

Maasdorp, J., said: It seems to me that defendant, having received certain information that the parcel had been sent to a certain house, and thinking it would not be forthcoming, was justified in putting the matter in the hands of the police to trace out the supposed dishonest person. In that event he was entitled to refuse to discuss the matter with plaintiff, and if he acted without malice, he would be protected in answering in a bona fide manner questions put to him by a person interested, namely, the plaintiff.

Solomon, J., held that the plaintiff had gone out of her way to make the words applicable to herself, even if, which was doubtful, those words did impute theft to a family of which she was a member. The defendant did not make the statement voluntarily, as he was sent for and questioned by plaintiff.

The appeal was allowed with costs, and the judgment of the Magistrate reversed.

[Appellant's Attorney, Mr. Arthur P. Kenealy; Respondent's Attorneys, Messrs. Innes and Hutton.]

SUPREME COURT

[Before the Acting Chief Justice (the Hon. Mr. Justice BUCHANAN), the Hon. Mr. Justice MAASDORP, and the Hon. Mr. Justice SOLOMON.]

LUCKE V. VAN COLLER. { 1890.
June 11th.

Architect—Plans and specifications—
Negligence Damages.

Where an architect offers his services to a person, such services

must be of utility to the person to whom they are offered before he can claim payment for them. Where in answer to a claim for the preparation of plans and specifications and the supervision of work on those plans, the defendant pleaded carelessness and negligence on the part of the plaintiff, Held, that as the defendant had had the benefit of the work and the carelessness and negligence had caused no damage to the defendant and the defendant had taken the work out of the plaintiff's hands, the plaintiff was entitled to succeed.

This was an action instituted by E. B. Lucke, an architect, against P. J. van Coller to recover the sum of £122 4s. 10d., being the balance due on an account rendered, and comprising cash paid by the plaintiff for and on behalf of the defendant at his special instance and request, and for professional services rendered during the month of March, 1898, and the following months.

The declaration set forth (1) that in or about the year 1897 the plaintiff, at defendant's request, prepared certain plans and specifications for a house to be built by defendant in Kotze-street, Cape Town. These plans were accepted by the defendant, and approved by the Town Council, but no building has been erected.

2. That at the beginning of the year 1898 the plaintiff prepared another set of plans at the request of the defendant for a house to be built. The plans were accepted by defendant and approved by the Town Council, and the house was built. The building of the house was superintended by plaintiff, the contract for its construction being £1,620.

3. During the erection of the house the plaintiff, at defendant's request, amended the plans, showing alterations to the out-buildings, yard, and drainage. These plans were accepted by defendant and approved by the Town Council.

4. At plaintiff's request plaintiff made on defendant's behalf certain disbursements, amounting to £1 0s. 10d. and £1 4s., in respect of certain taxes and advertisements.

5. The charges for the plans mentioned in paragraphs 1 and 3 are the sums of £40 and £5, which are fair and reasonable.

6. The plaintiff is entitled to the sum of £81 in respect of the plans mentioned in paragraph 2, being at the rate of 5 per cent. on the contract price, which was for £1,620.

7. The defendant is indebted to the plaintiff in respect of the professional charges and disbursements above mentioned in the sum of £128 4s. 10d., according to account rendered.

8. The defendant has paid £6 on account, but has neglected and refused to pay the balance of £122 4s. 10d., or any part thereof.

Therefore plaintiff claims: (a) The sum of £122 4s. 10d., with interest *a tempore morae*; (b) alternative relief; (c) costs of suit.

The plea (1) denied paragraphs 4, 5, 6, 7.

2. With regard to paragraph 1, defendant says the plans were not made at his request or instruction, that the plaintiff requested to be allowed to prepare certain plans which the defendant refused to accept when prepared and submitted to him. That the plans were adopted and approved without his knowledge. Save as above, he denies paragraph 1.

3. With regard to paragraph 2, defendant says that on his refusing to accept the plans referred to in the last preceding paragraph of this plea the plaintiff prepared and submitted to him other plans and specifications. He denies that he requested plaintiff to prepare plans. When these plans were submitted to him with an assurance and representations by plaintiff that they included all the necessary drainage except the cost of Municipal connections, and that the cost of the erection of the building would not exceed £1,620, the defendant accepted and adopted the said plans. Save as above, the defendant admits the allegations in paragraph 2 of declaration.

4. That when the building was almost completed defendant ascertained that no provision had been made in the said plans for drainage, and that a further cost of £116 would be incurred in that respect. He specially pleads that he would not have ac-

cepted the said plans if plaintiff had not represented to him that the plans included the costs of drainage.

5. By reason of plaintiff's wrongful conduct in representing to defendant that the plans provided for drainage, and by reason of plaintiff's carelessness and negligence in omitting to provide for the drainage, and the plaintiff's carelessness and negligence displayed in the supervision of the erection of the building, the defendant says plaintiff is not entitled in law to claim payment for the plans and services rendered as set forth in paragraph 2 of the declaration.

6. Defendant denies the allegations in paragraph 3 of the declaration. He says specially that no such plans were ever submitted to him, nor does he know of their being submitted to the Town Council, and that if they were so submitted it was done without his knowledge and approval.

7. He denies paragraph 8 except that he admits that he refused to pay £122 4s. 10d. or any portion thereof.

Wherefore he prays that the plaintiff's claim may be dismissed with costs.

For a claim in reconvention the defendant, now plaintiff, says:

1. He craves leave to refer the matters above pleaded.

2. He says that by reason of defendant-in-reconvention's careless and negligent conduct as set out in paragraph 5 of plea, he has sustained loss and damages in the sum of £148 1s. 3d., as set out in an account, and which sum he is entitled to claim as and for damages.

3. He (plaintiff in reconvention) says the defendant in reconvention is indebted to him in the sum of £46 for money lent and advanced, which the defendant in reconvention has failed to repay.

In reconvention he claims: (a) Judgment for £148 1s. 3d. as damages; (b) judgment for £46, with interest at 6 per cent. from 20th January, 1898; (c) alternative relief; (d) costs of suit.

The replication to defendant's plea was general, and joined issue thereon.

For a plea in reconvention the plaintiff, now defendant in reconvention, says:

1. He admits he owes plaintiff in reconvention the sum of £46, and says that he deposited with the said plaintiff certain transfer deeds and securities, as security for the loan.

2. He has tendered and still tenders payment of the amount on delivery to him of the aforementioned security, which has been refused him.

3. As to the £148 1s. 3d., he says the plaintiff in reconvention instructed the contractors to do certain extra work of the amount or value of which he has no knowledge, and is not liable therefor.

4. The said buildings are not now completed to his satisfaction, nor in accordance with the plans, owing to the fact that the plaintiff in reconvention took possession of the premises and resided therein without the necessary certificates having been granted.

5. Save as above, he admits the allegations in the claim in reconvention, and craves leave to refer to the matters set forth in his declaration and replication. Wherefore he prays that the claim in reconvention may be dismissed with costs.

For a replication to the plea of the defendant in reconvention the plaintiff in reconvention says (1) he admits paragraph 1 save that for greater certainty he says that the following were the securities lodged with him: Deeds of transfer in favour of E. B. Lucke, 16th December, 1895, 4th September, 1897, and 4th September, 1898.

2. He denies paragraph 2, and says that he has always been willing and ready, and now tenders to deliver to the defendant in reconvention these securities upon payment to him of the £46.

3. He admits that the buildings were not in accordance with the plans, and admits that he has occupied certain rooms in the house, but says that defendant in reconvention was in no way affected thereby.

4. Save as above, he denies paragraphs 3, 4, 5 of the plea in reconvention, and joins issue with the defendant in reconvention thereon.

Account A, annexed to plaintiff's declaration. P. J. van Coller to E. B. Lucke—October, 1897, to taxes, £1 0s. 10d.; to plans, £40; 1898, to cash, advertising, £1 4s.; to plans and supervision, being 5 per cent. on £1,620, £81; to additional plans, £5; total, £128 4s. 10d.; less by cash, £6; grand total, £122 4s. 10d.

Account annexed to defendant's plea: Cost of drainage, exclusive of cost of Municipal connections, £116 1s. 3d.; cost to com-

plete work wrongfully passed by Lucke, and not in accordance with specifications, £32; total, £148 1s. 3d.

Mr. Searle, Q.C. (with whom was Mr. Gardiner), appeared for the plaintiff.

Mr. Graham, Q.C. (with whom was Mr. P. S. Jones), appeared for the defendant.

Mr. Searle, Q.C., asked for an amendment of paragraph 3 of the plea in reconvention, so as to make it read that the work therein mentioned, instead of being extra work, was included in the plans and specifications, and therefore came within the tender.

The amendment was allowed, as were several formal amendments asked for by Mr. Graham.

The first witness called was

Edward Bernard Lucke, the plaintiff, who said that he was an architect practising in Cape Town. Witness gave evidence as to the preparation of the plans and specifications, as set forth in the declaration. When the second set of plans and specifications had been prepared and passed by the Town Council, the tender of Mr. Oliver as contractor was accepted. Oliver was introduced to witness by defendant. The work was not done to witness's satisfaction, nor was it finished within the contract time, this being partly due to difficulty in obtaining material, but also to the desultory manner in which the work was carried on. Witness had also to make an amended plan after the completion of the work to submit to the Town Council owing to some alterations having been made. Witness had given certificates authorising payment of £1,200 only, but he believed now that defendant had also made payments to Oliver, and guaranteed accounts, etc. Defendant went into the building before it had been fully completed inside, that was to say, painting, etc., had to be done. There had been extra work done, but without witness's knowledge, and apparently on some understanding between defendant and Oliver. With regard to the claim of £90 made against witness in respect of drainage, witness stated that all drainage necessary was provided for on the original plan and passed by the Town Council Drainage Department before the contract with Oliver was signed. Therefore that was included in the contract for £1,620. With regard to the £32 claimed against witness on the ground that he had wrongfully passed cer-

tain work, witness had not to this day passed the building. He had only issued certificates for £1,200, and there was more work than that on the building. Witness admitted the £46 lent, and said that he had deposited certain title deeds against this loan. Defendant still had those securities, and when witness got them back he would pay the money. This case had been pending for some time, latterly owing to witness having broken his leg.

Cross-examined: Witness had not tendered the £46 in cash, but he had in the correspondence allowed that money as a set-off against the first plans. Witness had qualified as an architect through private instruction in the Public Works Office. He was never under instruction in any architect's office. Twelve years ago witness was employed as an insurance agent for three months, when he was travelling for the benefit of his health. He had not embezzled money, and he had not been convicted. Witness did not press defendant to give him this work, and it certainly was not understood that the first plans were to be prepared at witness's own risk. When the first plans were rejected witness did not press defendant to allow him to submit another set. Witness was rather full of work at the time, and was not specially anxious for this work. With regard to the drainage, the specifications produced (the builder's) had to be read in connection with the plans and specifications now in the hands of the Court, and these contained sufficient provision to enable the building owners to have drainage done under the tender. The work had been badly done by the contractor, and witness was thoroughly dissatisfied with it.

David Watson, an architect, said that he was plaintiff's assistant during the time this house was being erected for defendant. Witness was there three times a week, and on every occasion had to point out defects in the work. On one occasion witness had just returned from an inspection of the work, and in the presence of defendant told the plaintiff of the defects he had found in the work. Defendant's family went into the house before it was completed. While witness was on the work he never heard any objection by anyone.

By the Court: Although the defects were pointed out, no attention was paid to them. Witness gave no certificates; he had nothing to do with that.

Cross-examined: Witness was not in plaintiff's office now. Witness first inspected the house on June 1. At that time he was not satisfied with the way in which the work had been done. The joinery was defective in the way of fittings. When witness went to the building in June the brickwork was completed, and the roof was partially completed, in fact, virtually finished so far as inspection was concerned. Witness's first report was on June 1, and there were then several things wrong. Some attempts were made to rectify these things, but not satisfactorily.

This closed the case for the plaintiff.

For the defence,

Paul Johannes van Coller, the defendant, said he was in the Telegraph Department of the Post-office. Mr. Heckroodt introduced plaintiff to him as an architect. Plaintiff afterwards proposed that witness should allow him to prepare plans, but witness was not very keen on building just then, and plaintiff prepared the plans at his own option. Witness saw that the proposed house would cost more than £1,600, and would be too expensive. Witness signed the first set of plans in ignorance of what he was doing. Afterwards plaintiff said he would make other plans. Witness engaged one Oliver to build the house for £1,620, and he also accepted the plaintiff's plans, but he never saw the specifications, the plaintiff always evading production of them. He said afterwards they were like the first lot, but fewer, and included drainage. Witness recollected that he did see the specifications on the second set of plans, but he gave them to Oliver without studying them. Witness did not go through the specifications when he handed them to Oliver, and the first witness knew about drainage not being included was when the house was almost completed, and he received an account for it. He was surprised, as plaintiff had told him that drainage was included in the £1,600. If he had known that it was not included in these specifications he would not have built. Witness had paid £60 as an extra for drainage. Some alterations were made without witness's knowledge or consent. It was an arrangement between plaintiff and the contractor, and was for convenience in putting in the drainage. Plaintiff had never, when witness was making payments on the

certificates, made any complaint as to the manner in which Oliver was doing the work. Witness had made some payments outside the certificates so that Oliver could go on with the work. Oliver was hard up, and could not get the material from the merchants unless he paid for it. Witness had paid the full contract price, £1,620, some extras, and £60 for drainage. Witness had paid money without the architect's certificate because he had difficulty in finding plaintiff. Witness occupied the house about July 20.

Cross-examined: With regard to the tenders on the first plans plaintiff called for those in his own responsibility.

Walter Oliver, a builder, said that in the plans and specification he worked on there was no mention of drainage. A day or two after the contract was signed witness asked plaintiff about the drainage, and the latter said that drainage would be an extra.

Cross-examined: Witness knew drainage would have to be provided. The connections, etc., mentioned in the specifications were in connection with the water supply. Witness had his authority from the architect to go on with the drainage. If witness had known before he tendered he would have put more than £60 on the tender. The tender was rather low to make much out of. It was a matter of opinion as to whether the work was well done or not. An architect would not have granted certificates if the work had been very badly done.

Re-examined: This was the first time witness had had a contract under plaintiff. At first plaintiff properly superintended the work.

Edwin Austin Cook, an architect practising in Cape Town, said he had examined the house, and had seen the plans and specifications. The work was very bad all through. There was a large crack in the wall. At places the plaster had fallen off, and other places had never been plastered. The joinery work was also bad. Generally witness would say there had not been proper supervision.

This concluded the evidence in the case.

Mr. Searle, Q.C., referred to *Cuttell v. Stonestreet* (5 Searle, 131). *Bevan on Negligence*.

Mr. Graham, Q.C., referred to *De l'it v. Canning Company* (11 Juta, 116).

Buchanan, A.C.J., in giving judgment, said: The plaintiff in this case is an

architect, and claims a balance of account of £122 4s. 10d. against the defendant. This sum is made up of charges in connection with preparing plans and specifications and supervising the work on a house which was built by one Oliver for the defendant under the plaintiff's supervision. There are two small items which are admitted, and of which no further notice need be taken, viz., £1 0s. 10d. for taxes, and £1 4s. for advertising. The two main items in the dispute are the sum of £40 for plans and £81 for plans and specifications, while there is also a sum of £5 for an additional plan. With reference to the sum of £40, it appears that the facts are these: The plaintiff and the defendant met at the house of a mutual friend for whom the plaintiff was doing architectural work, and the plaintiff was introduced to the defendant with a recommendation that he should be employed by defendant in case the latter wished to build. Thereafter the plaintiff went to the defendant and urged his services upon him. There is nothing objectionable in this, but in case of an architect who offered his services such services must be of utility to the person to whom they are offered before he can claim payment for them. After some conversation the defendant told plaintiff that he would like a house built for about £1,600. The plaintiff thereupon drew up plans and specifications according to sketches given him by the defendant, and had them passed by the Town-house, but when he brought them to defendant the latter saw that it would be a mad speculation to think that any house could be built like that for anything like the sum of £1,600. The plaintiff, however, persuaded the defendant to call for tenders upon the plans and specifications, and on this being done the tenders were, as the defendant expected, far in excess of the amount proposed to be spent. It must be taken therefore that these plans were utterly valueless to the defendant, and valueless through the plaintiff's own conduct, as he was told that he might prepare plans for a house which might cost £1,600, while he prepared plans for a house which would cost considerably over that amount. The plaintiff is therefore not entitled to recover from the defendant anything in respect of these plans. However, the plaintiff, wishing to secure this work, went on to prepare other plan-

so as to bring the price within the amount specified by the defendant. He did prepare this second set of plans, and when these were submitted a tender was received for £1,620, which was slightly in excess of the limit fixed by defendant, but which he agreed to accept. These plans and specifications were framed on the original plans, but apparently one of the plans, viz., the drainage plan, was not submitted with the other plans and specifications to the tenderer, Mr. Oliver, when he tendered for the erection of the house. The defendant objects to pay this amount of £81 for plans and specifications and supervision on the grounds, first, that there was misrepresentation on the part of the plaintiff in that he said the drainage was included in the plans and specifications, whereas according to Mr Oliver's evidence it was not included, and that he would not have authorised the building of this house if the drainage had not been included. As stated in the claim in reconvention, an amount of £60 has been paid for this drainage work—certainly a very small amount—as a result of a compromise between defendant and the trustee of the insolvent estate of the contractor, and certainly according to the evidence, though the plaintiff pleads that the tender included the construction of that drainage, it is clear, I think, that the tender did not include this amount, and if it had been shown that the defendant had suffered damage in any way because of this I think the Court would have given damages. The difficulty in this case is that the defendant has got the benefit of the work, that he has received full value for the money spent on drainage, and consequently there is a difficulty in estimating that he received any damage at all in respect of this drainage. Now the ground on which the plaintiff's charges are claimed is $2\frac{1}{2}$ per cent. for the preparation of the plans and specifications, and $2\frac{1}{2}$ per cent. for the supervision of the work, and the defendant alleges that the plaintiff's charges for the supervision of this work ought not to be allowed, because of the plaintiff's carelessness and negligence in the discharge of his duties, and there was certainly such negligence and carelessness. In the first place there was carelessness and negligence in not seeing that the amount of the drainage was included in the contract, but I cannot see how defendant suf-

fered great damage on this account, as he has got the benefit of the drainage. There also seems to have been a great amount of carelessness in the supervision of the work on this house, and plaintiff's own witness, Mr. Watson, informs the Court that for a time he inspected the building and made objections, and that he certainly would not have passed the work or given certificates until these defects were remedied, while notwithstanding that these defects were not remedied the plaintiff did give certificates. Unfortunately the defendant was in a very awkward position. Between an insolvent builder and a careless architect he was really in such a position that he hardly knew what to do, and he took the matter entirely in his own hands and out of the hands of the architect, advanced moneys required for the building, and has now settled with the trustee of the insolvent builder for the whole amount claimed under the contract. The defendant having taken the matter out of the hands of the architect in this way, although there is some negligence on the part of the architect, still I think the negligence is not so great as to disqualify him altogether from receiving anything for supervision. He did supervise the work to a certain stage, and probably would have continued to do so until the end had not defendant taken the matter out of his hands. The defendant having done so, prevented him from now saying that the plaintiff was not entitled to his commission. With reference to the £5 for additional plans, these were rendered necessary by a change in the yard, which is a matter solely between the architect and the builder, and for which the defendant is in no way responsible, and I do not think, even if it was a fair charge, that the plaintiff is entitled to recover that amount from the defendant. Therefore on the plaintiff's claim in convention, the Court will allow the items £10s. 10d., £14s., and £81, a total of £83 4s. 10d. Judgment will therefore be for the sum of £83 4s. 10d. With regard to the claims in reconvention, as to damages for the drainage, as I said before, it is hard to say that any damage has resulted to the defendant, now the plaintiff in reconvention, and consequently the Court is not prepared to give any judgment upon that. The second claim is for £46, and this is admitted. Summons was taken out on

February 24, 1890, and therefore there is thirteen months' interest running on this amount, as nearly as possible a sum of £3, making it £49. For these two amounts I think the plaintiff in reconvention is entitled to judgment. With regard to the third claim, for £32 for work wrongfully passed, this work was not wrongfully passed by the defendant in reconvention, in fact, he never passed it at all. Judgment will therefore be on the claim in convention for £83 4s. 10d., and for the plaintiff in reconvention (defendant in convention) for the sum of £49; that is, there is a balance of £34 4s. 10d. due to the plaintiff in convention, and under these circumstances this judgment must carry costs.

Maasdorp and Solomon, J.J., concurred.

[Plaintiff's Attorneys, Messrs. De...pers and Van Ryneveld; Defendant's Attorney, Mr. Gus. Trollip.]

SUPREME COURT

[Before the Acting Chief Justice (the Hon. Mr. Justice BUCHANAN), the Hon. Mr. Justice MAASDORP, and the Hon. Mr. Justice SOLOMON.]

ADMISSIONS. { 1900,
 { June 12th.

Mr. Buchanan moved for the admission of Marwood Tucker as an advocate of the Supreme Court. The applicant had been duly admitted in the Eastern Districts Court.

Order granted.

Mr. Buchanan moved for the admission of Arthur William M. Norton as an attorney and notary of the Court.

Order granted.

Mr. Buchanan moved for the admission of William Stephen Pirie as an attorney of the Court.

Order granted.

PROVISIONAL ROLL.

KOHNE V. BECKMANN.

Mr. P. S. Jones moved for provisional sentence on a mortgage bond for £200.

Granted, and property declared executable.

FAIRBRIDGE V. GOUS

Mr. P. S. Jones moved for provisional sentence upon a mortgage bond for £200.

Provisional sentence granted, and the property declared executable.

MCINTYEE V. GOUS.

Mr. P. S. Jones moved for provisional sentence upon a mortgage bond for £350.

Provisional sentence granted, and the property declared executable.

STUCKE V. STAPELBERG.

Mr. P. S. Jones moved for the final adjudication of defendant's estate.

Order granted.

NEFDT V. WOIFAARDT.

Mr. Maskew moved for the final adjudication of defendant's estate.

Order granted.

HALL BROTHERS V. J. H. GOTT.

Mr. Buchanan moved for a decree of civil imprisonment against the defendant on an unsatisfied judgment of the Supreme Court for £63, money due to the plaintiffs by the defendant, with £7 costs. A writ of execution had issued and a return of *nulla bona* had been made.

The defendant appeared in person and pleaded inability to pay. He said that he was under bail to appear before the Criminal Sessions next month upon a charge of theft and embezzlement.

Mr. Buchanan said that under the circumstances he would ask that the matter be allowed to stand over pending the trial of the defendant at the next Criminal Sessions.

The Court accordingly allowed the matter to stand over.

MOSTERT V. W. FORDE.

Mr. Buchanan, for the plaintiff, moved for provisional sentence upon a Magistrate's

Court judgment and a decree of civil imprisonment against the defendant. The summons set out that the defendant had been sued and judgment obtained against him upon a good-for in the Magistrate's Court, Cape Town, and a writ of execution issued; that a summons had been issued calling upon defendant to show cause why a decree of civil imprisonment should not be issued against him, but in the Magistrate's Court an exception had been taken to the summons on the ground that the defendant resided in the Wynberg district, and was therefore outside the jurisdiction of the Cape Town Resident Magistrate's Court; that the exception was upheld, and the decree refused. The summons thereupon called upon the defendant to show cause why provisional sentence should not be granted, and also why a decree of civil imprisonment should not be granted. The amount in question was £3 7s. 4d., less 14s. costs in the application in the Magistrate's Court for civil imprisonment, which was given against the plaintiff.

Defendant appeared in person, and said that he objected to certain amounts, and that when he signed the good-for he was under the impression that it was correct, but afterwards found out that it was not.

It was pointed out that the Magistrate's Court had given judgment on this good-for and that no appeal had been brought.

In reply to the Court, defendant said that he was a broker, and he offered to pay off the debt by instalments of 10s. per month.

The Court granted provisional sentence, and also a decree of civil imprisonment, execution to be stayed pending payment of the debt by instalments of £1 per month, the first instalment to be payable on the 15th inst., and subsequent instalments on the 15th of each month.

[For a similar form of summons, see *Peters v. Davis* (Vol. I., p. 69, of Supreme Court Record of 1899: *Van Zyl on Costs* (p. 19: Act 20 of 1866, Rules 1 and 32).]

ILLIQUID ROLL.

GOURLAY AND CO. V. H. W. { 1900.
AND E. CARNRY. { June 12th.

Mr. Innes, Q.C., moved for judgment, under Rule 319, for the sum of £87 15s. 4d., in default of plea, the defendants having been duly barred. The amount due was for balance of an account.

Granted.

WALDR, SEN. V. T. COLEMAN.

Mr. Burton appeared for the plaintiff to move for judgment under Rule 319, in default of plea. There was a motion down for removal of bar and leave to plead.

Mr. Gardiner appeared for the defendant to move that the bar be removed and that defendant be allowed to plead, on the ground that the serious illness of the defendant had prevented his attorneys from communicating with him. An affidavit of defendant's attorney to that effect was read, the attorney also stating that he believed there were good grounds of defence.

Mr. Burton: The money being due on a broker's note, there cannot possibly be any defence, and certainly none was set forth by defendant's attorney.

Mr. Gardiner said he understood that the defence was that the sale was a conditional one, and that the conditions had not been complied with.

Buchanan, A.C.J., in giving judgment, said that the declaration was served on May 31, but on the previous day, May 30, the defendant was taken seriously ill, and was removed to the Somerset Hospital, and his attorneys had been unable to communicate with him. Under the circumstances the delay in filing the plea had been satisfactorily accounted for. Leave was therefore granted to the defendant to plead within fourteen days, costs to be costs in the cause.

ROBERTSON V. REYNOLDS.

Mr. Buchanan said he had been instructed to move, under Rule 329d, for judgment for £30 0s. 6d., goods sold and delivered, but as that amount had now been paid he asked for judgment for the costs only.

Granted.

CLARKE V. PAMLA.

Mr. Nathan moved, under Rule 329d, for judgment for the sum of £70 10s., goods sold and delivered, with interest *a tempore morae*, and costs of suit.

Granted.

KANNEMEYER V. HENNING

Mr. P. S. Jones moved, under Rule 329d, for judgment for £125 8s. 6d., being com-

mission for services rendered in connection with the sale of certain landed property, with interest *a tempore morae*, and costs of suit.

Granted.

GOODWIN V. HENRY TATE.

Mr. Gardiner moved, under Rule 329d, for judgment for £120, being balance of the purchase price of certain plots of ground, with interest from March 1, 1899, and costs of suit.

Granted.

THERON V. H. HARRIS.

Mr. Gardiner moved, under Rule 329d, for judgment for £64, being eight months' salary at the rate of £8 per month, and also for £8, being one month's salary in lieu of notice; further, for £15 7s. 5d., being money received by defendant for and on plaintiff's behalf, with interest and costs of suit.

Granted.

REHABILITATION.

Mr. De Waal moved for the rehabilitation of John Christian Michael Sadie.

Granted.

GENERAL MOTIONS.

KNUPPEL V. KNUPPEL.

This was an action for restitution of conjugal rights, failing which to show cause why a decree of divorce should not be granted.

Mr. Nathan appeared for the plaintiff; there was no appearance for the defendant.

The plaintiff, Mrs. Eva M. Knuppel, stated that she was married to defendant at Wynberg on March 14, 1898, after which she lived with her husband at Newlands until July 30 of the same year, when he deserted her. There were no children of the marriage. She did not know why defendant left, as they had no quarrel. Defendant did not work, but lived with plaintiff, who had a little money of her own. When he left he said he was going to Cape Town, but had never returned, and she had since received a letter from him

from Germany in which he said that all he longed for was to obtain his liberty, and once more be happy. Witness was a widow when she married defendant, and had had ten children.

The Court granted an order for restitution of conjugal rights, the defendant to return to or receive the plaintiff on or before August 31, failing which, to show cause by September 12 next why a decree of divorce should not be granted. Service was directed to be made as before.

Plaintiff's Attorney, Mr. C. W. Herold.

TABORYSKI AND CO. V. HENCKELS AND CO.

This was an application for an order that a sum of £70 13s. 9d., which had been deposited with the Registrar in terms of an order of Court dated 14th October, 1899, should be repaid to the applicant on the ground that respondent had failed to prove any claim to the money.

Mr. Buchanan for applicant.

Mr. Innes, Q.C., for respondent.

The facts appear sufficiently from the judgment and the previous reports of the matter. (See 9 Sheil, p. 570.)

An attempt was made by affidavit to show that the goods which had been attached were not the property of one Kramer, but the Court found from the affidavits and the proceedings in Germany in the insolvent estate of Henckels and Co., that the goods were the property of Kramer.

Buchanan, A.C.J., in giving judgment, said: It appears that Henckels and Co., who were a sort of commission agents, took orders from Taboryski and Co to supply them with certain goods. Henckel and Co. were not manufacturers, but only commission agents. They were not able to supply the goods, and also got into financial difficulties; the time elapsed within which the goods should be supplied, but as they wished to keep up the connection, Henckel and Co. ordered goods from manufacturers in Germany for the purpose of supplying Taboryski and Co. They could not pay for these goods, and the manufacturers refused to supply them until Kramer became security, and then the latter, for the purpose of protecting himself, had the bills of lading made out to him. These bills of lading were deposited with the National Bank, and Taboryski and Co., for the purpose of founding jurisdiction in an action they were bringing against Henckel and Co., applied for

and obtained an attachment against these goods, but this was afterwards, on the motion of Kramer, set aside. The Court, however, as Taboryski and Co. wished to sue Henckel and Co. for damages, ordered that as soon as the goods were paid for the attachment could be made, and ultimately Taboryski and Co. paid into court £70 13s. 9d., the amount of Kramer's claim against the goods. The onus is still upon plaintiffs to show that the goods were not Kramer's, the Court having decided when the order was discharged on October 14 that the goods were Kramer's. That has not been done, and the proceedings in insolvency in the estate of Henckel and Co. in Germany and the other affidavits go to support the claim that the goods were Kramer's. The application will therefore be refused with costs.

[Applicant's Attorneys, Messrs. Silberbauer, Wahl and Fuller; Respondents' Attorneys, Messrs. Van Zyl and Buissonne.]

IN THE MATTER OF THE MINOR HITGE.

Mr. Gardiner moved in this application, which was for leave to the minor to acquire certain property and to raise money on mortgage to purchase stock.

The matter was previously before the Court, and was postponed so that affidavits might be produced as to the capabilities of the minor to carry on farming.

The necessary affidavits were now read, and the Court granted the order as prayed.

BEYERS AND ANOTHER V. THE
WILLOWMORE LICENSING } 1900.
BOARD AND RAPHAEL. } June 12th.

Licensing Court—Special meeting—
Resolution—Restriction on
licences—Natives.

Where a Licensing Court had passed a certain resolution and then closed the proceedings, the business having been finished, and then a subsequent special meeting was held rescinding the resolution, Held, that there was no authority for holding such special meeting and the rescission of the resolution to be illegal.

A resolution which provided that all retail licences should be subject to the restriction that the licensee should supply liquor to natives only between the hours of 9 a.m. and 5 p.m. and that no native should be supplied with liquor unless he produced a pass signed by his European employer, a J.P., or a Field-cornet, was held to be one that could be passed.

This was an application for an order setting aside certain proceedings cancelling a resolution restricting the sale of liquor to natives.

Mr. Innes, Q.C., appeared for the applicants. There was no appearance for the respondents.

The petitioners were the minister of the Dutch Reformed Church at Willowmore and another, and they were also duly registered voters in the municipality, and were qualified to vote at Divisional Council elections. At the Licensing Court of Willowmore held at ten o'clock in the morning of March 7, a renewal of a retail licence was granted to the respondent Raphael subject to the restriction that he should supply liquor to natives only between the hours of nine a.m. and five p.m., and that no native should be supplied with liquor unless he produced a pass signed by his European employer, a Justice of the Peace, or a field-cornet. This was made applicable to all the licences considered by the Court that day. At the sitting of the Court the Magistrate opposed this restriction on the ground that it amounted to total prohibition, and that they had not power to pass such a resolution. The resolution was, however, carried by a majority of three votes to one. When the Court had concluded its business it rose. In the afternoon, however, a special meeting was held, at which this resolution was rescinded. It was contended that this second meeting was wrongful and illegal, the Court having once been closed, and that therefore the proceedings should be set aside, and the restriction mentioned endorsed on Raphael's licence.

[Buchanan, A.C.J.: What *locus standi* have the applicants?]

They are residents in the Municipality; they have the right to vote under the Act of 1891. On the question of the granting of licences, see *Riddelsdell v. Williams* (2 Juta, p. 356). That was before the Acts of 1883 and 1891. The Divisional Council voters have a control over the granting of new licences. *Raubenheimer v. Parsons* (12 S.C., 366) is on all fours with this case. The position of the voters was different when *Riddelsdell v. Williams* was decided. On the merits, the action of the Licensing Court was very irregular. The governing case now is the *Queen v. Parrott* (9 Sheil, p. 480). Certain special circumstances must be present to justify the holding of a special meeting. The public had no notice of this so-called second meeting. Second meeting must be quashed.

[Buchanan, A.C.J.: What about costs?]

The Court will not surely order applicants to pay the costs. See Section 30 of the Liquor Act. We are discharging a public duty in coming here.

Buchanan, A.C.J., in giving judgment, said: There was no authority whatever for holding that special meeting in the afternoon, and the members acted altogether illegally in this. The question then arises whether the resolution which was passed in the morning was one that could be passed by a Licensing Court, and previous decisions of the Court, especially in the case of *Parrott* show that to impose such conditions is clearly within the power of the Licensing Court. Therefore all persons who took licences at that Court must have their licences endorsed with that condition. The order is therefore granted as prayed, and costs will be given against the Licensing Court *ex officio*.

Maasdorp and Solomon, J.J., concurred.

In re THE LILLIAN SYNDICATE; ISAACS AND OTHERS V. DE MARILLAC.

Mr. Graham, Q.C., applied on behalf of Mr. De Marillac for leave to appeal to the Privy Council against the judgment of the Supreme Court in the action brought against him by D. Isaacs and others on behalf of the Lillian Syndicate. The amount involved was stated to be over £500.

Mr. Innes, Q.C., appeared for the Lillian Syndicate to consent, provided that the de-

fendant (applicant) be ordered to hand over the leases in terms of the judgment and to pay the costs of the action when they are taxed, the respondents to give security *de restituendo*.

Mr. Graham, Q.C.: The Court has a discretion. We cannot consent to any conditions. I ask for leave to appeal in terms of section 50 of the Charter of Justice.

Leave to appeal was granted, the applicant to hand over the leases and pay the costs of the action; the defendants to give security *de restituendo*.

PETERSEN AND ANOTHER V. EDWARDS.

Mr. Gardiner applied for leave to sue by edictal citation, and stated that in 1897 the respondent bought certain land, agreeing to pay in instalments at the end of three, six, and nine months. The last of these had not been paid, and defendant was believed to be in Bulawayo.

Leave was granted.

IN THE MATTER OF THE MINORS BRISLEY

Mr. Nathan applied for the appointment of a trustee in the place of the late Marais P. H. le Roux.

The application was granted.

IN THE ESTATE OF THE LATE GERHARDUS VERWEY, JUNIOR.

Mr. Buchanan applied for leave to raise money on mortgage in order to effect certain repairs.

Leave was granted.

IN THE MATTER OF THE PETITION OF MATTHYS GERHARDUS HUMAN, IN HIS CAPACITY AS THE EXECUTOR DATIVE OF THE ESTATE OF THE LATE JURIE JOHANNES HUMAN.

Mr. Burton applied for an amendment of the order of the Court of January 24, 1900, which decreed that "certain 108 9272 part of the farm 'Zeekoe River' should be registered as the property of the estate of the late J. T. Human. The petitioner now wished the words "and quit-rent adjoining" to be inserted after the words "Zeekoe River."

The application was granted.

IN THE MATTER OF THE MINORS BEYERS.

Mr. Buchanan applied for an order authorising certain payments towards the education and maintenance of the minors concerned, and read the report of the Master thereon.

The order was granted in terms of the Master's report, and subject to the conditions stated therein.

IN THE MATTER OF ROBERT JAMES OLIVER.

Mr. P. Jones applied for the appointment of a *curator ad litem* in the estate of Robert James Oliver, alleged to be of unsound mind, and stated that Mr Oliver had lately been manager of the Singer Sewing Machine Company. He was born at Swellendam, and was thirty-eight years of age, and possessed property valued at £1,500, wherefore the petitioner, his wife, prayed for the appointment of a *curator ad litem*. Certificates were put in from Dr. Charles McGowan Kitching, who had personally examined Oliver and found him of unsound mind, and under the delusion that he had direct communion with God. He was at present confined at Valkenberg Asylum.

The application was granted, and Mr. Advocate Wilkinson was appointed *curator ad litem*, the return day being fixed for July 12.

PIENAAR V. FORTUIN.

Mr. Gardiner applied for an order upon the respondent to deliver up certain children. Applicant filed an affidavit, in which she stated that owing to her husband's intemperate habits she had separated from him, he taking with him their four sons. Her husband before his death took the boys to applicant's sister-in-law at Frenchhoek, who had since had charge of them. Applicant had applied to her sister-in-law to deliver the children to her, but respondent had refused.

Respondent, who was in court, produced an affidavit in which she stated that her brother had not been of intemperate habits, and further, that there was a sum of £2 8s. due to her for board and lodging of the children since they had been in her charge.

The application was granted, no order being made as to costs.

SUPREME COURT

[Before the Acting Chief Justice (the Hon. Mr. Justice BUCHANAN), the Hon. Mr. Justice MAASDORP, and the Hon. Mr. Justice SOLOMON.]

IN THE MATTER OF THE PETITION OF MELCHIOR GRASER. 1900. { June 13th.

Mr. De Waal moved for an order authorising the cancellation of a certain bond on payment to the Master of the capital sum and interest. The petitioner had sold the property mortgaged under the bond, and was desirous of passing transfer to the purchaser, but could not do so until the bond had been cancelled. The application was made because the holder of the bond was away in Norway, and had not appointed a duly-qualified agent in the Colony.

There was no proper proof of notice to call up the bond having been given, but counsel said the applicant was prepared to pay three months' interest from the present date.

Under these circumstances the Court granted an order authorising the cancellation of the bond on payment to the Master of the principal, all interest due, and three months' interest from the present date.

MAHOMED V. LOUW.

This was an action to recover certain household furniture and fittings or the value thereof, also certain interest and survey expenses.

The declaration set forth that the plaintiff was Hadje Suleman Sha Mahomed, residing at Cape Town, and the defendant was J. A. L. Louw, residing at Newlands. On January 1, 1900, the plaintiff was the owner of certain ground at Newlands, on which were two dwelling-houses, and he sold a portion of the ground and one of these dwelling-houses called Mount Fair, to defendant for £2,000, transfer to be passed on February 15, but the occupier to take possession immediately, and defendant to pay interest from that date. The defendant took possession as agreed, and paid the purchase price on March 12, but had paid no interest. The declaration went on to say that when defendant took possession there were in the house certain articles of furni-

ture and fittings valued at £75, and belonging to plaintiff, which defendant wrongfully retained. Transfer had been duly passed, and for the necessary sub-division of the ground it was claimed that the defendant should pay half the survey expenses, £13 2s. 6d.

The plaintiff claimed delivery of the furniture and fittings or their value, with interest on the purchase price at the rate of 6 per cent. from January 1 until March 12, and also payment of half the survey expenses. (Counsel stated that the interest had now been paid, and therefore that was no longer in dispute.)

The plea admitted the purchase by defendant of the property, and went on to say that at the date of sale it was agreed that the parties should meet for the purpose of certain movables being pointed out, which were to be handed over by plaintiff to defendant in consideration of the sale and purchase. It was also specially agreed that the survey should be made and the diagram framed at plaintiff's expense. Certain articles which were not pointed out as amongst those to be handed over, defendant had tendered and still tendered. He therefore prayed that the plaintiff's claim might be dismissed with costs.

Mr. Innes, Q.C. (with whom was Mr. Gardiner), appeared for the plaintiff.

Mr. Searle, Q.C. (with whom was Mr. Buchanan), appeared for the defendant.

The first witness called was

Suleman Sha Mahomed, the plaintiff, who said he came from Bombay and had been here since 1883. He owned a certain amount of property here. The Mount Fair property and that adjoining, Shahvaugh, he bought in 1898 for £3,200. In December, 1899, Mr. Van Schoor came to witness about buying Mount Fair, but they could not come to an agreement as witness would not take less than £2,000. On January 1 last defendant and Mr. Van Schoor came to witness's office early in the morning, and defendant wanted to buy Mount Fair. He asked if witness would take less than £2,000, but the latter said not a penny less. Defendant then wrote a document which witness signed when he saw the figure was £2,000. Nothing was then said about the furniture and fittings in the house, and nothing was said about survey expenses.

At that time witness also wanted to sell his other house, and had put the matter in the hands of Mr. Van Zyl. He did not speak to defendant about the other house on January 1. After correspondence on January 9 defendant again came to witness's office in the morning, and afterwards witness by arrangement met defendant and Mr. Van der Spuy, and they went out to inspect the property Shahvaugh. They inspected the property, and nothing was then said about furniture. Defendant afterwards offered £1,500 for Shahvaugh, which witness refused.

Cross-examined: Witness never said anything about the fittings of the house. The diagram was never shown to witness. Witness did not, on January 9, take defendant and Mrs. Louw through all the rooms in the house. He went with them through some of the rooms. Mr. Van der Spuy was also there. It was not true that witness pointed out the roller blinds, linoleum, dresser, store, etc., as belonging to the house. On January 9 witness pointed out to defendant the boundaries of Mount Fair.

By Mr. Justice Maasdorp: Witness never told defendant that the property Mount Fair was not cut off from Shahvaugh, and the latter might have thought that they were distinct properties. Witness never showed defendant any diagram.

Mrs. Clark stated that she had occupied Mount Fair from May 1, 1899, to the end of January last. When witness went there there were certain articles of furniture in the house. Some time in January defendant and Mrs. Louw came to inspect the place along with plaintiff and Mr. Van Schoor. While witness was present nothing was said about taking over furniture or fittings. Witness did not give any furniture to Mrs. Louw.

Cross-examined: Witness was not there all the time when they were going through the house. Witness left behind all goods which were in the house when she became tenant.

Thomas Peters said he was in the employ of Messrs. Van Zyl and Buissinne. Early in January defendant came to see him about this transaction. Witness asked him about the furniture, and he remarked in a casual sort of way, "Oh, don't worry about the furniture." About the end of

January or beginning of February witness again spoke to defendant about the furniture, and he then said that Mahomed could have what was his, but he did not say what that was. Just after the issue of summons witness again mentioned to defendant the matter of furniture, and the latter then said it had been sold to him in the presence of Mrs. Louw, Mrs. Clark, and Mr. Van der Spuy.

Cross-examined: A purchaser always paid the survey expenses unless there was a special agreement to the contrary.

George W. Steytler, secretary of the Colonial Orphan Chamber, deposed that with Mr. Hofmeyr, the auctioneer, he went out to Mount Fair and drew up the list produced, and marked the things which were fixtures. The stove was not a fixture.

By the Court: It was always the custom that the purchaser should pay for a new diagram when such was required.

Charles Marais, a Government land surveyor, deposed that he made a survey for the purpose of sub-dividing the property in question. Owing to confusion as to the boundaries witness had to make an extensive survey.

By the Court: If the boundaries had been correct 5 guineas would have covered the cost of the survey necessary for subdivision.

Cross-examined: Witness was employed entirely by the plaintiff.

This concluded the evidence for the plaintiff.

For the defence,

Johannes Albertus Loubser Louw, the defendant, said his family moved into the house in question in February, but witness remained at Koeberg until March 12, as he had to sell off his farm, etc., there. As to the purchase of the property on January 1, witness and Mr. Van Schoor went to plaintiff's office. Witness offered £1,800 for the house, but plaintiff would not take less than £2,000, saying it was a substantial house, with hot and cold water laid on, etc. He showed witness a diagram of the two houses, and on witness pointing out that the two houses were on one piece of ground plaintiff said he would have the ground surveyed free of charge to witness. On that witness said he would not mind giving the price asked, and afterwards at plaintiff's request witness drew up the agreement produced, which they signed. It was agreed,

however, that plaintiff was to show witness over the house, which he did on January 10, not January 9, as plaintiff had stated. There were also present Mrs. Louw and Mr. Van der Spuy. Plaintiff, in going through the house, pointed out certain articles which he said went with the house, such as the window blinds, linoleum, dresser, stove, etc., and also some stumps of fir-trees and a ladder outside the house. Some other things now on the list produced, and which had not been pointed out by plaintiff, witness thought belonged to Mrs. Clark, and he had had them put carefully away. The first time witness heard about plaintiff's claim to the furniture and fittings was on May 20. The first time witness saw Mr. Peters was on February 15, and he did not see him again until issue of summons.

Cross-examined: If witness had been told he would have to pay the survey expenses he would not have bought the house. He never told Mr. Peters not to bother about the furniture.

J. C. W. van Schoor corroborated the evidence of the defendant as to the purchase of the property, and plaintiff's agreement to have the survey made free of charge to defendant.

S. J. van der Spuy also gave corroborative evidence as to plaintiff on January 10 having pointed out the articles enumerated by defendant as belonging to the house.

Mrs. Louw said she went through all the rooms with Mrs. Clark; as the others came out they went in. She knew nothing about the arrangements. Her husband had told her nothing.

B. C. Groenewald said he had previously sold both the houses to Mahomed; nothing extra had been paid for the stove. The stove was sold with the house. No reduction was made in rent because of the stove.

Cross-examined: It was specially provided in the contract that fixtures should go with the house. Mahomed took some things over from witness, for which he paid specially, such as the carpet for £13. The rent was paid in cash at the beginning or end of the month.

Re-examined: The linoleum had been down for some years—since 1897.

John Shipley Wright said he had been employed by D. Isaacs and Co. for twenty years. He had seen the linoleum and the cork carpet; their present value was £6 10s.

Case for defence closed.

Mr. Innes, Q.C.: The dispute is a trivial one. Can defendant retain the furniture? There is a conflict of evidence. Plaintiff is entitled to succeed. The survey expenses must be paid by the purchaser. See *Van der Merwe v. Colonial Government* (8 Sheil, p. 106).

[Buchanan, A.C.J.: In that case the property never having been surveyed, the survey was necessary.]

Here defendant says survey was necessary. Grantee or purchaser always pays costs of survey. The documentary evidence is conclusive. But defendant wants to read in a clause alleged to have been agreed upon by the parties before the contract was signed. The fixtures being portion of the house, go with it when sold. There is no evidence that the stove is a fixture. The document is the safest guide, and I submit that the Court will hold the defendants liable for the goods or their value.

Mr. Searle, Q.C.: The document is merely a memorandum: it is not a binding contract. The collateral agreements we allege are not inconsistent with the document. If the Court holds that such agreements exist they will be binding. We don't try to vary the memorandum. See *Indice Railway, Collieries and Land Company v. The Colonial Government* (14 S.C.R., p. 228). We may prove collateral agreements. They are alleged in the plea, and not excepted to: the evidence was not objected to.

Mr. Innes in reply.

Buchanan, A.C.J.: The two points the Court has to decide upon are whether defendant was bound to deliver up the articles claimed by the plaintiff, and, further, whether he was bound to pay £13 as survey expenses. With reference to the articles claimed no list had been given at the time of the pleadings, but a list had been put in subsequently enumerating thirty-one articles. The claim, however, for a number of these has been abandoned, as some of the articles are fixtures. There is only one article in the list about which there is any dispute as to whether it is a fixture, and that is the stove. At the time the contract was drawn up it was stated that there was a verbal agreement that plaintiff was to point out the articles that were to go with the house. This verbal agreement was disputed by the plaintiff. In view of the conflict of statements the Court must be guided by the written documents, and there is nothing whatever in them stating that any

articles were to go with the house. With regard to the stove, however, the property was purchased in 1898, and the stove was specifically mentioned among the fixtures, and I think that in this case it is clearly established that the stove was a fixture, though in every case a stove might not be a fixture. The question to decide in regard to the rest of the articles on the list is whether the plaintiff agreed to throw them in with the purchase of the house. That depends upon the *visu voce* evidence, and in a case like this, I think that the onus is upon the defendant to prove it, and in this case he has not made his evidence on that point clear enough. With the exception of the articles admitted by the plaintiff, and with the exception of the stove, all the other articles mentioned in the list must be delivered up by the defendant to plaintiff. As to the survey expenses, here again there is a direct conflict of testimony. The usual course is that survey expenses being necessary to the passage of transfer, they must be paid by the purchaser. The defendant, however, says that he made an express agreement with the plaintiff that the latter should pay the survey expenses. There is nothing in the written contract to show this, and defendant has not satisfied the Court that any such verbal contract existed. The amount expended on survey was much larger than might reasonably be expected, and it has been given in evidence that the amount should have been something like £5. On this second count the plaintiff will be awarded five guineas as survey expenses. As plaintiff has substantially succeeded in this case the judgment of the Court will carry costs. Judgment will therefore be for the plaintiff, for the delivery by defendant of the articles specified, and for five guineas survey expenses, and costs.

Maasdorp and Solomon, J.J., concurred.

[Plaintiff's Attorney, Mr. J. F. Bernard; Defendant's Attorney, Messrs. Van Zyl and Buissine.]

SUPREME COURT

[Before the Acting Chief Justice (the Hon. Mr. Justice BUCHANAN), the Hon. Mr. Justice MAASDORP, and the Hon. Mr. Justice SOLOMON.]

BENNETT V. WHITE, RYAN } 1900.
AND CO. } June 14th.

Contract—Breach—Vital condition
—Damages.

The parties entered into a contract for the purchase of a certain quantity of tea during the year 1900, the defendants undertaking to furnish plaintiff with letters of credit in October, 1899, and June, 1900 to cover his purchases for a period of six months at a time in advance. The plaintiff incurred considerable expense in preparing to carry out his part of the agreement, but the defendants failed to furnish letters of credit or to give any orders for the first six months. Held, that this was a breach of a vital condition, entitling plaintiff to sue for damages on the whole contract.

This was an action for £1,000 damages for breach of contract. The plaintiffs were J. M. Bennett and Marie Julienne Bennett, his wife. The defendants were merchants in Cape Town.

The declaration stated that the second named plaintiff holds the exclusive proprietary rights in a certain brand of tea called "Night and Morning" Tea, and that at the date hereafter mentioned the first named plaintiff, duly authorised by his wife, carried on business at Cape Town under the style of the Night and Morning Tea Company. On June 2, 1899, a written agreement was entered into between the plaintiffs and the defendants in terms of which the plaintiffs appointed the defendants to be the sole agents in South Africa for the sale of Night and Morning Tea, the plaintiffs to supply such quantity of the said tea, not being less than 30,000 lb per annum, to the defendants, as the latter might require, the tea to be supplied at certain

scheduled prices fixed in the said contract, the agreement to last for one year from 1st January, 1900, but to be renewable at the option of the defendants for a further period thereafter. It was also agreed that the first plaintiff should forthwith proceed to India and there arrange to have the tea packed and shipped to the defendants by direct steamer from Calcutta. The quantity to be shipped in any calendar year was to be not less than 30,000 lb., which quantity the defendants specially agreed to order and accept during the year and to pay for. Provision was further made in the said contract that the defendants should have the right under certain conditions to order more than 30,000 lb. during one year. In consideration of the premises, the defendants by the said agreement undertook to supply the first named plaintiff, acting as aforesaid, with all necessary letters of credit in order to cover the cost of procuring the said tea. The letters were to be supplied for a period of six months at a time in advance, and the defendants specially agreed to forward the said letters of credit in October, 1899, and June, 1900, respectively. Thereupon the plaintiff proceeded to India, and the plaintiffs were in all respects ready and willing to carry out their part of the contract, but the defendants wrongfully and unlawfully repudiated the contract, and refused to supply the said plaintiff with letters of credit in or before October, 1899, as agreed upon, and refused in any way to carry out their contract.

The defendants in their plea admitted the formal allegations and the written agreement, but referred to the agreement itself, for its exact terms, and its true effect and meaning. They specially denied that they were bound under it to supply letters of credit for the fulfilment of 15,000 lb. of tea in October, 1899, as contended by plaintiffs. In or about October, 1899, the defendants advised plaintiffs' agents in India that they were sending a letter of credit for £100, and on or about November 1, 1899, the said letter of credit was sent to the said agents with an indent or order for a certain quantity of the said tea of the above value, but neither plaintiffs nor their said agents executed the said order or communicated with the defendants with regard thereto; in consequence whereof defendants refrained from

sending any further indents or letters of credit as they were entitled to do until the said order was executed. They said they had always been ready and willing to send said tea, and to take delivery of the same in quantities up to 15,000 lb. before the end of June, 1900, and 30,000 lb. in all before the end of December, 1900, but by reason of the neglect and default of the plaintiffs they were entitled to refrain from sending such further letters of credit and orders until the first order sent had been fulfilled. They admitted that the first plaintiff had proceeded to India, but denied that the plaintiffs had been put to any expense or had suffered any loss for which they (the defendants) were liable, and they specially said that this action was prematurely brought. They were still ready and willing and tendered to forward letters of credit for and to take delivery of the balance of the 30,000 lb. of the tea before the end of the present year upon the plaintiffs executing the order already sent.

They prayed that the claim might be dismissed with costs.

The replication was general.

Mr. Innes, Q.C., and Mr. Gardiner appeared for the plaintiffs.

Mr. Searle, Q.C., and Mr. Howel Jones for the defendants.

The first witness called was

James M. Bennett, the plaintiff, who stated that his wife at present held the rights in this colony for the sale of tea under the brand Night and Morning Tea, he having ceded those rights to her in 1897. Since that time they had been carrying on business jointly as the Night and Morning Tea Company. Witness had been in the business of blending tea all his life. This Night and Morning Tea was not a tea grown in any particular state, but a blend of certain teas to produce a certain flavour especially suited to this colony, the blend being witness's secret. Witness had dealt with White, Ryan and Co. previous to the agreement in question, the custom being that witness had the consignments of tea sent out and defendants accepted the drafts, put the tea in their bonding stores, and allowed witness to take it out in the quantities he required, for blending and packing. They got their commission on the amount of the drafts they paid. Witness assigned his

estate in 1898, but had had a release since then. Before this contract was entered into witness was clear with defendants. On June 2, 1899, the agreement mentioned in the pleadings was entered into. The reason that witness stipulated for letters of credit for six months in advance was that there was a certain season for buying tea in India, viz., from June to December. There were then large auction sales of tea which the brokers attended, and if witness did not attend and buy the tea during the season he would have to take his chance of getting it from the dealers or the merchants, and of course pay the latter's profit, that was, he would have to buy second-hand. Mr. White knew all about that, witness having explained it to him before the contract was entered into. He also knew that witness was not a man of capital, and that it was necessary for him to get the money in advance, so as to pay for the half-year's tea. With regard to a clause in the contract as to 15 ounces of tea being made up in the pound packet, that was put there at Mr. White's suggestion. Proceeding, witness deposed as to his leaving for England on June 15, and thereafter proceeding to England. Certain correspondence passed as to a lot of tea plaintiffs had sold defendants, there being allegations as to the tea not having been properly packed, and also as to shortage in the weight, but this tea had nothing whatever to do with that mentioned in the contract. Proceeding, witness deposed as to his having gone to India, and when there he went to Mr. McLeod, whom he generally wrote to when he wanted tea shipped from India, and found that the defendants had written to Mr. McLeod suggesting that they should do business direct with him. That letter was written on May 10. Witness remained in India until December, but did not get the letter of credit, although he was informed that a letter of credit for £100 worth of tea was being sent to Mr. McLeod. The latter was not witness's agent, and he maintained that the letter of credit should have been sent to him direct, so that he could treat with the agents. If the letter of credit had been forwarded as agreed upon it would have reached him in November. He never received the letter of credit, and left India in December.

Proceeding, witness gave evidence as to the damage he had sustained. His passage from Cape Town to England cost him 10 guineas; in London his expenditure was £12. His fare to Calcutta was £36 15s., and during his two months there he spent over £30. His passage from Calcutta to Cape Town cost him £19 8s. 6d. He was satisfied that if the arrangement had gone through he would have made £340 profit. That was on the whole 30,000 lb. of tea. The schedule prices would give witness an average profit of twopence on the pound. That was allowing for 25,000 lb. of tea at the cheapest rate, and 5,000 lb. each of the two higher rates. Through defendants' action witness had no funds, which prevented him from going to Australia from India, and he thus suffered loss.

Cross-examined: During 1897 and 1898 witness had had dealings in tea with defendants, and McLeod and Co. acted for witness for about half his work. Witness drew up the draft of the agreement, and had himself inserted the words making the clause read that the defendants should forward the letters of credit to him or his agent. Mr. White had never said that he could not send letters of credit direct to witness, but must send them to witness's agent. Witness did give defendants McLeod's cable address, but that was for convenience, as McLeod had a code-book. Witness had no arrangement with McLeod. Witness did not see the letter of credit before he left India. Witness had never instructed Mr. McLeod not to fulfil the order for £100 worth of tea, as per the letter of credit. McLeod had refused altogether to pack tea for witness. When witness returned from India he saw Mr. White in his attorney's office, but had no conversation with him. Even if the letter of credit for the full amount had come out to McLeod before witness left India, witness would not have executed the order, as McLeod was not his agent. Witness was very excited at the time he saw Mr. White in his attorney's office. Witness never spoke to Mr. Ryan about the 15 ounces business.

Mr. Justice Solomon: Is it the custom of the trade to supply 15 ounces instead of 16 ounces?

Witness: Sometimes, but it is not done by everybody.

Cross-examination continued: It was Mr. White who suggested the clause about 15 ounces. Witness admitted that he was not in a good financial position at the time the contract was made. Defendants were creditors in witness's assigned estate. If the letter of credit for the full 15,000 lb. of tea had arrived witness would have remained in India until the end of January, blending the tea and making arrangements for its shipment to defendants. He would have left his agents to see to the packing. In the Indian market last season tea was 6½d. a pound taken all round, good, bad, and indifferent. Blending and packing cost witness 1d. per lb. In India witness could get an able-bodied man to work twelve hours for 5d. Witness's blend would cost him about 4½d. per lb. Witness required the letters of credit for six months to enable him to buy, but he would not have sent all the tea on at once. McLeod did not give any distinct reason for refusing to pack for witness. If witness had received the letter of credit for £100 he would have executed the order, but under protest.

This closed the case for the plaintiff.

For the defence,

Edward George White, a partner in the defendant firm, said the defendants had dealt with plaintiff in Night and Morning Tea for about four years. In the first instance they would import it for plaintiff from McLeod and Co., and then they would pay against the shipping documents. That was the way business was always transacted. The tea was placed in bond here, and plaintiff would take it out from time to time and blend and pack it for witness as the firm required it. They simply had the tea in bond for their own protection. They used to treat it as plaintiff's tea. This arrangement did not work satisfactorily. Several consignments arrived of which they had no notice, and as they had large stocks of the tea on hand, to save the further consignments being thrown on the market they had to take up the drafts. In consequence of this the agreement of June 2 was entered into. The words with reference to the letters of credit being sent to plaintiff "or agent" were inserted at witness's suggestion, because they did not want the letters of credit in plaintiff's name. On one occa-

sion they had given plaintiff letters of credit for £2,000 worth of tea, and he had shipped about £3,000 worth, and to save themselves they had to take up all the drafts. Therefore they wanted the letters of credit made out to reliable people, so that that could not occur again. Plaintiff told witness that McLeod was his agent, and witness made inquiries and found that McLeod was reliable. Witness knew McLeod as having acted for plaintiff in the other consignments. He admitted, however, that he knew of one small consignment coming through another house. Before plaintiff left for India witness had a conversation with him as to the orders coming through an agent. That was before the agreement was signed. Before then plaintiff never took up the position that the letters of credit must be sent through him. Before plaintiff went away witness explained to him that it would be quite impossible to send the letters of credit for the whole half-year's supply in advance, because they would not know in what quantities they wanted the tea put up. It could be done, but the result would be that they would be overstocked with one size and out of another. Witness had never any idea of taking the whole lot in one swoop, and on October 25 they wrote telling plaintiff so. When the latter went away witness never received any intimation that McLeod was not his agent. Witness had never repudiated or declined to carry out this contract. He was quite willing to carry it out. When plaintiff returned in January witness spoke to him about not executing the order sent, and plaintiff replied that he would have nothing whatever to do with it. The 15,000 lb. of tea could be packed and shipped in six weeks. Plaintiff could not have gone into the market with the letter of credit to buy. It would be of no use to him until the goods were shipped.

Buchanan, A.C.J.: You mean no use as far as trading was concerned, but he might have got credit on the strength of it.

Witness: Oh, yes, it would show he was authorised to that extent.

Examination continued: The letter of credit would not have taken him any further than the terms of the agreement itself. The printing of the labels had nothing to do with witness's firm, but plaintiff would know about the proportion of each size re-

quired, as they had been taking the tea for three years. With regard to the 15 ounces to the pound, witness had called plaintiff's attention to that in the draft agreement, and the plaintiff replied that that was the custom of the trade. Witness objected to it, and Mr. Ryan afterwards saw plaintiff on the matter. Plaintiff said he would want a penny more per lb. if they made it 16 ounces. Eventually they agreed to the 15 ounces.

Cross-examined: Witness had told plaintiff that he would not furnish him with the letters of credit direct. Plaintiff proceeded to India for reasons of his own. They had not replied to plaintiff's letter of demand.

By the Court: Witness thought it was generally known that a packet of tea contained 15 ounces instead of 16 ounces. He knew that Lipton had been brought into court on this count, but he was bound by the contract.

Pierce Ryan, one of the defendants, deposed with regard to the letter he had written to McLeod on May 10, 1899, that he did not wish to induce McLeod to deal with them apart from plaintiff, but just to let him understand exactly the position they stood in with regard to plaintiff. With regard to the 15 ounces mentioned in the agreement, witness was in his office when Mr. White came to him, and in consequence of what he said witness saw plaintiff. The latter explained to him that that was the custom of the trade, and that if he did not follow that he would have to sell 16 ounces while everyone was selling 15 ounces. Witness did not want to be Quixotic, and sell 15 ounces for the others' 15 ounces, and therefore he consented. As far as witness was concerned, the suggestion came from plaintiff. As far as witness was concerned, they had always dealt with McLeod as plaintiff's agent, and he knew nothing about any other agent.

Cross-examined: As a matter of fact, witness had had no communication with McLeod before May 10 last year, and had only dealt with him through plaintiff, but the latter had always spoken of McLeod as his agent. With regard to the 15 ounces, it was a question of their paying more or conforming to the custom of the trade. Witness gave way because it was the custom of the trade, but he was not satisfied with it.

Gilbert B. Kane, manager for the defendants, said he had had a good deal to do with these tea transactions between plaintiff and defendant. He saw Mr. Bennett almost daily in connection with the matter, both before and after the contract. Before he left plaintiff asked witness to send an indent shortly, and witness said he would do so as soon as possible, but there was no mention of the weight. Witness never promised to send an indent for 15,000 lb., as they could not have done so without overstocking themselves in certain sizes. Witness told plaintiff that the instructions as to packing would be given in the indent. Plaintiff had frequently stated that his agent was McLeod; in fact, witness knew of no other. With regard to the 15 ounces instead of 16 ounces, witness knew that the words "15 ounces" were crossed out in the original agreement, but witness could not say who had struck those words out.

Cross-examined: The indent was to be for what they required. Witness thought that he should order the quantity as he required it. An indent could be sent every month for what he wanted, but he reckoned from the quantity he had in stock that it would not be necessary for some months. The war upset his calculations to a certain extent.

Re-examined: The draft agreement was in Mr. Bennett's handwriting.

Harry Bird Black, a merchant, said he had seen Mr. Bennett recently in Cape Town, and had a conversation with him two months ago. Bennett asked if he knew he had entered an action. Mr. Bennett showed witness a contract, and they discussed the matter. He said they had sent a letter of credit and an order for £100 worth of tea to be packed in 2 oz. tins, but he would not accept the order, as the agreement was for 2,000 lb.

Cross-examined: Witness had no actual interest in the case. He was simply speaking from recollection, but he naturally took interest in a firm that had been good to him. Witness was quite sure Bennett said he would not execute the contract. He said the letter of credit was to have been sent to him, and as it was sent to McLeod he would have nothing to do with it. He might have been only discussing the legal

bearing of the letter of credit, and he said he had told Mr. McLeod to send the letter of credit back.

Postea (June 15).

After argument,

Buchanan, A.C.J.: The plaintiffs in this case are husband and wife, and carried on business in Cape Town as the Night and Morning Tea Company. Mr. Bennett, who apparently had some experience in the tea trade, purchased teas in bulk, blended them according to a secret which he said he had so as to make them palatable to the public taste, and thus created a considerable demand for his blend, which he sold under the description and style of the Night and Morning Tea. This title he had in 1896 registered in the Deeds Registry of this colony as a trade-mark. The defendants are merchants who had financed plaintiff in trading. The plaintiff getting into monetary difficulties, had to assign his estate, and to protect themselves the defendants took over the stock of tea then in the country, which at the time was very large. That was before May, 1899, when negotiations between the plaintiff and the defendants resulted in the contract of June 2 being entered into. By this contract the plaintiff appointed the defendants the sole agents for the sale of Night and Morning tea in the Cape Colony, the plaintiff undertaking to proceed to Calcutta to procure tea there, and to ship it direct to defendants each month, as opportunity occurred in the way of obtaining steamers. The quantity of tea which defendants agreed to take during the year 1900 was to be not less than 30,000 lb., while provision was made for a further supply should defendants require it, the agreement providing for due notice being given of any indents over and above the regular monthly supply. To enable the plaintiff to carry out the contract the defendants agreed and undertook to supply the necessary letters of credit to cover Bennett's purchases, and these letters of credit were to be forwarded in October and June to cover the quantity required for six months in advance. The plaintiff left the Colony on his way to India, proceeding first to England and France. Considerable correspondence followed, of which it will be sufficient to quote from the letter of the 4th July from the plaintiff, in which he asked defendants to forward the indent for 15,000 lb tea, being the half-yearly supply agreed to be ordered in advance. Several letters of a similar nature followed, and on August 18 the defendants wrote acknowledging receipt of plaintiff's letters and complaining about the packing and short weight of the tea

taken over. They also said that they had a large surplus stock, and that trade was bad owing to the war scare, but that they hoped when plaintiff reached India to send him letters of credit for further orders. In October the defendants again wrote to plaintiff complaining that trade had gone back, and saying that they had a large stock on hand, and would be unable to dispose of the same, and that they could not see their way to order the full quantity at the present moment. Up to that time the letters showed an unwillingness, to say the least of it, on the part of the defendants to abide by the contract, a certain amount of hesitancy and reluctance to keep to their bargain. In October instead of sending a letter of credit to plaintiff, they ordered Messrs. McLeod and Co. a small quantity of Night and Morning tea, covering their order with a letter of credit for £100, not in favour of the plaintiff, but of McLeod and Co. Messrs. McLeod and Co. were a firm of shippers in Calcutta, who in previous transactions had been engaged by the plaintiff. The plaintiff said he had not re-engaged the firm, and that they were not now his agents. One of his objects in going to India was to buy the tea in the cheapest market, and then appoint as his agent for the packing and shipping McLeod or such other persons as would be most advantageous. Defendants say that they sent this letter of credit to McLeod as they claimed they were entitled to do under the contract, which said that letters of credit should be sent to the plaintiff or "agents." This, however, must mean the plaintiff's agent and not such agents as the defendants chose to select. Therefore the sending of the letter of credit to McLeod could not be taken as even a partial compliance with the contract. The plea states that defendants were still willing to abide by the contract, but letters of credit have not yet been sent or offered by them, so that there has been a distinct breach of contract. Besides, although the defendants plead they were willing to continue the contract, Mr. White in his evidence candidly said that they would not under any consideration now send letters of credit to the plaintiff. Mr. Searle contended that this failure to send letters of credit to the plaintiff was not a breach of a vital condition of the contract, but the contract seems to make it the basis and essence of the whole transaction. The 9th clause of the agreement is as follows: "The said White, Ryan and Co. hereby agree and undertake to supply the said Bennett or agents with all necessary letters of credit to cover his purchase for

their firm and for the due fulfilment of his part of this agreement for the period of six months at a time in advance." And by the 13th clause: "White, Ryan and Co. agree to forward letters of credit in October, 1899, and June, 1900." I think this shows that the parties contemplated that these letters of credit would be necessary to enable Bennett to make his purchases in advance. Without them he was in fact unable to act. I think this is a distinct breach of a vital condition of the contract, and that it justifies the plaintiff coming into court and claiming damages on the whole transaction. The authorities which have been quoted on divisible and entire contracts do not seem to me applicable to this case, as the breach by defendants of their undertaking goes to the very root of the contract and not to only a subsidiary portion of it. That being my view the only remaining question is the amount of damages. The claim for £1,000 is the usual round, globular sum, while the whole transaction was only for some £1,100. A fair criterion to take will be the profit plaintiff would have made out of this contract if it had been carried out. The plaintiff has expended certain moneys in personal expenses going to India, but this would have had to come out of the profits if the contract had gone through. Plaintiff would also have had to give his time for twelve months, while as yet only six months have elapsed; he can still use the other six months for other purposes. This is a case in which substantial damages should be given. Plaintiff estimates that he would have made £340 profit out of the contract, but that is merely an estimate, and the amount can not be ascertained with mathematical precision, as so much depends upon the price of tea in India at the time plaintiff made his purchases. Looking at all the circumstances, I think £250 will be a fair amount to award. Judgment will therefore be given for the plaintiff for £250 damages and costs.

Maasdorp and Solomon, J.J., concurred.

[Plaintiff's Attorney, Mr. J. F. E. Bernard; Defendants' Attorneys, Messrs. Findlay and Tait.]

LAWRENCE V. ROMAIN AND GRONITZSKI. { 1900.
June 15th.

This was an action for declaration of rights brought by John Post Lawrence against Solomon Romain and Myer Gronitzski, trading as Romain and Gronitzski.

The plaintiff's declaration was as follows:

1. The parties reside in Cape Town; the plaintiff is the registered owner of certain landed property situated in Long-street, Cape Town, and the defendants are the registered owners of certain property situated in Long-street, adjoining the aforesaid property of the plaintiff.

2. In 1871 one Johannes Henricus Bam was the registered owner of both the aforesaid properties, and in the month of July in the said year the said Bam sold and transferred the said property now owned by the defendants subject to the following servitude, which was duly and legally registered against the title deed of the defendants, to wit: "The windows in the stable opening into the yard of the property sold to remain unobstructed, the doorway to be closed up by Bam at his expense, the fan-light over the door to remain unobstructed, Bam and his successors to have the right once a year to enter the yard or other portion of the property sold to repair his adjoining property, and likewise to enter for repair upon unforeseen circumstances." The said stables in the said servitude mentioned were situated upon the other property owned by the said J. H. Bam.

3. In 1874 the said Bam sold and transferred the said other property, upon which the said stables in the aforesaid servitude mentioned were and are situated, to the plaintiff's predecessor in title, and the said deed of transfer specially refers to the said servitude aforementioned.

4. In or about the month of December, 1899, the defendants wrongfully and unlawfully built a wall right up against the wall of the stables aforementioned belonging to the plaintiff, and completely and entirely obstructed the said windows in the said stables in the said servitude aforementioned, and have prevented the plaintiff from entering the yard or other portion of the property sold to repair his property in terms of the said servitude.

5. The plaintiff was and is entitled to have the said windows remain unobstructed and to enter the said yard as aforesaid, but the defendants refuse to remove the said obstruction, though requested to do so.

6. By reason of the said wrongful and unlawful obstruction by the defendants the plaintiff has suffered damage to the extent of £100.

The plaintiff claims: (a) An order compelling the defendants to remove the said obstruction and to allow the said windows to remain unobstructed; (b) the sum of £100 as and for damages for the said wrongful and unlawful obstruction; (c) alternative relief; (d) costs of suit.

The defendants' plea was as follows:

1. They admit paragraphs 1, 2, and 3, save that they say that one Anthony Bell is the registered owner of the property adjoining plaintiff's, but they admit that they are in occupation thereof, having purchased it from the said Bell.

2. As to paragraph 4, they admit that in or about December, 1899, they erected a store upon the premises purchased by them from the said Bell, and have built a wall adjoining plaintiff's wall and obstructing the lights therein.

3. They say that they purchased the said property and built the said wall without the knowledge of the above-mentioned servitude, and under the *bona fide* belief that they had the right so to build.

4. The plaintiff was aware of the said building operations and of the nature thereof, and did not object thereto till a considerable portion of the said wall was built; in consequence of the plaintiff's conduct in lying by as aforesaid he has now waived his right to claim that the said wall be removed, and is stopped from claiming that the same be removed unless payment of compensation be made by him to the defendants for the value of the work and labour expended by them in and upon the said building prior to the objection raised by him. The plaintiff has not tendered any sum as compensation to the defendants.

5. The defendants specially deny that they have obstructed the windows in the stable as set forth in paragraph 4; they say that the windows originally in the stables had been removed by the plaintiff prior to the erection of the wall by the defendants, and other and larger windows placed therein. The defendants specially deny that the plaintiff has the right to have the windows now placed by him in the wall adjoining defendants' property free and unobstructed, and say that by virtue of the servitude aforesaid the plaintiff has merely the right to the enjoyment of the same light as was enjoyed by his predecessor in title in 1874, at the date of the sale by the said Bam.

6. They are willing and hereby tender to allow the plaintiff the enjoyment of the same light as was enjoyed by his predecessor in 1874, to wit, that of a window fanlight in size 3 feet 6 inches by 2 feet 6 inches, above the former doorway of the said stable upon the plaintiff paying to them the sum of £550 as compensation for the work done by them before he raised any objection to the said wall.

7. Save as above they deny paragraphs 4, 5, and 6, wherefore subject to the above tender they claim that the plaintiff's claim be dismissed with costs.

For a replication to the defendants' plea the plaintiff said:

1. He admits that the property adjoining plaintiff's still stands registered in the name of the said Anthony Bell.

2. He denies the allegations in paragraph 4 thereof save that he admits that he has not tendered any sum as compensation to the defendants. He specially denies that he lay by in respect of the building of the said wall or waived his rights in the premises. He says that he duly and timeously gave notice of his rights and complained of the aforesaid obstruction of light, and that the defendants wrongfully and unlawfully and in defiance of such rights continued the obstruction and proceeded with and completed the said building. He further says that by virtue of the foregoing the defendants are entitled to no compensation at his hands.

3. He admits that he has removed the original windows affording access to the light to which he is entitled as aforesaid, but he says that he has substituted other windows in the place thereof, and occupying the same position and including the areas of the original windows. He says he is still entitled through such apertures to receive the light to which as owner of the aforesaid building he became entitled under the aforesaid servitude.

4. He says specially that such light came through three apertures, to wit, two windows and a fanlight. He admits that he is only entitled to the enjoyment of the same light as was enjoyed by his predecessors in title in 1874, and says that he claims no other or greater light in this action. Save as above he denies the allegations in paragraph 5.

5. He refuses to accept the tender set out in paragraph 6.

Save as above and save in so far as the said plea admits any of the allegations in the declaration he denies all the allegations of fact and conclusions of law in said plea, joins issue thereon with the defendants, and again prays for judgment with costs.

Mr. Howel Jones (with whom was Mr. Buchanan) for the plaintiff.

Mr. Searle, Q.C. (with whom was Mr. Graham, Q.C.), for the defendants.

In reply to the Court, counsel stated that the issues before the Court really were, which was the light in 1874, to which plaintiff was now entitled, and also whether he had waived his rights by lying by while building operations were going on.

The onus of proof being on the defendants, Mr. Searle called as his first witness

David Robertson, who said he had now retired from business. Previously he had been a coach-builder in Cape Town for many years, and then occupied the property defendants had now rebuilt. Defendant then owned the property, having bought it from Mr. Bam. Proceeding, witness pointed out on models produced the position of the windows in plaintiff's premises at that time. Witness had signed the servitude referred to, which had been duly registered. During the whole time witness was there no one came into his yard to repair plaintiff's wall. It was a stone wall and did not require repair.

Cross-examined: Witness did not notice the servitude, although he must have signed it, and accordingly when he sold to Bell he did not say anything about the servitude. Witness had since tried to tax his memory, and remembered something about the servitude only being for the time Bam was there. The old fanlight had been replaced by three large windows, but these windows would be blocked up by defendants' new buildings. He could not say if the windows were now blocked up, as he had not been there since last year, and at that time the wall was not commenced. Witness sold his property there three years ago, and had only seen the building when he was called in by Mr. Tenant.

William B. Shaw deposed that he had occupied the property now belonging to defendants for five years after Mr. Robertson

quitted it. There was only a small fanlight in the wall in question. The fanlight had iron bars, and roughly speaking, witness would say it was about 2 feet by 2 feet 6 inches. The narrow passage in question witness had kept a step-ladder in. Witness left the premises about five years ago.

John Lord said he was formerly employed by the late Mr. Bam, who owned both these properties, as a clerk. Witness lived in a portion of the property. At that time, thirty years ago, there was only the one window—the fanlight—looking into Mr. Bam's yard. There was another window beyond the end of Mr. Bam's house. Witness had left long before Mr. Bam sold, and had not been at the building since.

Cross-examined: Witness was almost sure he had not spoken to young Mr. Bam since he made his affidavit. Witness would not swear that he did not speak to Mr. Bam, jun., but so far as he could recollect he had not done so.

Solomon Romain, one of the defendants, said he bought these premises where he had now built last October. When witness bought he knew nothing whatever about this servitude. Immediately after buying witness had the back premises of the old house removed, and then as soon as he got his plans passed—about the middle of November—he commenced building. When the foundations were in witness's architect suggested making an arrangement with plaintiff about making this wall a party wall. Witness made inquiries and first heard from Mr. Davis, whom he saw in Lawrence's office, that there were considerable rights for the windows in plaintiff's wall. Previous to that witness had often seen Mr. Davis on the premises and looking through the back windows, but Mr. Davis had never interfered with them in their building operations.

The Acting Chief Justice: But you had not begun to obstruct the lights then.

Examination continued: By that time witness had spent \$150 or 175 on the building, but that was on the other walls. They stopped building for ten or eleven days after they heard about plaintiff's having considerable rights, but then on receiving a letter from their attorney resumed work. At that time the wall was ready for the roof to be put on.

Cross-examined: As witness's property was now built plaintiff could not get at his wall to repair it, with the exception of one portion of 10 feet. Witness had not yet taken transfer of the property, although transfer had been prepared. He would take transfer as soon as this dispute was settled. He could not say whether he would take transfer if they lost this case. Witness had nothing in writing to show when the work was commenced on this property, as he kept no books in connection with it. When he got the notice of the interdict the walls were already finished.

Re-examined: After that they only worked three days on the property, putting on a galvanised iron flash roof. They had to do so to save the walls, which otherwise might have fallen down, and damaged the adjoining property.

By the Court: To give the same light as before witness would have to pull down his building. What he meant to offer in his plea was substitutive light.

Frank Adler deposed that he was the foreman for the defendants on this building, and superintended the taking down of the old building and the erection of the new one. Until the building was completed witness occupied a room on the premises. When witness received notice to stop building only the foundations were completed at the side where the windows were in plaintiff's property. About ten or eleven days later they got orders to resume building, which was done, and the walls carried out up to the roof. That was done some time before Christmas.

Cross-examined: When they started to put on the roof witness left.

Mr. Searle said that was all the evidence he had.

Mr. Jones called as his first witness

Samuel Henry Davis, who said he was the manager for the plaintiff, who carried on business as Lloyds and Co., general and hydraulic engineers and general merchants. In 1895 the property was transferred to plaintiff, and in June or July, 1898, the old three-story building was pulled down and the present one, consisting of a single story, with basements erected. Before the alteration there were in the wall in question two windows and the fanlight, which were as nearly as possible in the same position as the present windows.

only the new windows were larger. At the time the alterations were made in plaintiff's property witness did not know of the servitude, the title deeds being in plaintiff's possession in London. Mr. Romain called upon witness on November 28. It was after five o'clock, and Romain had a lot of plans in his hand, which he commenced to unroll, but as witness was busy writing letters he asked him if the plans could not wait until the morning, upon which the plans were at once rolled up. Witness told Romain that plaintiff had certain rights as to lights, and advised him to see that their building did not interfere with those lights. Building was stopped for a time, and then resumed, and the windows in question blocked up. Witness's attention was first called to the encroachment on the windows on December 14. By that time the bricks had been laid about eighteen inches above the sill, but in the afternoon they had been laid three feet above the sill. Witness at once went to Mr. Findlay, and with him inspected the building. In the afternoon of the same day witness met Mr. Tennant by appointment in Mr. Findlay's office, and there a letter was read to him in which Mr. Tennant said he had advised defendants to discontinue building in the meantime. While a reply was being drafted Mr. Tennant came in, and witness told him that as holding powers for another he would do everything he could to defend that person's right. Mr. Tennant made no direct reply, but gave witness to understand that work would be stopped, and not resumed without several hours' notice to witness. Work was stopped that afternoon—a Thursday—and witness next noticed that they had begun work again on the following Monday morning, they having by that time put on an additional four feet of bricks. Witness protested against this, but work went on without intermission until the day after Christmas, when they were putting in the rafters. Witness had suffered damage through having to use electric light in the day time, besides general inconvenience to business. The room was kept as a showroom, and even the electric light would not show these goods properly to customers.

Cross-examined: Witness believed that the first time he was on the building defendants were erecting was on the afternoon

of December 14, when he went to measure the lane mentioned. If witness had the light from the windows he would not need to use the electric light.

After cross-examination, the Acting Chief Justice said that plaintiff might be entitled to certain legal rights, but it might be more advantageous to both parties to have a substitutive servitude, and he therefore asked if any agreement could be come to.

Mr. Jones said an offer had been made, of course without prejudice, but the defendants would not consent to that. Mr. Jones then read the letter, and produced the plan containing the offer, which provided for light being supplied through the roof at two places.

The Acting Chief Justice suggested that the parties should try to come to some arrangement.

Mr. Searle said with regard to the offer made by plaintiff, the defendants really thought too much was asked.

The Court then adjourned, the Acting Chief Justice expressing the hope that after the opinion the Court had expressed the parties would in the meantime come to some arrangement.

Postea (June 18).

Mr. Searle said he had been informed that no arrangement had been come to. The defendants wrote a letter containing a certain offer on Saturday, but unfortunately, owing to some fault on the part of the messenger, it was only delivered that morning.

Mr. Jones said they were ready to accept the offer made by the defendants subject to certain conditions. He might state that Mr. Davis was in the position that he had been left here as manager to Mr. Lawrence, and before the latter left he received his final instructions, whereupon the offer previously before the Court was made. If possible he would not like to absolutely consent to anything else, but he would leave the matter in the hands of the Court. Proceeding, Mr. Jones said that the defendants now offered, instead of the two areas plaintiff was willing to accept, one area, and to make it rather deeper and right down to the ground floor. Plaintiff was prepared to accept that on condition that the defendants put in the windows, as the windows plaintiff had put in were absolutely useless to him now.

Mr. Searle said he thought they ought to be able to settle the matter on these lines, as it could not be a very important matter who should put in the window.

With a view to such a settlement being arrived at, the case was further postponed.

Postea June 19.

On this matter being again called,

Mr. Jones, who appeared for the plaintiff, said that the parties had agreed to a settlement in terms of the consent paper put in. This consent paper was to the effect that the defendants would construct in and upon their property an area 12 feet 6 inches by 7 feet 6 inches right down to the ground floor, and this was to remain perfectly free and unobstructed. There were also conditions as to defendants removing the three windows plaintiff had put in and rebuilding the walls there, etc., and defendant was to pay the taxed costs of the suit.

The Court granted an order in terms of the consent paper put in, the Acting Chief Justice remarking that he thought the settlement a reasonable one.

Plaintiff's Attorneys, Messrs. Findlay and Tait; Defendant's Attorney, Mr. D. Tennant.

SUPREME COURT

[Before the Acting Chief Justice (the Hon. Mr. Justice BUCHANAN), the Hon. Mr. Justice MAASDORP, and the Hon. Mr. Justice SOLOMON.]

IN THE MATTER OF THE PETITION OF WEBSTER. { 1900
June 18th.

This was an application for an order authorising the petitioner to pass transfer of certain property.

Mr. Gardiner appeared for the petitioner, and stated that the property in question was situated in the Albert division, but transfer could not be passed owing to the absence of power of attorney from Mrs. Webster, who had an interest in the property. This power, duly sworn before a justice of the peace, it had been impossible

to obtain owing to the interruption in communication, Mrs. Webster being now in Rhodesia.

Mr. Gardiner quoted *Nieuwoudt v. Registrar of Deeds*, reported in Foord, p. 3.

Buchanan, A.C.J., pointed out that the Court had before it no authority at all from Mrs. Webster. He thought that now communication had been reopened with Bulawayo, there would be no difficulty in getting her power of attorney, and if it was not possible to get such a power of attorney signed before a justice of the peace the Court might forego that. Before, however, the Court could grant the order asked for it must have something before it.

Their lordships concurred.

IN THE ESTATE OF BRISLEY.

Mr. Nathan moved that a certain award of arbitrators be made a rule of Court, with the substitution of an amended valuation of the property, instead of that which the arbitrators had before them. He explained that the arbitrators had had before them the inventory of the estate, but a fresh appraisal had shown a difference, and it was therefore asked that the arbitrators' award should be made a rule of Court in accordance with that fresh appraisal.

Mr. Searle, Q.C., said he had been instructed to appear on behalf of the respondents to consent to those terms.

The award was made a rule of Court in terms of the consent paper, the fresh appraisal being taken as the value of the land; costs of the application to come out of the estate.

STRUBEN AND PHILLIPS V. THE COLONIAL GOVERNMENT.

Mr. Ward, for the Colonial Government, moved for leave to appeal to the Privy Council against the decision recently given in this case.

Mr. Gardiner, for the respondents, said they had no objection provided the applicants paid the costs of the application.

Mr. Ward said they would consent to that.

Buchanan, A.C.J., said that if the respondents had not consented he did not see how the Court could have granted the application, as the evidence showed that the value of the ground was nothing like £500.

The application was granted.

SOUTH AFRICAN BREWERIES, } 1900.
 LIMITED V. WYNBERG LI- } June 18th.
 CENSING COURT.

Licensing Court. Review of proceedings—Conditions of licence—Representations by original licensee—Renewal—Powers of Board—Section 47 of Act 28 of 1883.

A licence was granted on representations made by the licensee that the licensed premises would be enlarged in accordance with plans and specifications produced, but these conditions were not endorsed on the licence. On a subsequent application for a renewal of the licence by a transferee of the licensee who did not know of these conditions the Licensing Board refused the application on the report of the police authorities that the conditions as to erection of new premises on which the licence had been granted had not been fulfilled,

The Court refused to declare the proceedings irregular on these grounds.

The refusal of an application for re-opening made at a subsequent meeting of the Licensing Board after the case had been properly disposed of, is no ground for setting aside the proceedings on the ground of gross irregularity.

The Licensing Board has power to take cognizance of any facts within its own knowledge when considering an application for the granting or renewal of a licence.

This was an application to have certain proceedings of the Licensing Court held at Wynberg on March 7 set aside, on the ground of gross irregularity in the proceedings.

Mr. Searle, Q.C., appeared for the applicants.

Mr. Ward appeared for the respondents.

Mr. Searle said that at the above Licensing Court, W. Fothergill, a tenant of the applicants, applied for a renewal of the

licence for the hotel known as The Hermitage, but that the said application was in a wrongful and grossly irregular manner refused without any notice to applicant of any objection, and without hearing evidence for or on behalf of the applicant, but that the Court irregularly and unlawfully admitted the reports of the police authorities. The licence had been refused because of the non-fulfilment of certain conditions as to the erection of suitable premises for a family hotel, etc., which conditions applicant alleged he was unaware of, they not having been endorsed on the licence, while they had never been notified to him. Counsel then proceeded to read the affidavit of Mr. Hackblock, the manager of the South African Breweries, which stated that the company was started in Natal and subsequently acquired Martienssen's business in Cape Town. After detailing the proceedings at the Licensing Court when the application for renewal was refused, the affidavit went on to say that the applicants purchased the Hermitage premises from Mr. Bidewell-Edwards, broker, for £3,500, and a licence was originally granted to one of their tenants in March, 1899. The company put the premises into a state of repair and were putting up a billiard-room, when the police stopped them and said the Licensing Court expected much larger premises. They accordingly got estimates of from £5,000 to £6,000 for new buildings, but the London Board, seeing that the company's business had been seriously affected by the war, were not willing to spend so much. They also pointed out that the original licence did not contain this condition as to new buildings of the extent that was now expected. The existing premises had been placed in an efficient condition for £500, pending the decision of the Licensing Court as to a bigger hotel. No objection had been taken to the tenant Fothergill personally.

Mr. Ward read the affidavit of Mr. C. S. Nicholson, R.M. of Wynberg, and president of the Wynberg Licensing Court, who said that when the licence was first applied for in September, 1898, it was opposed by 100 householders and over 400 ladies resident in the neighbourhood. The then proprietor said it was proposed to open a first-class family hotel, and that there would be no bar or outside tap. In consequence of

these representations the licence was subsequently granted. Proceeding, Mr. Nicholson incidentally referred to the obvious attempts that were frequently made to get licences by similar representations of new and extensive premises, and said he told the applicants at the time if the representations then made were not carried out it would be looked upon by the Court as a breach of good faith, and the licence would be liable to be withdrawn. In March, 1900, the police reported that no such alterations had been made, but that an outside bar had been added, and the place had been made more like a canteen. What the police expected was a double-storied place with a verandah, and at least twenty-eight bedrooms. They, however, added a note to the effect that a liquor licence in the locality of the Hermitage was not needed.

An answering affidavit by the applicant alleged that he had no knowledge of what transpired before the Court when the licence was originally applied for, and said that the company was quite willing to erect a good first-class hotel as soon as the requirements of the neighbourhood had been ascertained.

The objections taken by the police in their report to the Licensing Court were: (1) That the conditions as to rebuilding had not been adhered to; (2) that the house was in a dilapidated state of repair; and (3) that a family hotel not having been erected, a licence was no longer required for that neighbourhood.

Mr. Searle, Q.C.: The licence was applied for in 1898, and granted without any conditions except those ordinarily endorsed. None of these conditions have been infringed. In January, 1899, a licence was again taken out. The applicant company got transfer without any notice of the conditions referred to in the Licensing Court or the promises made by the previous licensee at the time the application was made. The previous licensee undertook to convert the licensed premises into a large family hotel. The premises are in a proper state of repair. The application was refused in the Court below because the place was not a family hotel.

[Buchanan, A.C.J.: The three grounds of objection taken by the police are: (1) Premises are in bad state of repair; (2) conditions not carried into effect; (3) no necessity for a licence.]

The police report forms a history of the case. Objection (1) is now remedied: as to (2) it was the duty of the police to see that the conditions were endorsed on the licence. The licence was refused under section 52, subsection 4 of Act 20, 1883. None of the first four grounds there mentioned can be relied upon.

[Solomon, J.: If the original licensee had applied for a renewal, could a licence have been refused because of conditions which were not endorsed on the old licence?]

Section 50 has been repealed by section 5 of Act 23, 1891. The repeal affects this case neither one way nor the other. Section 48 gives the Licensing Court the widest possible power: it allows the Court to take notice of anything they may know independently of any objection raised by other persons. Here there was no person appearing to oppose the application. The objection was one taken by the Board itself. See *Barnet v. Namaqualand Licensing Court* (8 Juta, 231).

[Buchanan, A.C.J.: There the applicant did not request an adjournment: he merely asked for a reopening of an adjourned meeting.]

I submit it is the same thing. *Barnet's* case covers this case. It was decided before Act 25, 1891. Section 50 gave a kind of vested interest to licensees of three years' standing. The repeal gave the Court further and greater power. At the adjourned meeting the Court would not hear the present applicant.

Licences should not be granted upon verbal undertakings.

Licences are freely transferred: the result would be many cases of fraud. The Licensing Court did not carry out the terms of section 48. They would not hear the matter thoroughly. They acted irregularly.

Mr. Ward: *Barnet's* case is against the applicant: it is on all fours with this case so far as the notice was concerned. He had notice of the objections, and was represented by counsel at the Licensing Court. He can't now be heard to say there was irregularity. See section 38, section 76, subsection 3. The grounds of repeal are subsections 4 and 5 of section 52. Further, no licensed house is necessary.

Section 50 was repealed, and therefore any authority based on it by which a vested interest may be said to exist has been repealed. A condition of this kind need not be endorsed on a licence. Even if it is necessary, the Governor can at any time order the Licensing Court to rectify the omission.

The Licensing Court was acting within its powers. The applicant admits that he will not carry out the conditions, because he is not bound by them.

Mr. Searle in reply.

Buchanan, A.C.J., said: This is an application for a review of the proceedings of the Wynberg Licensing Court, on the ground of gross irregularity, and to set aside their decision refusing to renew a licence for the Hermitage Hotel. This is not a case where objection was taken by the ratepayers, but the Licensing Court acted on their own knowledge. A licence was originally granted in 1896, no premises for the sale of liquor previously existing in that neighbourhood. Some opposition was made at the time, and the then owner of the property, to induce the Board to grant the application, produced elaborate plans and specifications for a new building he intended to erect, intended for a family hotel, for which he applied for a licence. Ultimately the licence was granted, the only endorsement on it being to the effect that there should be no tap on the premises. From the affidavit of Mr. Nicholson, the Magistrate, who was President of the Court, and also from the police report, it is clear that at the time an intimation was given that it would be considered a breach of good faith, and that the licence would be withdrawn unless the representations made with regard to the erection of suitable premises for a family hotel were carried out. If the then applicant had retained possession of the property and again gone before the Court there is very little question that, on it being shown that he had not carried out the representations made by him, there would be good grounds for refusing the renewal. In this case, however, the licence was transferred during the twelve months, and the present holders object to being bound by any representations made by the original applicant, seeing that no conditions were endorsed on the licence itself. The police reported to the Licensing Court the failure to erect new premises, and also made complaints as to the dilapidated condition of the building, and to the fact that though the licence did not allow a tap, there had been an outer door opened leading to the bar to facilitate the supply of liquor to people not residing on the premises. These objections made on the part of the police were brought to the notice of the applicant, and he was represented by counsel before the Court, and made answer to the complaints. The Licensing Court, acting on its own knowledge, refused to re-

new the licence. It is not very clearly stated on the affidavits filed, but one ground influencing the decision of the Court seemed to be that as no family hotel had been established, the requirements of the neighbourhood did not call for any premises to be licensed. This decision they were entitled to come to on their own initiative under section 47 of the Act. If when they came to this conclusion and informed the applicants thereof, their counsel had applied for a postponement to give them an opportunity of meeting the objection, the Licensing Court would have been bound to have given time, but no request for a postponement was made, and the application was dealt with and settled. A request to reopen the question was made and refused at an adjourned meeting of the Court, but this was a very different thing from applying for a postponement for the purpose of bringing evidence to meet the objection. There has not been any gross irregularity shown which would justify this Court in setting aside the proceedings of the Licensing Court. The applicants based their case upon the ground that the premises were licensed, that on that account they had paid a large sum for them, and that the value of the premises would be deteriorated by refusing the licence, but that is a consideration which does not apply under the Licensing Act of the Cape Colony. The premises were not licensed; the person was, and unless he complied with the conditions of his licence, it might be withdrawn. In the absence of gross irregularity the application will be refused, with costs.

Application refused accordingly, with costs. Maasdorp and Solomon, J.J., concurred.

[Applicant's Attorneys, Messrs. Van Zyl and Buissine; Respondent's Attorneys, Messrs. J. and H. Reid and Nephew.]

COHEN V. GROMAN.

This was an application by the defendant for an order setting aside a judgment obtained against him by default.

Mr. Buchanan appeared for the applicant.

Mr. Searle, Q.C. (with whom was Mr. P. S. Jones), appeared for the respondent (plaintiff in the action).

The petition set forth that the reason for defendant's default of appearance was that he could not read English, and when he received the letter the sheriff's officer spoke very fast, and he understood that it was a demand for money for bricks, otherwise he would have put in an appearance, as he had a good defence. He alleged that the in-

debtedness had arisen through his standing guarantee for the purchase of certain 50,000 bricks, and for these judgment was given against him for £83. He alleged, however, that only 11,000 bricks had been delivered.

Answering affidavits were read, in one of which the sheriff's officer stated that he had clearly explained to applicant the nature of the summons.

Buchanan, A.C.J., in giving judgment, said that the plaintiff in due form took out a summons which was served upon defendant. The latter failed to enter an appearance, and the plaintiff was thereupon entitled to come into court and obtain judgment by default. Apparently, however, the defendant had a good defence on the merits of the case, and the Court would therefore grant leave for the case to be reopened, but the defendant must pay the costs incurred by plaintiff in coming into court to obtain judgment. The costs of this application would be costs in the cause.

SUPREME COURT

[Before the Acting Chief Justice (the Hon. Mr. Justice BUCHANAN), the Hon. Mr. Justice MAASDORP, and the Hon. Mr. Justice SOLOMON.]

IN THE INSOLVENT ESTATE OF { 1900.
JAN JANSE BOLTMAN. { June 19th.

Insolvency—Ordinance 6 of 1843,
section 127—Execution.

A writ against an unrehabilitated insolvent for the deficiency in his estate does not issue under the 127th section of the Insolvent Ordinance as a matter of course, but the Court must first be satisfied that there are reasonable grounds for believing there are assets belonging to the insolvent capable of satisfying the writ, wholly or in part.

This was an application for leave to issue execution against the insolvent.

Mr. Gardiner appeared for the applicant.

Mr. Molteno appeared for the respondent.

The applicant was Rudolph Seydell, who stated that on April 26, 1898, the respondent's estate was surrendered, and applicant was the sole creditor who proved, he lodging a claim for £121 5s. 6d. He was appointed trustee, but got nothing out of the estate, having to contribute a further sum of £2 16s. 8d. towards the deficiency. The applicant stated that the insolvent was now possessed of live-stock and movables to the value of £149, and that there was also a promissory note due to him for £31. Under the 127th section of the Insolvency Ordinance applicant now wished execution to issue against this property and promissory note, the insolvent not having been rehabilitated.

In his answering affidavits the respondent showed that he was not possessed of the property specified in the schedule annexed to the petition.

Mr. Gardiner referred to section 127 of Act 6 of 1843.

[Buchanan, A.C.J.: Are there reasonable grounds for believing there are assets?]

He had a large amount of property; this he appears to have given away or exchanged. We can show there is some property; and there is reason to suppose there is other property; we are entitled to the writ.

Mr. Molteno was not called upon.

Buchanan, A.C.J.: The 127th section of the Insolvent Ordinance requires that the Court shall be satisfied not only that the respondent is an unrehabilitated insolvent and that there is a deficiency in his estate, but also that there are reasonable grounds for believing that there were assets in the insolvent's estate to satisfy the writ wholly or in part. The writ did not issue as a matter of course. In this case the respondent has no doubt been in possession of some property, but he has satisfactorily accounted for the articles specified. No reasonable grounds have been shown why a writ should be issued, and the application will therefore be refused with costs.

Maasdorp and Solomon, J.J., concurred.

[Applicant's Attorneys, Messrs. Fairbridge, Arderne and Lawton; Respondent's Attorneys, Messrs. Walker and Jacobsohn.]

INGRAM V. THE GRAAFF-REINET { 1900.
LICENSING COURT. { June 19th

Licensing Court - Application to set aside proceedings - Irregularity - Qualification of members - Section 28 of Act 28 of 1893.

An application to set aside the proceedings of a Licensing Court, on the ground that a member of one of the municipalities constituting the Court who had been elected to represent that municipality in the absence on private business of the Mayor or Chairman was not allowed to take his seat, was refused on the ground that the 28th section did not give a municipality power to appoint a substitute when the Mayor or Chairman was "absent," but only when he was under some "disqualification."

This was an application for an order setting aside certain proceedings in connection with the refusal of the granting of the renewal of the licence held by applicant and for an order to restore the said licence.

Mr. Searle, Q.C., appeared for the applicant, Charles H. Ingram.

Mr. Ward appeared for the Licensing Court.

The affidavit of the applicant set forth that he was the owner of a certain property, called the Argyle Hotel, at Adendaal, in the district of Graaff-Reinet, having purchased the property and had the licence transferred to him in September, 1899. The premises had been licensed for forty years. The affidavit stated that on a renewal of the licence being applied for at the Graaff-Reinet Licensing Court on March 7 last, the chairman (the Resident Magistrate) stated that the requirements of the law had been complied with, and that there was no complaint against applicant, while the police report was also favourable. One of the members of the Municipality of Adendaal, Mr. Jansen, had been duly appointed by the Municipality to attend in place of the Mayor, who was unable to be present, but he was not allowed to take his seat, although he afterwards spoke in favour of the licence being granted. At the hearing

of the application an objection, signed by certain voters in the Municipality, and presented by the Dutch Reformed Church minister there, was lodged against the renewal of the licence. The objection was not received owing to its not being signed by one-half of the voters in the Municipality, but the Dutch Reformed Church minister was allowed to address the Court, and made a strong appeal against the application. After consideration the licence was refused by a majority of four to three. Affidavits as to the orderly manner in which the house had been conducted, and others from members of the Licensing Board, who had voted in support of the application, were filed, as were affidavits regarding the appointment of Jansen as a member of the Licensing Court in place of the chairman, who appeared from the affidavits to have been unable to attend owing to his having to be absent on some business of his own.

For the respondents, affidavits of the members of the Licensing Court who voted against the granting of the application were read, and were generally to the effect that a licence was not required at Adendaal, it being only three miles distant from Graaff-Reinet, while there was another licensed place some miles farther on the road.

Mr. Searle, Q.C.: The ground of the objection was the refusal to allow Mr. Jansen to take a seat on the Board in place of the Mayor of the Municipality of Adendaal. The section (28) of Act 28 of 1893 providing for the appointment of members of the Board, states, *inter alia*, that the Municipalities within the district should be represented on the Board by their chairman or Mayor, but in case of the Mayor or chairman being disqualified, then the Council may appoint another of their number to take his place. The section as to disqualification refers to those who have any connection with licensed houses. It is probable that the Chairman was disqualified, and therefore Mr. Jansen should have been allowed to take his seat, when the result would probably have been different, as the chairman, who had voted for the granting of the application, had a casting vote.

Mr. Ward was not called upon.

Buchanan, A.C.J.: The Licensing Court for the division of Graaff-Reinet assembled on the 7th March last to hear applications for licences. There were certain members

present as to whose right to sit there could be no doubt, but there was also one person, viz., Mr. Jansen, who claimed a seat as representing the Municipality of Adendaal. The 28th section of the Licensing Act, No. 28 of 1883, states of whom the Court shall consist, and among such members is the Mayor or Chairman of any and each Municipality within the district. Adendaal is a Municipality within the district of Graaff-Reinet, but Mr. Jansen, who was deputed to attend, was not the Mayor or Chairman. This section of the Act also provides that in case the Mayor or Chairman is disqualified under the provisions of the Act, the Council or Commissioners can elect one of their number to attend instead. Here, however, the record shows, not that the Chairman was disqualified, but that he could not attend owing to his having to be absent on his own business affairs in the country. Now being absent on his own business was no disqualification under the provisions of the Act, and is not a ground for the appointment of another Commissioner to attend instead of the Chairman. It might be reasonable to amend the law, so that when the Mayor or Chairman is unable to attend, the Council can elect someone in his place, but that is not the law at present, and it is only in case of disqualification of the Mayor or Chairman that the Council can appoint a substitute. The application is founded wholly upon this point, for it is said, if Mr. Jansen had taken his seat, the applicant's licence would have been granted, instead of being refused. The application must fail, as the Act gives the Licensing Court discretion in these matters, and it cannot be said that the members present wrongfully exercised that discretion. The application must therefore be refused, with costs.

Maasdorp and Solomon, J.J., concurred.

[Applicant's Attorneys, Messrs. Dempers and Van Ryneveld; Defendants' Attorneys, Messrs. J. and H. Reid and Nephew.]

QUEEN VS. GILDENHUYS. } 1900.
June 19th.

Martial law—Bail—Copy of proceedings before military—Proclamation evidence of necessity.

An application for an order on the military authorities to admit applicant to bail, to deliver to him copies of the evidence taken against him, to pay to him certain money being the value of a wagon and

oxen belonging to him, and to allow him leave to dispose of his stock by sale,

Refused, because as long as martial law exists in any one district, and it is not shown that there is no necessity for it, the Court will not interfere and grant relief.

The proclamation of martial law is strong "prima facie" evidence of the necessity for such proclamation, and it would require very strong evidence to justify the Court in going behind the proclamation.

By applying for bail instead of a writ of Habeas corpus applicant recognised the validity of the proceedings before the military.

—
This was an application of Dirk Petrus Lourens Gildenhuys, a farmer, residing at Oudefontein, in the district of Albert, for orders upon the military authorities to show cause why he should not be admitted to bail, and for copies of certain proceedings in an inquiry held on April 18; also an order for leave to dispose of his stock, and for the payment out to him of certain money, the value of a wagon and oxen belonging to him. The petition set forth that Gildenhuys was arrested in April 1 and lodged in gaol at Burghersdorp on a charge of high treason; that on April 18 certain proceedings, termed an inquiry, were held before the Resident Magistrate at Burghersdorp; that petitioner was deprived of legal assistance, for which reason he declined to cross-examine any of the witnesses for the defence. So far as petitioner could recollect the gist of the evidence tendered was that when on November 20 last the Republican forces entered and occupied Venterstad, the petitioner joined in with the crowd in front of the Court-house in singing the National Anthem of the Orange Free State, and in the cheering which followed, and that he also on the same day presided at a meeting of British subjects held in the Court-room at Venterstad, where a committee was chosen to co-operate with the Republicans, and further, that at this meeting the petitioner incited those persons to commit deeds of a disloyal character. The petitioner had requested the military authorities to allow him out on bail, but this had been refused, and they had also refused to supply him with a copy of the evidence taken at the inquiry.

Proceeding, petition r stated that under the military regulations in the district of Albert persons arrested as rebels were not allowed to sell any movable property, with the exception of perishables. Eggs and butter were treated as perishables, but wool and grain were not, and as petitioner was a stock and grain farmer, and had no perishables, in the sense of the military regulations, he could not raise funds to support his family or for his defence. He further stated that on April 30 the military authorities requisitioned his wagon and ten oxen at a totally inadequate price, viz., £40 for the wagon and £10 each for the oxen, while petitioner contended that the wagon was worth £60 and the oxen £15 each. The military authorities further refused to pay out any portion whatever of the money, and petitioner could not carry on his farming operations, and suffered damage. Wherefore the petitioner prayed for orders calling upon the military authorities to show cause (a) why he should not be liberated on bail under such terms as their lordships might determine; (b) why copies of the evidence tendered as aforesaid against petitioner should not be supplied to him; (c) for an order allowing him to sell his stock; (d) that the full value of the oxen and wagons be paid to him, or that in the alternative he should be allowed to receive the purchase sum of £40 for the wagon and £10 each for each ox under protest, and (e) alternative relief.

Mr. Burton (for applicant): It is clear that applicant is a British subject. He complains that he was arrested on the 1st April, 1900, for high treason. An inquiry was held on the 18th, and without any committal, he has been kept in gaol since then. The allegations in applicant's petition are clear and definite. He was allowed no legal assistance at the inquiry. The answer of the Crown to our allegations is simply that martial law exists; there is no denial of our allegations. This case differs from *Fourie's* case very materially in that no active operations are going on in Burghersdorp, while in *Fourie's* case, fighting and rebellion were going on at the time of his arrest and trial. In *Fourie's* case it was held that the Court could take judicial cognizance of the state of affairs of the district. There has been no active rebellion for months past; the district has been peaceable for the last two or three months. In *Fourie's* case it was held that there was a *de facto* suspension of the civil authority, whereas here the officials are performing their functions.

The main ground of the decision in *Fourie's* case was paramount necessity, which does not exist here; is there any paramount necessity to suppress rebellion here? The applicant has not even been tried.

[Solomon, J.: You are not applying for release. By applying for bail, you are recognising the proceedings of the military.]

The applicant asks for general relief on such terms as may seem fit to the Court. The refusal of bail is illegal. The Court should consider this application as one for release on bail or for other relief. The application is broad enough for that. The embargo levied on his property is illegal.

[Solomon, J.: Is it an embargo?]

They have prevented him from alienating.

[Solomon, J.: They have only interdicted him from alienating.]

They have used force to prevent him from dealing with his property.

[Solomon, J.: Is that alleged in the petition?]

They prevent him from selling anything except perishables.

[Solomon, J.: Do you ask for the regulation to be set aside?]

The regulation is operative. The statement must mean that he is actually prevented from dealing with the property. We ask the Court to declare it illegal. There is no paramount necessity. See the judgments of Maasdorp and Solomon, J.J., in *Fourie's* case, reading: "I am not . . . proclamation," and "It is unnecessary to consider . . . martial law." The Court did not in *Fourie's* case deny that it had power to interfere: the Court merely exercised its discretion. The proclamation means nothing; it simply notifies that such and such a state of affairs exists: the Court is not bound to take it as conclusive.

[Maasdorp, J.: It is very strong evidence; you must show that the proclamation is wrong.]

The proclamation is not evidence of necessity. The military authorities must allege necessity and show it.

Wheaton's International Law (3 Edition, p. 470), reading: "Martial law is founded on paramount necessity . . . insurrection." The Court can exercise its jurisdiction. The only question is "Is it advisable?"

Mr. Ward: Prayer (d) is withdrawn. (c) can't be dealt with on motion, an action must be brought. As to (b), copies of the evidence will be given before the trial in ample time. The only question re-

maining is that of bail. Can this Court grant bail at all in this case? See Ordinance No. 40 of 1828.

[Buchanan, A.C.J.: That Ordinance only refers to magisterial matters.]

That is the only act in which bail is allowed to be given. There is no precedent in England or Scotland for an application for bail in a case of this kind.

Furleigh v. Newnham (2 Douglass, p. 419), and *Jones v. Danvers*; 5 Meeson and Welsby, 234) are cases in which the Courts have declined to grant bail or interfere with prisoners in the hands of the military. The proclamation of martial law suspends the power of Courts to grant *habeas corpus*. The presence of the Magistrate in the district is no evidence that the civil courts are exercising jurisdiction. The Magistrate is not acting in his capacity as magistrate. He is instructed by the military. The proclamation is issued by the Executive on advice from the military, and is presumptive evidence of necessity which applicant must rebut.

Mr. Burton in reply.

In *Fourie's* case Maasdorp and Solomon, J.J., were not prepared to accept the proclamation as evidence of necessity. I don't deny the original justification for the proclamation, but how long is it to stand as a bar to any application such as this?

Ordinance 40 of 1828 does not apply here.

The Court refused the application.

Buchanan, A.C.J., in giving judgment, said: When war broke out between Her Majesty's forces and the Republics the district of Albert in this colony was placed under martial law. This district was invaded by the enemies of the Queen, who captured the town of Venterstad; and the petitioner says that he has been charged with high treason, in that he encouraged the entrance of the forces, cheered them, and afterwards presided at a meeting held the same day for the purpose of arranging co-operation with the Republican authorities. The military authorities having charge of the district had on April 1 arrested the petitioner on a charge of high treason for his conduct in encouraging, receiving, and aiding the enemies of the Queen. Now that district is still under military jurisdiction, martial law still prevailing there. At the time martial law was proclaimed, there were good grounds for its proclamation. A military commandant is in charge of the district, and there has been nothing brought before the Court, except the opinion of the attorney engaged

for the defence, to show that martial law was not still necessary in that district. Now it appears that the military authorities instituted an inquiry into petitioner's conduct, and the petitioner recognises these proceedings, because he now comes to Court to give him an order upon the military authorities so to do. To grant such an order would be assuming a control over military operations and procedure which, I do not think the Court should attempt to exercise, for the Court cannot recognise military proceedings or military inquiries, or any action in that way which the military authorities do under martial law, as they do so on their own responsibility. An inquiry was held, by an official instructed by the military authorities, and the applicant wishes to have a copy of the proceedings, but here again we cannot grant such an order without recognising the validity of the action taken by the military, and as I said before, I do not think this Court should recognise military tribunals in that way. This disposes of the first two grounds of objection. Then there is an application with regard to the military regulations proclaimed in the district prohibiting the disposal of certain property.

The applicant says that the prohibition under these regulations affects him in disposing of his property. Well, we are not now able to decide on the validity of these military regulations, and we cannot, I think, as long as the military have control of that district under martial law, interfere with whatever orders they may consider it necessary to enforce in the district. There is a fourth prayer in the petition to the effect that the military authorities have requisitioned a wagon and oxen for transport purposes, and have fixed a price for compensation, but that this compensation has not yet been paid, and the applicant wishes the Court to compel the military authorities to pay this amount of compensation. The learned counsel who appears for the petitioner sees that he cannot press this prayer, and consequently it has been withdrawn. There remain then three prayers only to be dealt with, viz., application for bail, and for a copy of the proceedings at the inquiry, and for an order cancelling part of the military regulations for the district. As I said before, in my opinion, as long as martial law exists, as it has done and now does in this district, and inasmuch as no reason has been shown that the necessity for martial law does not exist, I do not think the Court ought to interfere. As the matter has recently been fully dealt with in *Fourie's*

case, it is unnecessary for the Court now to go so fully into the question of martial law. In my opinion, no order should be made.

Mr. Justice Maasdorp concurred.

Mr. Justice Solomon also concurred, and said that in considering this matter the Court must confine itself strictly to the application. He pointed out that, in the first place, this was not an application for a writ of Habeas Corpus for the release of the petitioner, because if it had been, other questions might have had to be considered, which they did not require to consider at present. Further, the petitioner had recognised the military proceedings, and did not in any way say that he had been illegally detained. His lordship quite agreed that in an application of that sort it was not in their province to interfere with the discretion of the military authorities. The same reasons applied with regard to the second prayer, for the copy of the evidence, although it was difficult to understand why the military should refuse copies of the evidence against petitioner. Still it was a matter purely within their discretion, and he did not think the Court would be justified in granting the prayer. With regard to the prohibition of the sale of movables, his lordship pointed out that that was a general regulation proclaimed by the military authorities, and applied to all persons in the same position. As to the fourth prayer, which had been withdrawn, it was admitted by the petitioner that the wagon and oxen were required for military purposes. As to martial law, there was not sufficient evidence in the affidavits before the Court to justify them in coming to the conclusion that martial law had ceased to exist in this district, and that the proclamation should be withdrawn. The proclamation of martial law was strong *prima facie* evidence of the necessity for such proclamation, and surely something much stronger than the mere affidavit of an attorney living in Cape Town, saying that the district was now in a peaceable condition, was required to show that the necessity for martial law had ceased to exist. He thought strong evidence would be required to justify the Court in going behind the proclamation.

With regard to the question of costs, the Acting Chief Justice said that in a case of this kind no order as to costs should be given.

[Applicant's Attorney, Mr. J. J. Michau; Attorneys for the Crown, Messrs. J. and H. Reid and Nephew.]

QUEEN V. SMIT.

{ 1903.
June 19th.

Appeal—Theft—Military occupation
—Acts of enemy.

During the occupation of Burghersdorp, by the enemy two Orange Free State burghers acting in an irresponsible manner, and not acting under any military control, stole certain goods, the property of the Colonial Government. These goods they handed to a British subject who buried them. The latter was convicted of the crime of receiving stolen goods well knowing them to be stolen. On appeal, the conviction was sustained.

This was an appeal from a decision of the Resident Magistrate of the district of Albert in a case in which the appellant was charged with having received stolen property well knowing the same to have been stolen. The goods included lamps, a chair, etc., the property of the Colonial Government, having been taken from Albert Junction during the occupation of the district by the Free State forces. The preliminary examination was held at Burghersdorp in the month of April last, and afterwards the papers were sent to the Solicitor-General. The case was remitted by the Solicitor-General to the Magistrate, and after evidence had been led for the defence, accused was found guilty, and a fine of £30, with the alternative of thirty days' imprisonment imposed.

For the prosecution a Basuto, named Jonas, who had been in the employ of the accused, deposed to seeing the goods in the accused's house in the early part of January and afterwards. Accused told witness he had buried the things, and that he (witness) must say nothing about it. Witness had not seen any Free State burghers with a cart at the farm.—Corporal Stubbs, of the Cape Police, deposed to having gone to the farm to make inquiries as to the goods, and that at first accused denied all knowledge of them. However, on being confronted with the natives, he said that the latter had buried the goods. Afterwards he said that two bur-

ghers of the Free State, J. van Straat and Barend de Wet, had brought the goods to the farm, and asked him to hide them until they could take them away. Subsequently he pointed out the spot where the goods were buried.—Evidence was given as to the articles having been at Albert Junction, and that the goods had been brought to the farm by the two Free Staters named, one P. J. Smit saying that he had hired his buggy to the men to take the goods. The defence taken up was that under International Law the taking of the goods was not a theft, the enemy being in occupation of the district, and that therefore accused could not be charged with the crime of receiving stolen goods.—The Magistrate, however, held that in this case the act of two irresponsible persons wandering about taking what they could pick up was theft. He found the accused guilty of the charge against him, and imposed sentence mentioned.

Mr. Molteno appeared for the appellant.

Mr. Ward appeared for the Crown.

Mr. Molteno: The Civil Courts have no jurisdiction to try persons in the position of burghers of the Free State. The war made these persons citizens of one State (Free State) and enemies of England.

The acts of the enemy are not crimes against the municipal law; they are only hostile acts. An international relationship exists between the Crown and the accused, but no municipal relationship. *Inter arma leges silent.*

The members of a hostile force cannot commit a crime in this colony during the continuance of hostilities. Such an offender can only be dealt with by the military authorities.

[Solomon, J.: Are not such wanton acts as child murder crimes under these circumstances?]

The crime here must either be a military offence against his own Government, or it must be dealt with as a breach of international principles. The municipal relationship between accused and the Crown is at an end. It is not even necessary to go as far as that. The enemy was in occupation of the place at the time the goods were taken by members of the Boer force. The effective occupation vested all the movable property of the Crown in the occupying force.

[Solomon, J.: But what has that to do with our own subjects?]

He is charged with receiving stolen goods, therefore if I can show that no crime of theft has been committed, he cannot be guilty of the crime laid to his charge.

[Maasdorp, J.: But he might have been convicted of theft.]

He is not charged with theft. The goods vested in the persons who took them.

[Buchanan, A.C.J.: You say that it is so with regard to Government property. What of private property?]

The Orange Free State could have passed a good title in the goods to neutrals. See *Wheaton's Private International Law*, pp. 466-468.

[Solomon, J.: Supposing the property did vest in the O.F.S. Government, was there no theft by the two members of the Federal force? The property did not vest in the two men who handed it to prisoner.]

See *Risley on the Law of War*, pp. 136, 137, 58, 59, 62.

[Solomon, J.: Did these two burghers capture this property on behalf of their State?]

Yes; most distinctly so.

[Solomon, J.: Does the evidence show they did not take it for themselves? The Magistrate finds they took it as marauders.]

The capturing State may make any regulations they please as regards loot.

[Solomon, J.: You must show that the property was captured on behalf of the State.]

The point is that the property was divested entirely from the Colonial Government; there was no property in the Crown.

[Solomon, J.: It does not matter to whom it belonged, so long as it was stolen.]

Upon recapture, this property might at most revert to the Colonial Government. These men belonged to a hostile force; the only Court which could try them in the event of their committing murder would be a military court. If the accused goes back to the commando, and he is not punished there, then nobody can punish him. If we capture him the military court alone can punish him. The Attorney-General would not indict any prisoner of war for any offence committed in the Colony during hostilities. The military courts would punish him. All State property at the time of the charge had been divested from the Crown. It might perhaps have been better had the charge been theft. The burghers committed no theft: it was their duty to take the property. They committed no crime against the Crown, therefore the conviction must be quashed.

Mr. Ward: An invading army can take movables, but they must do so under proper military authority. Until movables are taken in this way the Crown does not lose its property in them. Here the men were acting by and for themselves: there is no evidence to show they were acting for the Federal army nor that they were acting with the army. The property must be taken for sustenance of the army or the crippling of the enemy: this was not their object here, because they actually gave the property to the accused, the enemies of the invaders. They were acting in their own private interests. Even assume that they were soldiers, could they take A's property and give it to B, A and I being enemies?

An offence is not less an offence because committed by a soldier. *Manual of Military Law* (Chapter xiv.). If our courts were in active operation at the time of the offence these burghers could have been tried and convicted. It is not necessary to convict A of theft of X before B can be convicted of receiving X.

Mr. Molteno in reply.

This is not a case of pillage. If these burghers had been caught the military courts, and not the civil courts, would have dealt with them.

[Buchanan, A.C.J.: If there had been an Orange Free State magistrate there, would he have convicted them for theft?]

They would have gone before the Krygsraad and not before the Landdrost. They could have been charged with dealing with the enemy and not theft.

Buchanan, A.C.J.: The accused, Erasmus Jacobus Smit, was convicted before the Resident Magistrate at Burghersdorp of the crime of receiving stolen goods, knowing the same to have been stolen, and was sentenced to pay a fine of £30 or in default to undergo six weeks' imprisonment. The charge preferred against him was that some person or persons unknown to the prosecution stole certain articles belonging to the Colonial Government, and that these articles were afterwards found in the possession of Smit, who had received the stolen property knowing it to have been stolen. The Magistrate who tried this case makes it quite clear in his reasons that this property was taken by two men who were Free State burghers, but he says they were men wandering about the country in an irresponsible manner, not under any military control, and as such took this property without any authority, and thus committed the crime of theft, and

that the accused, knowing the property had been so taken, in receiving the property and converting it to his own use committed the crime of receiving stolen property, knowing it to have been stolen. The evidence shows that a native who had seen the accused burying certain articles on the farm gave information to the police. When the latter went out to the farm to make inquiries as to the articles the accused at first denied any knowledge of them, but when confronted with the native he said that it was the native who had buried them. Unfortunately for prisoner, later on his own son admitted he had buried the articles on the direction of accused; and another Smit, who says he is no relative, but knows the parties well, tells us that one Barend de Wet came to the witness and hired a buggy to take the articles to Erasmus Smit, the accused. Mrs. Smit, the accused's wife, gave evidence as to the two Free Staters, Van Straat and De Wet, coming to the house with the articles, and of her objections at first to receive them, upon which, apparently to get over her scruples, they offered her a lamp as a present, and subsequently the rest of the property was left. The question is, does this evidence justify the conviction by the Magistrate? In my opinion it does. It has been contended that because this part of the Colony was invaded by the Free State forces and the persons who had taken this property were members of these forces, that therefore there could be no theft. I quite admit that International Law may recognise the right to take by force property belonging either to the opposing Government or to individuals by a military force duly organised and under proper control, but I fail to see that war justifies two persons wandering about the country taking for themselves whatever they can pick up. It is not an act of war, not an act of occupation, and not taking property for the benefit of their Government. As to the question whether or not the prisoner knew the goods to be stolen, there is the evidence of prisoner's wife. It is said that the prisoner did not conceal the articles. He did not conceal them at the time, as there then was no chance of his being found in possession, but as soon as there was a possibility of his being found in possession, he took the articles and buried them. I agree with the Magistrate's decision that taking the property in the manner disclosed by the facts by irresponsible people in this way is theft. The prisoner can only

justify his position by showing that the goods came into his possession innocently. Whatever this Court might have done in the first instance, I think, the Magistrate having evidence before him to justify a conviction, the appeal must be dismissed.

Maasdorp, J., concurred.

Solomon, J., said: Mr. Molteno in his argument laid down the very broad proposition of law that when any districts are occupied by the enemy no crime can be committed by any member who belongs to the enemy's force, and if such a proposition could be maintained he would no doubt have succeeded in his appeal, but I can not see how such a proposition could be established. Taking the case of a member of the enemy's forces knocking out the brains of a child or committing criminal assault upon a woman, is it to be said that for such a crime the person committing it is not to be answerable? The question does not arise by what Court the person should be tried, whether by this Court or by any Court, but how can it be said that such an act does not constitute a crime? In my opinion it does constitute a crime, no matter what Court should try it. In the present case I hold that the taking of the goods by those two burghers constituted the crime of theft. I can quite understand the proposition that property taken by the enemy's forces in the prosecution of military operations, or even the property taken on behalf of the military force which was in occupation of the district, would not constitute a crime, but that is a very different case from the present. Here the whole circumstances show that the property was taken by these persons for their own private purposes, for their own private gain. It is not necessary for me to detail the circumstances, but I think that upon the evidence before him the Magistrate was justified in coming to the conclusion he did, and that these persons having committed the crime of theft, the prisoner in receiving the goods from them, knowing them to have been stolen, was guilty of the crime with which he was charged.

[Appellant's Attorneys, Messrs. Walker and Jacobsohn.]

SUPREME COURT

[before the Acting Chief Justice (the Hon. Mr. Justice BUCHANAN), the Hon. Mr. Justice MAASDORP, and the Hon. Mr. Justice SOLOMON.]

MTEKISI V. E. C. WRIGHT. { 1900.
June 20th.

Transkei—Hut-tax—Native law.

When in default of payment of hut-tax in a native territory property is summarily seized by virtue of Proclamation No. 110 of 1879, such property must be that of the debtor, as the law of the Colony, and not native law, is applicable to proceedings between the Government and natives.

This was an appeal from a decision of the Resident Magistrate for the district of Idutywa, in a case in which Mtekisi, of Cizela, sued Edwin Cromwell Wright for the sum of £5, being the value of five goats. It appeared that two younger brothers of the appellant were in arrear with their tax, and as they lived in appellant's kraal the messenger duly authorised under the Proclamation 9 of 1894 seized five goats belonging to appellant, afterwards giving them to Wright for safe keeping. Mtekisi brought an action in the Court of the Resident Magistrate of Idutywa, and after hearing evidence the Magistrate gave absolution from the instance with costs. Against this judgment the present appeal was made.

The Magistrate's reasons for his judgment were as follows: The question in this case is whether the defendant had rightful possession of the goats. The five goats were seized by a messenger duly authorised under the provision of section 1 of Proclamation No. 9 of the 5th of January, 1894, and were handed over to Wright (who herds such stock) for safe keeping. The tax for which the stock was seized was due by Kivintini and Yalani, both younger brothers of the plaintiff, who reside at plaintiff's kraal, and who are therefore according to Kafir custom under his guardianship, notwithstanding that they are married and have their own huts. The responsibility of the head

of a kraal for the liabilities of members of his family were set forth in the decision of the Court of Appeal given at Butterworth on the 29th July, 1897, in the case of *Peter Klass v. Mgweqe*, which was as follows: "It is a well-known principle of native law that the head of a kraal is responsible for penalties incurred by members of that kraal, provided those committing them are not in a position to satisfy judgments recorded against them. The principle is so thoroughly understood by all natives that the Court cannot think they are ignorant of it. In this case the uncle of the defendant accepted the guardianship of the nephew, well knowing the liability that position entailed upon him, from which he was doubtless fully aware he might have released himself by compelling his nephew to establish a kraal of his own. The question as to whether the father or uncle is liable in such cases is summed up by the simple answer that the legal guardian under whom a ward is living is liable irrespective of the degree of relationship subsisting between them. This Court therefore holds that the seizure of the uncle's property was in accordance with native law, and the appeal is allowed with costs, the above ruling not to apply to shop debts, cases which do not arise out of native law." Two of the best authorities in the Native Territories on Native Law sat as assessors when that decision was given—only shop debts not specified as not coming within the ruling then laid down. It has always been the custom throughout the Territories to hold the stock of the head of the kraal liable to seizure for tax in arrear by relatives residing with him. The natives fully understand this, for they view the Government as the supreme chief, having absolute and indisputable power to make an indiscriminate levy on the stock of a kraal for debts due to him by members of the kraal. The reasons for this are good and well known to those acquainted with native custom. I therefore presume that seizure for hut-tax was expressly not mentioned in the concluding paragraph of the above-quoted decision. No native in arrear with his taxes, and residing with his father, uncle, or elder brother, would admit that he owned property in such relative's kraal, and the latter would from his native point of view declare

all such property to be his, unless he happened to be the person in default. If the defaulting taxpayer and the sympathising members of the family are to be relied on to prove to the messenger the ownership of the stock, then the proclamation is inoperative. I take it that the stock found at the kraal where the defaulter lives may be held to be his property until a complainant comes forward and takes action against the messenger in the manner directed in the proclamation. I therefore maintain that the stock in question was rightly seized and rightly handed over by the messenger to his caretaker Wright.

Mr. Buchanan appeared for the appellant.

There was no appearance for the respondent.

Mr. Buchanan: This is not a case between natives. The parties are the Government and a native, consequently native law and custom does not apply. See *Mendo v. Moriarty* (9 Shill, p. 521). See also Proclamations 110 and 112, of 1879, to be found in *Theal's Regulations of Native Territories* is 38 of 1887. Act 35 of 1896 regulates appeals from these territories.

[Buchanan, A.C.J.: Was the property seized on judgment?]

No. But the amount of a tax can be seized without a judgment, according to law. Hut tax is a rule or principle of civilised law. It is unknown to native law and custom. Under hut-tax regulations all property belonging to any particular person must be registered in the inspector's books. See Act 37, of 1884, section 13. It can there be easily shown to whom stock belongs. There is a somewhat similar provision in Act 33 of 1892, section 14. This latter Act really applies to private locations, but it is evidence that these locations require the imposition of this registry system with regard to the property.

Buchanan, A.C.J.: The Magistrate has based his decision in this case upon a judgment of the Transkeian Native Appeal Court in a matter which was entirely between two natives, in which it was stated that according to native law the head of a kraal was answerable for the debts of all his relations residing at his kraal. But even in that case the Appeal Court was careful to say that this principle did not apply to shop debts. Native law could only be applied in the Transkei to cases between natives. This was not such a case, but a proceeding taken by Government to collect hut tax. The proclamation

cited authorised the collector in cases of default summarily to seize property, but this property must be that of the debtor. Neither the proclamation nor the law of this colony, which is the law applicable where both parties are not natives, make a man liable for the debts of all his relatives. There was nothing to justify the seizure of the appellant's property to pay the hut tax due by his two nephews, who, though they lived in the same location, were married men, and had huts of their own. The appeal must therefore be allowed with costs, and the judgment in the Court below entered for plaintiff with costs.

Maasdorp and Solomon, J.J., concurred.

Appeal allowed accordingly, with costs.

Appellant's Attorneys, Messrs. Walker and Jacobsohn.

GADOW V. DE VILLIERS. { 1900.
June 20th.

Insolvency—Doctor's fees—Date of vesting in Trustee.

A debt due to an insolvent, a medical practitioner, for medical attendance given after the preparation of his schedules but before the acceptance of surrender, becomes vested in the trustee, and is not recoverable by the insolvent himself. The date of the sequestration must be taken as fixing the period when the insolvent is divested of his property, which afterwards becomes vested in the trustee.

This was an appeal from a decision of the Resident Magistrate of the Paarl in a case in which Dr. Gadow sued De Villiers for the sum of £6 for professional services rendered and medicines supplied by him from 20th to 29th July, 1899. The defendant's plea denied the debt, and further pleaded that the plaintiff was an unrehabilitated insolvent, and that the debt was incurred before the surrender. The plea was overruled, and judgment was given for the plaintiff with costs. The plaintiff, in his evidence, stated that his schedules had been prepared on 18th July, and filed on the 20th.

The Magistrate, in his reasons for this judgment, said that it appeared that the services were rendered and the medicine supplied between July 20 and July 29, 1899,

that the schedules were lying for inspection from 20th July inclusive, and that the surrender of plaintiff's estate was accepted on August 2. It also appeared from Dr. Gadow's evidence that the trustee, Mr. J. F. P. Perold, was now dead, and that this debt was not recorded in any of the documents or books handed to the trustee owing to an arrangement between them whereby the proceeds were allowed to the insolvent, who was to collect the money for his own account for work and labour done by him after 20th July, in support of the maintenance of insolvent and his family. It also appeared that since the death of Mr. Perold and up to the present no one had been appointed to administer the estate. The Magistrate quoted the 49th section of the Insolvency Ordinance 6 of 1843, which provides for the insolvent receiving, suing for, and recovering in his own name, and for his own person and exclusive use, and free from control of his trustee, the hire, wages, or reward of his work and labour, or that of any of his family during the intervening time aforesaid or any part thereof. He said this clearly showed that from the date of insolvency until the filing of his account the insolvent was perfectly justified in collecting the amounts earned by his work and labour as laid down in the case of *Boose v. Boose*.

The defendant appealed.

Mr. Gardiner appeared for the appellant; there was no appearance for the respondent.

Mr. Gardiner: The schedules of the insolvent were framed on the 18th July, and filed on the 20th. The services sued upon were rendered between the 20th and 29th July. The sequestration took place on August 2.

Under section 45 of Ordinance 6 of 1843, sequestration vests all property and rights belonging to insolvent at the date of sequestration in the Master. The insolvent cannot proceed by action to recover anything. By section 48 these rights are transferred to the trustee when appointed. Section 53 vests the estate on the death of trustee in the Master. So that, at the time of hearing of this case, the whole estate was vested in the Master, since the trustee was dead; but since then another trustee has been appointed, and in him the property is now vested. But at no time has the insolvent any right to the estate which on sequestration was vested in the Master. Nor has he

any right to recover debts due to him; every right vests in the Master or the trustee; the insolvent must make a full and fair surrender. Section 49, on which the Magistrate relies, makes certain exceptions. It gives the insolvent the right to practise his professional calling, and to recover by action his earnings. But this right is limited to earnings obtained in the time intervening between sequestration and confirmation of accounts, and not to earnings obtained before actual sequestration; this the Magistrate held he was entitled to do, being misled by the cases. This is no mere technical objection. If the insolvent is not entitled to recover, we cannot get a discharge from him, and may be sued by the trustee, and have to pay twice over.

Buchanan, A.C.J.: The plea in bar was a good plea, and should have been sustained in the Court below. It might not be very gracious for the defendant not to pay for the services of a medical man called in to attend him, but if he took the legal defence he was entitled to do so, as payment to the plaintiff would be no answer to any action which might be brought by the trustee of the insolvent estate. Under the old Ordinance No. 6, 1843, the practice was for schedules to be accepted at once after they were prepared. Though Act No. 38 of 1884 now requires that notice should be given and a certain time elapse between the preparation of schedules and their presentation for acceptance, no alteration of the provisions of the Ordinance has been made which is to the effect that on sequestration the insolvent is divested of all property and claims due to him up to that date, and that the trustee is subsequently vested therewith. This debt was incurred between the date of the preparation of the schedules and their presentation for acceptance. But the date of surrender must be taken as determining the rights of the parties. Everything that insolvent had previously to that date was taken from him and vested in his trustee. The trustee, and not the insolvent, was alone entitled to recover the debt. The provisions of the ordinance protecting the earnings by the insolvent refer to what has been gained by him subsequently to the surrender. The appeal must be allowed with costs.

Maasdorp, J., and Solomon, J., concurred.

Appeal allowed accordingly.

[Appellant's Attorneys, Messrs. W. E. Moore and Son.]

BOTHA V. DE KLERK. { 1900.
June 20th.

Wages—Minor son—Master and Servants Act.

In an action in a Magistrate's Court for £20 for rent, the defendant counter-claimed for £5 damages, breach of contract, in that plaintiff had let the premises to a third person before the expiration of his defendant's term, and also for £15, being 3½ month's wages due to his minor son. The Magistrate gave judgment for plaintiff for £20, less £1 15s., being the amount of wages admitted by plaintiff to be due, and said that had there been no such admission by plaintiff, the judgment would have been for £20 without any reduction, inasmuch as the contract for the services of defendant's son was not a valid contract according to the authority of Queen v. Kruger.

Defendant appealed but the judgment was upheld, though not on the same grounds as those on which the Magistrate had decided.

Queen v. Kruger only decided that where a father hires out the services of his son, informally the son cannot be punished for desertion under the Master and Servants Act, but that does not deprive him of his right to sue for wages due.

This was an appeal from a decision given by the Resident Magistrate for the district of Richmond in a case in which De Klerk was sued by Botha for £21 5s., reduced to £20 to come within the Magistrate's jurisdiction, for the rent of certain cottage and land. Defendant set up two counter-claims, one for £5 for damages for breach of contract in plaintiff having let the cottage before the expiration of the period for which it was let to him, and the other for £15 for wages due to defendant's minor son. The Magistrate gave judgment for the amount claimed, and dismissed the counter-claim

for £5, but, the plaintiff having admitted that he owed defendant £1 15s. in respect of the wages of defendant's son, allowed that amount, and gave judgment for plaintiff for £18 15s. It was with regard to the second counter-claim, that for £15, that defendant now appealed. It was stated that the Magistrate did not allow evidence on the counter-claim, ruling that the contract was not in accordance with the law as laid down in the case of the *Queen v. Kruger*.

In the record it appeared that plaintiff had said that there was a specified agreement as to the boy's wages, viz., that they were to be 10s. per month, while defendant said there was no specified agreement, but that plaintiff had said the boy would receive the same as the other grown-up white men on the farm, viz., £4 per month.

The Magistrate's reasons for his judgment on the counter-claim were that plaintiff having admitted the claim for wages to the extent of £1 15s., it appeared to him that the plaintiff was bound to pay that to the boy, but, the latter being fifteen years of age, the contract was not in accordance with the law as laid down in the case of the *Queen v. Kruger*.

The defendant appealed.

Mr. Ward (for the appellant): The Magistrate relies on *Queen v. Kruger* (7 Juta, p. 71). See, however, *Royer v. Dormer* (7 J., at p. 6): "Now the ordinary law . . . criminal appellant." The Magistrate contends that because there is no contract in either of the ways laid down, the boy must give his services for nothing.

Addison on Contracts (p. 847, 9th edition, reading: "In these cases there is in truth . . . bound to execute it." This the boy could have at any time. But he is entitled to a "quantum meruit" for the work which he did.

[Buchanan, A.C.J.: Mr. Buchanan, what do you say about sending the case back to the Magistrate?]

There is nothing to show that the Magistrate refused any evidence. He simply intimated that any evidence led on the point of wages would be useless, because he believed the plaintiff: he did not stop any evidence being led. He found 10s. per month was sufficient.

Mr. Ward: The Magistrate did not go into merits of the case. He finds there was no contract, and therefore, according to *Queen v. Kruger*,

the boy is entitled to nothing. We were prevented from calling further evidence. Even if every word of the case had been heard, and the Magistrate had not exercised any judicial discretion, we would have been entitled to appeal. No discretion was exercised.

Buchanan, A.C.J., in giving judgment, said, after detailing the points in dispute: We have only to deal with the claim for £15 for the boy's services. The plaintiff, when questioned about this, gave evidence admitting that he had engaged the boy's services for 3½ months at the rate of 10s. per month, while the defendant in his evidence said that there was no agreement between the parties, but that the plaintiff said he would pay the boy the same as all the other grown-up people. The Magistrate expressed the opinion that this kind of contract was not a legal contract, but the plaintiff having admitted that he owed the boy £1 15s., allowed that amount. It seems that the Magistrate's reasons for giving this judgment were altogether wrong, but the evidence supports the amount awarded. The Magistrate appears to have been misled by the case of the *Queen v. Kruger*, but that was a criminal case, in which it was held that a contract informally entered into did not allow the person who entered into it to be punished under the Masters and Servants Act. This appeal will be dismissed now, not because the Magistrate's reasons are right, but that the Magistrate's judgment is right, although his reasons are wrong. The whole case is really a trumpery matter, and we do not wish to send it back to the Magistrate, as the Magistrate would probably on correct grounds give the same decision as he has already given.

The appeal was therefore dismissed with costs.

Maasdorp and Solomon, J.J., concurred.

[Appellant's Attorney, Mr. Paul de Villiers; Respondent's Attorney, Mr. Gus Trollip.]

LOGAN AND CO. LTD. V. COLONIAL GOVERNMENT. { 1900.
June 19th
June 20th

Contract — Construction — Term—
Notice.

The conditions of tender annexed to a contract stated that "the contract is for a period of five years,

to be thereafter continued subject to twelve months' notice on either side." The contract itself set out that it was to continue "for a period of five years, and thereafter subject to twelve months' notice on either side."

Held, that, these words meant that there was to be a contract for at least six years, and that twelve months' notice could only be given at the end of the fifth year.

This was an application for an interdict made on behalf of James D. Logan and Co. against the Commissioner of Public Works, and as such representing the Government, to restrain the Cape Government Railways from advertising for contracts for certain refreshment rooms on the railway pending the expiration in 1902 of the contract which at present existed between the Cape Government Railways and the applicants. A similar interdict was applied for with regard to the advertising, bookstalls, etc., on the railway line.

The affidavit of J. D. Logan, the managing director of the applicants, was read in support of the application.

The applicants' contract gave them the sole right of advertising on the railway and to the bookstalls "for a period of five years, commencing from the first day of April, 1896, and ending on the 31st day of March, 1901, and thereafter subject to twelve months' notice on either side." The conditions of the tender annexed stated that the contract shall be for the exclusive right of advertising and for opening bookstalls for five years, "to be thereafter continued subject to twelve months' notice on either side." The refreshment rooms and bars contract was for a similar period, but commencing on February 1, 1896, and ending on January 31, 1901, and "thereafter until twelve months' notice shall be given to determine the same," while the conditions of tender stated that the period should be for five years, and "thereafter to be continued subject to six months' notice on either side."

Mr. Searle, Q.C., for the applicants: The matter has been brought forward in this form so that it may be heard at once, as tenders have been called for the refreshment-rooms,

bookstalls, etc., and as these tenders have to be in by the end of this month, Messrs. Logan & Co. do not know what to tender for until this matter is decided. The question is whether we are entitled under the contract to five years, and then one year's notice after the five years, thus making the contract a six years' one. The Colonial Government gave notice at the termination of the fourth year, thus giving us only five years. Our contention is that they are not entitled to give such notice until the expiry of the five years. The words are: "To be thereafter continued, subject to twelve months' notice." Reading the contract and the conditions of tender together, the present contracts do not terminate until March 31, 1902, and January 31, 1902, respectively.

Mr. Ward: We do not object to the form of procedure. It is convenient to have a contract interpreted by motion. The conditions of tender do not help much. We are only obliged to give twelve months' notice if there is a tacit relocation after the expiry of five years. See *Thompson v. Maberley* (2 Campbell's Reports, p. 573); *Chudburn v. Green* (9, Adolphus and Ellis, 658). See page 660 of latter report. *Denman, J.*, says that *Thompson v. Maberley* is correctly explained in the argument at p. 660. *Brown v. Symons* (8 C.B. (W.S.), p. 208).

[Buchanan, A.C.J., referred to *Pothier*, where he says a lease "for years" is said to be for two years.]

Langton v. Carleton (43 L.J., Exch., 54).

The Cape cases sanction the English ones. *Denny v. S.A. Loan and Mortgage Co.* (3 E.D.C., p. 47); *Kenrick v. Central Diamond Mining Co.* (3 H.C., 414).

Mr. Searle, Q.C., in reply: All the authorities cited are founded on *Thompson v. Maberley*, which was a *nisi prius* case, and went off on another point. In *Langton v. Carleton* (9, L.R., Exch. p. 58), there was a dissenting judgment. *Thompson v. Maberley* was discussed in a late case—*Gardner v. Ingram* (1890) (61, L.J., p. 729).

Foa's Landlord and Tenant, p. 90. There is a good deal of doubt in the English law; the authorities are not a sure guide. We should go by the actual words of the contract.

[Solomon, J.: In order to succeed, the respondent must go to the length of saying that the contract may be terminated without any notice!]

Yes, he must.

[Solomon, J.: What is the difference between a "term of five years" and a "term of five years certain"?

It is difficult to say. The conditions of the tender are to be read as forming part of the contract.

The Colonial cases are merely cases for assessment of damages, although the point here at issue was incidentally raised.

See *Kenrick's* case at p. 430 of 3 H.C.: "The only other points, *et seq.*

In *Denny's* case, 3 E.D.C., at p. 59, see *Barry, J.P.*: "As to damages by plain . . . after that period." See also *Shippard, J.*, at pp. 66, 67: "With regard to the measure of damages . . . *et seq.* *Gardiner v. Ingram* is a very strong case in applicants' favour. Notice must only be given after the expiration of the five years. The common ordinary construction of the words in the documents themselves ought to be applied.

Buchanan, A.C.J.: This application is for an interdict restraining the Railway Department from advertising for tenders and entering into contracts for the refreshment-rooms and advertising on the Government Railways. Both parties are agreed that this is a convenient way of obtaining a decision as to the proper construction to be put on the contracts existing between the Government and the applicants. These contracts were founded upon the conditions upon which tenders were asked for, and these conditions are expressly embodied in and declared to form part of the contracts. The first contract to which our attention has been directed is the contract for the exclusive right of advertising and opening bookstalls on the railway. As to the period of this contract, the conditions state: "The contract is for a period of five years, commencing from the 1st April, 1896, and ending on the 31st March, 1901, to be thereafter continued subject to twelve months' notice on either side." The contract is not in exactly the same terms, but is substantially so. It says the contract is to run "for a period of five years, and thereafter subject to twelve months' notice on either side." In the one case it says "thereafter continued subject," and in the other "thereafter subject." The question we have to consider is whether the intention of the parties was that this contract should be for five years only, and to terminate at that date unless there was a tacit renewal to continue after that date. That is the con-

tention of the Government in this matter. It appears from the correspondence that the General Manager of Railways, in negotiating with the applicants, considered otherwise, but whatever was the understanding between the Government officials and the applicant, we must now look at the contract itself to discover what are the actual terms. In the second contract the words used are slightly different. In the refreshment-rooms contract the conditions say it is to be "for a fixed period of five years, thereafter to be continued subject to six months' notice on either side," while the contract says "for a term of five years certain, and thereafter until twelve months' notice shall be given or received." The reading of these words would lead anyone ordinarily to the conclusion that this contract could not be terminated until twelve months' notice had been given, and that this notice could not begin to run until after the expiration of the five years. The use of the word "certain" in this second contract has been relied upon by Government as showing that the contract was terminable at the end of five years certain, and it is contended on their behalf that even without any further notice the contract could then be terminated. This contention is founded mainly on the English case, *Thompson v. Maberley*. That was a single judge decision given long ago. Though decided by a very eminent judge, it was followed with some hesitation in the English Courts, and since then, as has been pointed out, there has been a desire to question the soundness of that decision. It was first said not to be a decision but only a *dictum*, and its principle has been departed from in more recent English cases. Great as would have been the assistance to us from English cases, we are not bound by these decisions in the same way as English Courts would be to follow their own precedents, especially where we find the soundness of those precedents questioned. The second contract more especially seems to me clear that it was intended to run for a period of five years and thereafter until twelve months' notice be given. It must be taken to be a contract for six years at the least, and not to be terminated until twelve months' notice has been properly given after the expiration of the period mentioned in the contract. As to the first contract, I think the words lead to the same conclusion. The contract for five years and thereafter subject to twelve months' notice means that

the contract cannot be terminated before the end of that period, but if either party wishes thereafter to terminate the contract he shall then be entitled to do so at the end of that time upon giving twelve months' notice. We have here a contract for five years and to be continued thereafter until terminated by twelve months' notice. Mr. Ward candidly admits that according to his interpretation it was not necessary for the Government to give notice at all, but that the contract came to an end on the effluxion of five years. If that is so what was the necessity for this requiring notice to be given at any time to terminate the contract. The insertion of this condition leads to the conclusion that it was not intended that the period should be for five years only, but that the contract should run for a certain period at least, and be terminated any time after that period, in case either party so determined, on giving the notice required. This being the construction I have put upon the contract, the application for an interdict will be granted. Of course this is only a matter of form, what the parties desire being a proper construction of the contract. This interdict will carry costs.

Maasdorp, J., concurred, and said: I am of opinion that the intention in this case must be gathered from the words used in the contract. With regard to a number of cases quoted in support of the respondents' contention, I think it will be found that the words which were construed in all those cases were very different from the words in this contract, and there are also several additional words used in this contract which would distinguish it from the contracts referred to. It was held in the case of *Thompson v. Maberley* that it must have been the intention of the parties that a certain period should be fixed, and that notice should be given as to the continuation after the expiration of the aforesaid period. There is also the word "fixed" in one of these contracts, but then there are additional words which quite alter the meaning, and take it out from this case. We have it now that the contract is to commence on April 1, 1896, and end on March 31, 1901, "to be thereafter continued subject to twelve months' notice on either side." The ordinary meaning of these words seems to me to be that the contract is to be continued subject to twelve months' notice, and it can not be con-

strued as if the words were inserted there "and if continued it shall be continued for a further period of twelve months." Reading the words as they stand, I think, this case can be easily distinguished from the cases referred to by counsel, and that the contract contemplated clearly that it was to be continued, and that notice was to be given of determination only in case it was continued. Under those circumstances, I think notice for the termination of the contract can only have reference to the period of twelve months after the expiration of five years.

Solomon, J., concurred, and said: I would have had no difficulty whatever in coming to a conclusion in favour of the plaintiffs were it not for the cases cited in the course of argument. Of course I think upon the contract itself the ordinary principles which guide the Court in construing a contract would lead them to the conclusion contended for by the applicants. The ordinary rule of construction is that the plain grammatical meaning of the words should be followed by the Courts as indicating the intention of the parties, unless there are some special circumstances to show that the parties intended something else. Now it seems to me, reading the conditions and the contract, that the plain, ordinary, and grammatical meaning of the words of the contract—the words in the two contracts are different, but they are substantially the same—is that the contract is to continue for a period of five years, and to continue thereafter subject to notice of twelve months being given on either side. The contract is for a certain period of five years, and for an uncertain period thereafter, which is to be fixed by the notice to be given after the expiration of five years. The contention on behalf of the Government is that it is only in case the parties chose to prolong the contract for a period of five years that it would be terminable on twelve months' notice, but that contention would put into the contract the words "if the parties choose to prolong the contract after the expiration of five years twelve months' notice shall be given," etc. If that was the intention of the parties nothing would have been easier for them than to have inserted words to that effect in it, but there are no such words in the contract. My view is strengthened when we look at the conditions of the tender, which in the

contract itself are stated to be the conditions of the contract. In the one case they say "to be thereafter continued," etc., and in the other case "thereafter to be subject," etc. I do not see how these words could be construed, taking the ordinary meaning of the term, otherwise than in the sense contended for by the applicants. Of course the English cases referred to, particularly the case of *Thompson v. Maberley*, are no doubt very strong arguments in favour of the respondents' contention. There the words were "twelve months certain, afterwards subject to six months' notice," and the construction put upon them by Lord Ellenborough is that contended for by Mr. Ward in this case. Of course Lord Ellenborough is a great authority, but his *dictum* has been questioned in subsequent cases. Now although we are not bound by the decision of the English Courts, I will say that if there were a regular current of decisions placing a construction on the words, such as we have in this case, I would have felt bound to follow. But we have no such current of decisions, and it has been shown that the authority in the case of *Thompson v. Maberley* has been questioned in subsequent cases, and evidently there is a desire on the part of the Courts in England to overrule that *dictum*.

[Applicants' Attorneys, Messrs. Van Zyl and Buissinne; Respondents' Attorneys, Messrs. J. and H. Reid and Nephew.]

CAPE TOWN TOWN COUNCIL }
V. KAISER. 1900.
CAPE TOWN TOWN COUNCIL } June 19th.
V. FALCONER.

Municipality — Regulation — *Ultra vires* — Occupation — Act 26 of 1893, section 170.

A regulation of the Cape Town Municipality framed under Act 26 of 1893, provided that new buildings erected should not be occupied until the City Engineer had given a certificate to the effect that they were fit for occupation.

K. let certain premises which were being erected to X. from a certain date, but, owing to the premises not having been completed and his having been threatened with legal proceedings, he before the completion of the premises and without having a certificate of occupation

allowed X. to enter into occupation for the purpose of carrying on a shop but not for sleeping and other purposes. An interdict was granted restraining K. or his tenants from occupying the premises until a certificate had been granted by the City Engineer.

F. proceeded to build a house and submitted certain drainage plans to the Cape Town Town Council which were adopted. Meanwhile by selling the adjoining house F. by his own act put it beyond his power to carry out the original drainage plans and refused to connect his pipes with the main sewer by a more circuitous route. The City Engineer accordingly refused to grant a certificate for occupation. F. nevertheless did occupy the premises, in consequence of which a nuisance arose. An interdict was accordingly granted ordering him not to occupy the premises until he had obtained a certificate.

These two applications, which were in the case of the Town Council of Cape Town v. Abraham Kaiser, for an interdict restraining respondent from occupying certain premises, and in that of the Town Council of Cape Town v. R. A. Falconer, for an interdict restraining the respondent from occupying or allowing any agent or tenant to occupy certain premises and from committing a nuisance thereon, were heard together.

The premises concerned in Kaiser's case consisted of shops with dwellings above in Hanover-street, and the application was based on the ground that the respondent had not complied with regulation 117 of the Municipality, under which, before occupation, a certificate was necessary, to be granted by the City Engineer. The formal allegation was supported by the affidavit of Mr. Wynne Roberts, City Engineer, who stated that the buildings were not finished, inasmuch as the drainage was not completed. The sanitary fixtures were not in, the yard was not cemented, and they were not fit for human habitation. They had already been occupied in part as dwelling-houses, and were in a filthy and unsanitary condi-

tion. No certificate of occupation had been granted, and for the reasons stated it was necessary in the public interest that the respondent should be prevented from allowing them to be occupied until they were fit for habitation.

The answering affidavit of Moritz Kaiser, son of the respondent, set out that the respondent was at present en route to England, that the premises were to have been finished at the end of March last, and that the contractor promised that they should then be ready for occupation. On this assurance the respondent let the premises in advance. It was, however, found impossible to complete the buildings in the time specified, and the respondent was then threatened with legal proceedings by the persons who had hired them. It was arranged that they should put in their furniture, and should have the use of the sanitary arrangements next door, but should only occupy the premises during the day, and leave them at night. More than a month ago the entire property was completed, with the exception of the yard and the water connections.

The affidavit of Charles Hendricks, the builder of the four shops and dwellings in question, alleged that none of the houses had been occupied in the real sense of the term, but that three shops had been let. He had not been able to complete the contract in the time agreed upon for various reasons, including the interference of the Building Inspector of the Town Council, who insisted upon certain alterations. The drainage had now been completed for a fortnight past.

Affidavits by tenants of the buildings in question, deposing that these were only occupied during the day, and denying that the buildings were in a filthy and unsanitary condition were also filed. William Black, the architect of the buildings, also deposed to having seen the buildings on the 12th instant, when they were not in an unsanitary condition.

The property concerned in Falconer's case was No. 7, Moray Place, at the top of Breda-street. Mr. J. R. Finch, Chief Clerk at the Town-house, stated in an affidavit that on one occasion the respondent was summoned for having allowed the house to be occupied without a certificate, but the case was dismissed because the respondent plead-

ed that the house was occupied without his knowledge. He had utterly failed to provide proper drainage, and was summoned on a second occasion, when the case was again dismissed on the ground that it was unreasonable to ask the respondent to connect with the nearest drain, which was a good way off in Breda-street. Mr. Herbert Rigby, Drainage Engineer, corroborated, and Basil Victor O'Riley, who occupies one of the houses opposite No. 7, Moray Place, also made an affidavit showing that owing to the accumulation of filthy drainage water from respondent's house which settled under his (Mr. O'Riley's) dining-room window, he was quite prevented from opening the window. The nuisance was an intolerable one. Edward Payne, tenant of No. 7 from March to May last, stated that there was no drainage system at all. Respondent had promised to provide one.

The affidavit of the respondent Falconer set out that there was no finished sewer near his house with which he could connect. The Town Council had made no drain in Moray Place, and if he had to connect with Breda-street, he would have to put down 420 feet of piping. He alleged that Payne was at one time quite prepared to make an affidavit in his (respondent's) favour, to the effect that there was no nuisance at all, and had only failed to do so because the attorney was not in at the time.

In a replying affidavit made by Mr. Rigby, he said that the cost of connecting with the Breda-street sewer would be £100, certainly not more. Respondent had received £7 10s. per month for the house, and had said that he could get £9 if the property were drained. He would only have to lay down 310 feet of drain pipes.

Mr. Innes, Q.C., A.G., for the applicants, referred to sections 110-117 of the Municipal Regulations.

Section 117 provided that within a reasonable time after the completion of the erection of a building, notice should be given to the City Engineer, for the purpose of having it inspected by him, and that no new building should be occupied until a certificate had been granted to the effect that the building was in accordance with the regulations.

[Buchanan, A.C.J.: Is there any question of *ultra vires*?]

Mr. Searle, Q.C., for the respondent Kaiser: That is our defence. We have occupied the houses without a certificate, but not as dwelling-houses.

The gist of the complaint is that we occupy part of the premises as a dwelling-house, and that the premises are filthy and unsanitary.

Section 170, sub-section 7, of Act 26 of 1893, is apparently the one that the Council relies upon.

Section 117 of the regulations does not refer to the question whether the house is fit for a dwelling-house.

The ground floor is used as a shop or store-house; the upper floor is not occupied.

[Solomon, J.: The object of the regulation is to prevent an inquiry as to whether the premises are fit for occupation as a dwelling-house.]

A difference exists between "inhabit" and "occupy." Inhabit means to stay in the premises during the night; to dwell in them. Occupy means to use as a store. The point is whether the Council can under sub-section 7 of section 170 make such a wide regulation as to prevent persons coming in at all. The Act intended that the Council should deal with buildings used as dwellings.

Mr Buchanan, for the respondent Falconer: There is a difference between the respondents' cases. Our premises were occupied as a dwelling-house up to May 31. At present our house is not occupied. We cannot occupy because the Town Council will not grant a certificate on the ground that Falconer has not connected his drain with the main sewer in Breda-street; that means that Falconer has to construct a drain down Moray-street, which would be 420 feet in length. The Council claim that however far we happen to be situate from the main sewer we must connect our drain with it, no matter whether the street down which they want to compel us to make the drain is vested in the Council or not. This is unreasonable. See section 170, sub-sections 5 and 6, of Act 26 of 1893. The Act does not give them such arbitrary power. They want to make a private person do what they themselves should do. They have power to connect the drains under section 133 of the Act, and so before they can take advantage of section 170, they must show that they have exercised all their power. See also sections 126 and 127 of the regulations, and *Oliff v. Worcester Municipality* (15 S.C.R., p. 203). See particularly the remarks of *De Villiers, C.J.*, at pp. 205 and 206.

[Maasdorp, J.: Cannot the Council prevent the respondent from committing a nuisance, and cannot they do so by giving him power to make a drain on their own land?]

They want to cast a public burden on the respondent.

Mr. Innes, Q.C., A.G.: In regard to Kaiser's case, sub-sections 5, 6, 7, and 10 of section 170 of Act 26 of 1893 give the Council power to do what they are doing. The machinery is provided in sections 110, 112, and 117 of the regulations. The regulations are reasonable and necessary. The object of the regulations is that the certificate by the City Engineer as to whether the premises are habitable or not is conclusive. "Habitation" does not necessarily mean "sleeping." Warehouses may become unsanitary.

[Buchanan, A.C.J.: Are the regulations with regard to habitation authorised?]

See sub-sections 10 and 7 and sub-section 42 of section 170 of Act 26 of 1893.

[Solomon, J.: Does not section 7 apply to buildings which have been inhabited and not to those which are new?]

That would be too strict an interpretation.

Falconer's case is different. We are asking him to carry out the terms and plans in regard to drainage which he submitted to us, and which we passed. We don't want to compel him to lay pipes down Moray-street. But we give him leave to do it if he can't carry out the original plans: this we say is reasonable. We merely wish for an abatement of the nuisance.

[Buchanan, A.C.J.: The nuisance is abated if there is no tenant.]

Falconer gives no undertaking that he will not leave the premises later on.

Buchanan, Acting C.J.: The Town Council of Cape Town, under their Act of Incorporation, No. 26, 1833, section 170, have very extensive and large powers conferred upon them to frame Municipal regulations. Acting under these powers, among the regulations framed by them are some providing for the erection of buildings within the Municipality. These regulations require persons intending to build to submit to the Town Council for approval plans of the proposed building, and also a plan of the drainage by which the building was to be sewered. In both the cases before the Court plans have been submitted to and approved of by the Town Council, and it is clear that in both these cases the drainage provided for by these plans has not been completed and

carried out. Among other Municipal regulations, the 117th provides that within a reasonable time after the completion of a building, notice must be given at the Town-house for the purpose of having the building inspected by the City Engineer, and until the latter gives a certificate that it is fit for occupation it shall not be occupied. The respondent Kaiser, though he has not obtained such a certificate, has had his new buildings occupied. The buildings consist of shops on the lower floor and residences on the upper floor. Now the use of these buildings for shops is certainly occupation, within the meaning of the regulation. The persons occupying the shops during the day time required the conveniences which have not yet been completed. They themselves say they had to go next door for the conveniences mentioned, and that very fact shows that the regulation requiring a certificate before occupation should apply to shops as well as to dwelling-houses. An objection has been taken to this regulation on the ground that it is *ultra vires* of the powers of the Town Council. But when we look to the 170th section of the Act, we see that the 10th proviso gives full power to the Town Council to frame regulations requiring notice to be given, plans to be adopted, and after the building is commenced, gives power to prevent, remove, alter, or pull down at the expense of the owner any work begun or done in contravention of the regulations. The 7th sub-section seems more applicable to an existing building or portion of a building unfit for habitation, but even apart from the 10th sub-section, if the Council can close an existing building, surely they can prevent the occupation of a new building not yet fit for occupation. But besides these two sections, there is also power given to frame regulations for the general good government of the Municipality, and to secure the comfort or health of the inhabitants, so that, although the 10th proviso is sufficient, the other powers conferred under the various clauses of the 170th section would also cover in this case. Taking then this regulation to be *intra vires*, there is no doubt as to its contravention, and the Council is entitled to an interdict preventing the contravention going on. In the case of Kaiser, the parties seem to be doing their utmost to comply with the requirements of the Council, and it will only be fair to allow a reasonable time, say fourteen days, before the interdict comes into force, and of course if the work is carried out to the satisfaction of the Municipal

officers before the expiration of the fourteen days, the interdict will fall to the ground. The order meantime will be for an interdict restraining the respondent from occupying these premises until a certificate has been obtained under the 117th regulation, but this order will be suspended for fourteen days. In the case of Falconer, the plans submitted to the Town Council provided for drainage along a combined drain existing at the time the plans were submitted for approval. The plans were passed, but before they were carried out Falconer put it out of his power to complete them by selling the adjoining house. He now says it is unreasonable to make him go a long way round before he can connect his house with another drain. But that is not the fault of the Town Council. Falconer had provided for the drainage before erecting the buildings, and unless he had provided plans showing proper drainage the plans for the building would never have been passed by the Town Council, and the house would never have been erected. I think that until respondent has carried out some approved means of drainage the City Engineer is justified in refusing a certificate for occupation. There is no doubt the house has been occupied from time to time. Falconer when first charged before the Magistrate with having allowed the house to be occupied before a certificate was granted, said this had been done without his knowledge, and he was therefore acquitted of the charge of contravening the regulations. Since then he has been again charged, and on this latter occasion he said that it was unreasonable that he should be compelled to connect with the Municipal drain owing to the distance that drain was away from his property. That is a matter for him to consider, not for the Town Council. If he had carried out his original plan he would have suffered no hardship, but having failed to do so, and being unable now to carry out his original plan through his own act, he must adopt some other means of satisfying the Municipal requirements. In his case a nuisance has arisen through the occupation of these premises before the drains were connected with the sewers, and complaints have been made by persons residing in the neighbourhood. This is a very strong reason why this interdict should at once be granted against further occupation. The respondent says that the buildings are not now occupied, but they have been occupied, and it is clear that it is intended they should be occupied again. As

interdict will therefore be granted in both the cases. In Falconer's case it must be to the effect that his house shall not be again occupied until the certificate is granted. In the other case fourteen days will be allowed for the work to be completed, and the order will not operate until then. These orders will be granted, with costs.

Maasdorp and Solomon, J.J., concurred.

[Applicants' Attorneys, Messrs. Fairbridge, Arderne and Lawton; Respondents' Attorneys, Messrs. Van Zyl and Buissinne and Messrs. Walker and Jacobsohn.]

SUPREME COURT

[Before the Hon. Mr. Justice BUCHANAN, (Acting Chief Justice), the Hon. Mr. Justice Maasdorp, and the Hon. Mr. Justice Solomon.)

REGINA VS. BOTHA.

{ 1900.
{ June 26th.

Arrest—Warrant—Telegram—Act 41 of 1882, section 2—Reasonable suspicion—Ordinance 40 of 1828, section 23—Ordinance 73 of 1830, section 12.

A warrant for the arrest of B. upon a charge of high treason was issued by a Justice of the Peace for the Colony upon information sworn before him. The warrant was sent from Aliwal North to Cape Town, but returned to Aliwal North. B. was subsequently arrested in Cape Town by a police constable who had no warrant in his hands at the time but had a telegram from the Commandant of Aliwal North to the Chief of Police, Cape Town, stating that a warrant had been issued for B.'s arrest. The constable had also seen the original warrant.

Upon application by B. for his release from custody,

Held, that the police had reason-

able grounds to suspect him of having committed the crime laid against him and sufficient grounds upon which to arrest him, and that the application must be refused.

This was an application by Jacobus Nicolas Petrus Botha for his release from arrest. His petition was as follows: The petition of Jacobus Nicolas Petrus Botha sheweth: That your petitioner is resident in the district of Aliwal North, Cape Colony. That your petitioner is one of the elected members representing the electoral division of Aliwal North in the Honourable the House of Assembly of this colony. That on or about the 6th inst., your petitioner came to Cape Town at the request of the then Prime Minister. That since that time your petitioner has been in the neighbourhood of Cape Town awaiting the proximate meeting of Parliament. That on Monday last, the 25th inst., your petitioner came to Cape Town, where he heard at the hotel he lodged at that inquiries had been made for his whereabouts by the police authorities. That on the following day, the 26th inst., your petitioner proceeded to the office of the Attorney-General, and left his address there. That on the evening of the 26th inst. your petitioner was arrested by a policeman and lodged in gaol. That the authority produced for such arrest by the said officer was a telegram, of which the annexure hereto marked A is a copy. That no other authority or warrant was exhibited for your petitioner's arrest and detention. That at ten o'clock on the morning of the 27th inst. your petitioner was brought before a Police or Assistant Magistrate in Cape Town, when certain proceedings were taken in connection with the arrest and detention of your petitioner, a copy of which said proceedings, as recorded by the said Magistrate, is annexed. That Mr. James Tennant Molteno applied to the said Magistrate for the release or discharge of your petitioner, on the ground that there was no proper warrant or authority for his arrest, which was refused. Wherefore your petitioner prays that your Honourable Court will cause his release.

The telegram, annexure A referred to above, was as follows: "Telegram. Aliwal North, Commandant to Chief of Police, Cape Town. A.N. 340, 18th June. Please arrest Jacobus Botha, M.L.A., stop. War-rant is issued for arrest on charge of high

treason, dated 16th inst., stop; Corporal Dobie, Cape Police, proceeds to-day to Cape Town with warrant."

Annexure B, the record of the proceedings before the Magistrate, showed that the applicant had been arrested on the telegram referred to above. The police-constable who made the arrest stated in evidence that the original warrant had been in Cape Town lately, and he had seen it. The Magistrate said that he considered the constable was competent to make the arrest under Ordinance 40, 1828, section 23, and refused to discharge the applicant, but remanded him until the 30th inst., in order to obtain the original warrant.

Mr. Molteno appeared for the applicant.

Mr. Ward appeared for the Crown.

Mr. Ward said he had answering affidavits, which he would hand in from the Bar. There had not been time to file them, as the notice of the application, etc., had only been served upon the Attorney-General that morning.

The answering affidavit of Edwin Faunce Lonsdale was as follows: I am acting secretary to the Law Department, which department has control of the police in the Colony. On the 11th inst., the Commissioner of Police, King William's Town, was instructed to direct his officers that the police in each martial law district were placed under the orders of the military commandants of those districts, who, until further orders, would be responsible for the general policing of those areas.

The affidavit of Captain H. A. Jenner, Chief of Police, Cape Town, stated: I am Chief of Police, Cape Town. I attach a copy of telegram, dated the 27th inst., from Inspector Halse, addressed to Police, Cape Town, setting forth a copy of a warrant issued by Mr. Hugo, Resident Magistrate, Aliwal North, for the arrest of Jacobus Nicolas Petrus Botha for high treason. I also attach copy of a telegram, dated 27th inst., from the Magistrate, Aliwal North, addressed to the Chief of Police, Cape Town, stating that the warrant referred to in the above telegram is signed, not "R.M.," but as "J.P." for the Colony. I also attach a copy of a correction from telegrams to police, of Inspector Halse's telegram first above mentioned. I further say that the original warrant was produced to me by Corporal James Dobie, of the Cape Police, District 1, the officer who came down from Aliwal North to execute the same.

The telegraphic copy of the warrant referred to in the above affidavit was as follows: "John Daniel Hugo, Esq., Justice of Peace for the Colony, to the field - cornets, constables, police officers, and other officers of the law proper to the execution of criminal warrants. Whereas from information taken on oath before me there are reasonable grounds of suspicion against Jacobus Nicolas Petrus Botha, M.L.A., Klipplaatfontein, district of Aliwal North, that he did, during the month of November, 1899, commit the crime of high treason: These are, therefore, in Her Majesty's name to command you that immediately upon sight hereof you apprehend and bring the said Jacobus Nicolas Petrus Botha, and cause him to be apprehended and brought before the Resident Magistrate of Aliwal North, to be examined and to answer to the said information, and to be further dealt with according to law." This warrant, according to the first telegram, was signed J. D. Hugo, R.M., but the subsequent telegram showed that the warrant was signed by Mr. Hugo as Justice of the Peace for the Colony, and not as Resident Magistrate.

The affidavit of William Walker, a detective officer of the Cape Town police, set out: I received instructions from the Chief of Police to proceed, together with Corporal James Dobie, of the Cape Police, to apprehend one Botha, M.L.A. for Aliwal North, on a charge of high treason. I asked Dobie if he had any warrant, and he said yes, and showed it to me. It appeared to be regular. I do not remember now who signed the warrant, and subsequently, after Dobie had left with the warrant, I arrested the accused.

Mr. Molteno: I have not seen those telegrams before. The only things that are before the Court are the original telegram from the Commandant of Aliwal North, and the proceedings before the Magistrate, and I submit that it is quite impossible to go into these questions now, these telegrams having quite taken the petitioner by surprise. I submit that it was the duty of the Attorney-General to have supplied petitioner with copies of these telegrams. It is very unfair for the petitioner to come into court and have these telegrams sprung upon him. Whatever proceedings the Attorney-General may be advised to take hereafter, the only proceedings now before the Court are the proceedings before the Magistrate on the 27th instant. There are the only papers the Court can take cognisance of. Upon these papers alone the application has been made, and the Court must go on these alone.

[Mr. Justice Solomon: This is not an application for bail from the Magistrate's Court, but it is a question whether the applicant should be released, and therefore, as we must have all the facts before us, why should we confine ourselves to the proceedings before the Magistrate?]

The applicant's position is that he applied to be released from wrongful arrest. If he can show that the arrest was wrongful and illegal, I submit that the Court will go into that case and not beyond it.

[The Acting Chief Justice: What are the grounds for saying it was a wrongful and illegal arrest?]

The telegram from the Commandant at Aliwal North was not a telegraphic warrant for arrest under the second section of Act No. 41 of 1882, which provides: "A telegram from any diplomatic, judicial, or police officer, or the sheriff or any deputy sheriff, stating that a warrant or writ has been issued for the apprehension or arrest of any person accused of any offence or crime, or to appear in or answer to any civil suit, action, or proceeding, shall be a sufficient authority to any officer by law authorised to execute any such warrant or writ for the arrest and detention of such person in this colony until a sufficient time, not exceeding thirty days," etc.

[The Acting Chief Justice: This does not seem to be an arrest by telegraphic warrant, but an arrest without any warrant at all. There is an intimation by telegram, but no warrant.]

The Commandant of Aliwal North is not such an officer as is recognised by the Telegraphic Warrant Act of 1882.

[Mr. Justice Solomon: But does not this telegram from the Magistrate settle any defect there may be in the other telegram?]

The only proceedings before the Court are those upon which Mr. Botha was arrested.

[The Acting Chief Justice: The telegram only says that a warrant has been issued.]

[Mr. Justice Maasdorp: If a police officer knows there is a warrant out against a man, can he not arrest him without a warrant?]

A man must be arrested upon a warrant or a telegraphic warrant.

[The Acting Chief Justice: Why, nine-tenths of the people arrested are so arrested without a warrant at all, but upon credible information.]

If that is so, it can only be by virtue of an Act, and the only authority for arresting anybody is contained in the 23rd section of Ordinance 40 of 1828, and I think that is the section upon which the Magistrate relied.

I submit, however, that that section applies where a crime has been committed, and somebody who has seen that crime committed lays information with a constable or any of the officials mentioned in the section, when that constable or other official would be justified in acting upon that information, but no constable has a right to arrest a person upon the mere fact that he had seen a warrant.

[Mr. Justice Solomon: But of course there is the Ordinance 73 of 1830, which cuts down to some extent, but in other ways enlarges the Ordinance of 1828.]

A person cannot be arrested without a warrant. *Silberbauer v. Ruthven* (1868, page 100), *Jacobs v. Evans* (1869, page 29), and *The Queen v. Cooper* (1879, page 152).

[Mr. Justice Solomon: What is the utility of an order for applicant's release, as he might be rearrested immediately.]

The Court will not go into that question now. The Court will only go into the question as to whether the arrest was justified or not.

[Mr. Justice Solomon: But here we have a warrant to justify the arrest.]

These papers have only been handed in now, and we must confine ourselves to the proceedings before the Magistrate, and these proceedings were wholly illegal.

[The Acting Chief Justice: Is there any objection to the taking of bail in the case?]

Mr. Ward said he was not prepared to say anything on that question, as it had not been considered, the application only asking for release.

Mr. Molteno: If we had known that these papers were to be put in, there would have been an application for bail. There is no danger of Mr. Botha going away. He is only too anxious to meet any charge that might be brought against him. In fact, when he heard that inquiries had been made regarding him while he was away, he instantly handed in his name and address to the Attorney-General's department.

[The Acting Chief Justice: The application for bail can be made at any time.]

Mr. Molteno said he would like to make the application now.

Mr. Ward said it was the applicant's own fault that the additional papers were not presented before; they had hurried the thing on, and as he had said before, it was only that morning the notice, etc., was served upon the Attorney-General.

After further hearing Mr. Molteno, and without calling on Mr. Ward for argument, the Court refused the application.

Buchanan, A.C.J., in giving judgment, said: This is an application for the release of the applicant, in terms of the petition which has been read. The petitioner, who is a resident of the district of Aliwal North, has been arrested on a charge of high treason. This arrest has been effected without any warrant being in the hands of the police at the time of the arrest. Ordinance 40 of 1828, section 23, allows constables and others to arrest in any case in which they have credible information from others that a crime has been committed. This Ordinance No. 40 has, however, been modified by Ordinance No. 73, and this section, although not expressly repealed, must, I think, be taken to have been modified by that later Ordinance, which was passed to explain, alter, and amend. The 12th section of that later Ordinance states that superintendents of police, or their deputies, constables, and others are authorised and required to arrest every person who shall commit any crime in their presence, and also every person whom they shall have reasonable grounds to suspect of any crime of a serious nature. The arrest was effected in this case by a police constable who had not a warrant in his hands at the time of the arrest, but had a telegram from the Commandant of Aliwal North, stating that a warrant had been issued for the arrest of Botha on a charge of high treason. The question we have to consider is whether this constable had reasonable grounds to suspect the applicant of having committed this serious crime. The police constable states that he saw this warrant for the arrest of the applicant; that this warrant had been in Cape Town, but that it was returned, and that he had this telegram from the Commandant of Aliwal North at the time when he acted upon this warrant. We have now the further information supplied to us that this warrant was issued not by any military authority, but by a civil officer, a Justice of the Peace for the whole colony, upon information sworn before him. That fact being before the police, I think we are obliged to

say that the police were justified in arresting accused for the crime with which he stands charged. It is not a question now as to whether this warrant is sufficient or not, but a question as to whether the police had reasonable grounds to suspect the applicant of having committed the crime laid against him. This warrant having been in Cape Town, having been, as now intimated, shown to the police, the police in this case had sufficient grounds upon which to arrest the accused, who was brought before the Magistrate, and remanded by the latter until the 30th instant, when the warrant itself will be produced. The only application we have before us is that for the release of the applicant. We are not reviewing the Magistrate's proceedings, and we can only go upon the information before us, and this information now before the Court justifies the arrest. I must say as an expression of my own opinion that it seems to me to be a case in which it would be very reasonable for the Attorney-General to consider whether the applicant should not be admitted to bail, but an application of that nature is not now before us. I can therefore only express an opinion upon the point, that I think this is a case where the Attorney-General would do well to consider whether the applicant should not be admitted to bail, considering the applicant's position and his willingness to meet the charge brought against him. Of course that is a mere expression of opinion on a point which will be dealt with on a further application. At present the only question is, is the applicant entitled to be released, and seeing that the warrant was issued by a Justice of the Peace for the whole colony upon sworn information laid before him, and seeing that this warrant was brought to the notice of the police, they were justified in acting as they did, and the application for release must therefore be refused.

Maasdorp and Solomon, J.J., concurred.

[Applicant's Attorneys: Messrs. Sauer and Standen.]

“Cape Times” Law Reports.

CASES DECIDED IN THE SUPREME COURT, CAPE COLONY.

SUPREME COURT

(IN CHAMBERS.)

[Before the Hon. Mr. Justice BUCHANAN
(Acting Chief Justice), and the Hon. Mr.
Justice SOLOMON.]

REGINA v. BOTHA. { 1900.
 { July 2nd.

High treason—Bail—Consent of the
Crown.

*The Court, the Crown consenting,
admitted to bail a person charged
with High Treason.*

This was an application for bail on behalf
of Mr. J. N. P. Botha, M.L.A., who was
under arrest upon a charge of high treason.

Mr. Molteno appeared for the applicant,
and Mr. Ward for the Crown.

The petition was as follows: “That since
the application to your Honourable Court
for his discharge on Thursday, the 28th ult.,
to which he craves leave to refer, he has
been detained in the gaol at Cape Town.
That on the 30th ult. your petitioner was
further remanded by the Assistant Magis-
trate of Cape Town to Monday, the 2nd
instant, the warrant for his arrest and de-
tention not having yet arrived. That appli-
cation was made to the said Magistrate for
release on bail by your petitioner, when the
same was refused on the ground that the
said Magistrate had no jurisdiction. That
your petitioner is ready and willing to meet
any charge that may be preferred against
him. Wherefore your petitioner humbly
prays that your lordships will be pleased to
grant his release on bail.”

Mr. Ward: I am instructed to consent to
bail being granted upon certain conditions.

Buchanan, A.C.J.: What are your con-
ditions?

Mr. Ward: That the petitioner reside in
the village of Aliwal North until the con-
clusion of the preparatory examination.
After that, should he be committed for trial,
he should reside in the Cape Peninsula, I
think.

Buchanan, A.C.J.: Of course, we can-
not anticipate the result of the prepara-
tory examination. The Magistrate must first
hear all the evidence.

Mr. Ward: Yes, my lord.

Buchanan, A.C.J.: The petitioner could
apply again in the case of a committal.
Will he be released here or at Aliwal?

Mr. Ward: The bond could be entered
into here.

Mr. Molteno: He will proceed to Aliwal
North at once.

Buchanan, A.C.J.: Has the warrant
arrived?

Mr. Molteno: I was in the Magistrate's
Court at ten o'clock this morning when a
warrant signed by Mr. Hugo, and dated the
16th ult., was produced. Proceeding, Mr.
Molteno said he informed the Magistrate
that he intended to make this application.
The accused was committed to the Aliwal
Court, and the police had engaged that he
would not leave for Aliwal North before
that night.

Mr. Ward: If the bond were entered into
here he might be released.

Buchanan, A.C.J.: He will proceed to
Aliwal North at once?

Mr. Ward: Oh, yes.

Buchanan, A.C.J.: Seeing that the
Crown has consented to the application,

the Court will allow the accused to be released on bail on his giving security himself in the sum of £2,000 and two further sureties, to the satisfaction either of the Resident Magistrate of Cape Town or the Resident Magistrate of Aliwal North, in the sum of £1,000 each, and on the further conditions that the accused proceed to Aliwal North at once, and reside in that town until the conclusion of the preparatory examination. If the accused is committed for trial he will have to make another application for release on bail, and of course if he is discharged, there will be an end of the matter. Everything depends upon what may be disclosed at the preparatory examination.

Solomon, J., concurred.

[Applicant's Attorney, J. J. Michau.]

SUPREME COURT

(IN CHAMBERS.)

[Before the Hon. Mr. Justice BUCHANAN (Acting Chief Justice), the Hon. Mr. Justice MAASDORP, and the Hon. Mr. Justice SOLOMON.]

REGINA V. VISSER. { 1900.
July 4th

This was an application for the release on bail of C. J. W. Visser, a Barkly East farmer, then in custody of the police on a charge of high treason.

The petition set forth that applicant was a British subject, and had for years been a farmer in the Barkly East district; that when at Cape Town, whither he came with the leave of the military, he was arrested, and lodged in gaol; that he was not guilty of the charge, was possessed of considerable property, and wished to be released on bail.

Mr. Molteno for the applicant.

Mr. Ward for the Crown.

Mr. Ward: I consent on the same terms and conditions as were imposed in *Botha's* case.

[Buchanan, A.C.J.: Is the case going to be removed to Barkly East?]

Mr. Ward: Yes; we expect an escort here by Saturday.

Bail was granted, the accused to give security to the amount of £2,000, and to find two sureties for £1,000 each, and to reside in the district of Barkly East until called upon.

SUPREME COURT

[Before the Hon. Mr. Justice BUCHANAN (Acting Chief Justice), the Hon. Mr. Justice MAASDORP, and the Hon. Mr. Justice SOLOMON.]

ADMISSION.

Mr. Burton moved for the admission of Samuel Hammond Rowson as an advocate of the Supreme Court.

The order was granted as prayed, and the oath administered.

PROVISIONAL ROLL.

SIGIDI'S EXECUTORS V. MJO- { 1900.
KOLO. { July 12th

Sir Henry Juta, Q.C., for the applicants, moved for a decree of civil imprisonment upon an unsatisfied judgment granted by the Supreme Court on November 29, 1899, for £200, with costs £169 6s. 3d., less 16s., which had been paid.

Mr. Searle, Q.C., appeared for the defendant. An affidavit made by the defendant was filed, in which he said that all the property he possessed was seized and sold by the Deputy Sheriff, and consisted of three goats and one mare. Defendant further stated that he had to support two wives and children, his three sisters and seven children, and some other persons and their children. As headman, he drew £6 per annum from Government, but with this exception he had to depend upon the season's crops for support of himself and his large family, and in consequence of rinderpest, drought, and locusts, he had been impoverished, and had no means to satisfy the judgment, nor could he appear personally before the Court.

To this an answering affidavit was filed, in which it was stated that Mjokolo's statement that he had to support his three sisters and their seven children was untrue, and that as a matter of fact these three sisters did not live with him, but were married, and were supported by their husbands. Mjokolo's statement as to several of the other persons he had to support was also denied. It was also alleged that there were thirty head of cattle in Mjokolo's kraal, which he claimed as his own pro-

perty, but of which the deponent stated that eighteen or twenty belonged to Sigidi's estate. It was also pointed out that as headman, although he did not have a title to the land, he could cultivate as much of the land as he liked. It was also alleged that £56 had been paid to an attorney for the defence in the action heard in November last year.

After argument,

Buchanan, A.C.J., said: This matter came before the Court originally upon the executors of the late Sigidi claiming under a will made by Sigidi all the property in his estate. The property of Sigidi had been divided by the different sons or "houses" among the different wives of Sigidi, but the executors were declared by the Court entitled to this property. It was shown that a great quantity of this property was in the hands of the defendant, and the Court ordered it to be delivered up or its value to be paid. A writ was taken out and a return of *nulla bona* made, and now there is an application for a writ of civil imprisonment. The onus is upon the defendant to show that he has no property with which to satisfy this judgment. The Court is not satisfied on the affidavits that the defendant has discharged his onus; on the contrary, there is strong ground for believing that property in his possession at the time of the judgment is still in his possession, and has not been delivered up. Therefore a writ of civil imprisonment will be granted, but of course it will be open for the defendant at any time after his imprisonment, if he can satisfy the Court that he has no property, to apply for his discharge.

Maasdorp and Solomon, J.J., concurred.

[Plaintiffs' Attorneys, Messrs. Silberbauer, Wahl and Fuller; Defendant's Attorney, Gus Trollip.]

ESTATE OF CARDINAL V. JOHN COE.

Mr. P. S. Jones moved for provisional sentence on a mortgage bond for £650, with interest from July 20, 1899, and costs of suit, and also that the property specially hypothecated be declared executable. The bond had become due by reason of the non-payment of the interest and the instalments.

Provisional sentence granted as prayed, and property declared executable.

MILLER AND CO. V. ANDERSON.

Mr. P. S. Jones moved for provisional sentence upon a mortgage bond for £500, with interest due thereon, and also that the property specially hypothecated be declared executable. The bond had become due by reason of the non-payment of the instalments. The summons also asked for judgment on an illiquid claim for £81 14s. 1d., for goods sold and delivered, together with costs of suit.

Provisional sentence granted as prayed on the liquid claim, and the property declared executable, and judgment with costs granted on the illiquid claim.

LEGG V. BAUMGARTEN.

Mr. Howel Jones asked that this matter might stand over until August 1, as an offer had been made by defendant which would probably be accepted.

Postponement granted.

PELSEER V. P. B. VENTER.

Mr. P. S. Jones moved on a promissory note for provisional sentence for £50, together with the interest due thereon. The summons also asked for judgment under Rule 329d, for £117, goods sold and delivered, with interest *a tempore morae*, and costs of suit.

Provisional sentence granted as prayed on the liquid claims, and judgment on the illiquid claim.

STANDARD BANK V. VILJOEN.

Mr. Gardiner asked that this matter might stand over until August 23, as there was a prospect of a settlement.

Postponement granted.

FREEMAN AND CO. V. HENDRICKS.

Mr. Maskew moved that the provisional order of sequestration granted in this case be superseded.

The provisional order of sequestration was discharged.

FREEMAN AND CO. V. CLEWS.

Mr. Maskew moved for provisional sentence on a promissory note for £67 17s. 2d., together with interest from November 15, 1899, and costs of suit.

Provisional sentence granted as prayed.

MADESON V. VKEERASAMY.

Mr. Gardiner moved for the final sequestration of defendant's estate, the provisional order having been granted by Mr. Justice Maasdorp on June 27.

Final sequestration granted.

LITHMAN AND CO. V. SABAN.

Mr. P. S. Jones moved for a decree of civil imprisonment against the defendant on an unsatisfied judgment of the Supreme Court for £62 17s. 6d., together with taxed costs and the costs of the writ, amounting to £6 9s. 2d. and £1 3s. 6d. respectively.

Order granted as prayed.

LITHMAN AND CO. V. MARKUS.

Mr. P. S. Jones moved for a decree of civil imprisonment on an unsatisfied Supreme Court judgment for £52 8s. 10d. with taxed costs £6 15s. 8d. and cost of writ £1 8s. 2d.

The defendant appeared in person, and offered to pay the debt by instalments of £3 per month, and also to cede to plaintiffs a claim for £130 he had against an insolvent estate.

The Court granted a decree as prayed with costs, but suspended execution pending payment of instalments of £3 per month and the ceding of the claim in the insolvent estate.

COLONIAL ORPHAN CHAMBER V. SAMUEL PHILLIPS.

Mr. Gardiner moved for the final sequestration of defendant's estate. The provisional order was granted by Mr. Justice Maasdorp on June 27.

Final sequestration granted.

COLONIAL ORPHAN CHAMBER V. E. COHEN.

Mr. Gardiner moved for the final sequestration of defendant's estate. The provisional order was granted by Mr. Justice Buchanan on June 27.

Final sequestration granted.

SPANIOR AND CO. AND OTHERS V. VENTER.

Mr. P. S. Jones moved for the final sequestration of defendant's estate. The provisional order was granted by Mr. Justice Buchanan on June 27.

Final sequestration granted.

HULL V. H. J. VILJOEN.

Mr. P. S. Jones moved for provisional sentence on a mortgage bond for £150, with interest from July 1, 1899, and also that the property specially hypothecated be declared executable. The bond had become due by reason of the non-payment of interest. There was also a claim for 8s. 6d. insurance, but that was not now asked for, as the amount had been paid by defendant's agent.

Provisional sentence granted as prayed, and property declared executable.

MCINTYRE V. KEYSER.

Mr. P. S. Jones moved for provisional sentence upon a mortgage bond for £60, with interest from July 1, 1899, and costs of suit. Also that the property specially hypothecated be declared executable. The bond had become due by reason of the non-payment of interest.

Provisional sentence granted, and property declared executable.

MEDLY BROTHERS V. BARNARD AND ANOTHER.

Sir Henry Juta, Q.C., moved for provisional sentence upon a mortgage bond for £369 9s. 11d., with interest from January 1, 1898.

Provisional sentence granted as prayed.

WITHINSHAW V. REEVE.

Mr. Gardiner moved for the final sequestration of the defendant's estate. The provisional order was granted by Mr. Justice Buchanan on June 5 last.

Final sequestration granted.

SMYTHE V. HUDSON.

Mr. Searle, Q.C., moved for provisional sentence for £100 upon an acknowledgment of debt.

Sir Henry Juta, Q.C., for the defendant, read an affidavit stating that the defendant was resident in Natal, that the acknowledgment of debt took place in the Transvaal, that the defendant was not domiciled in this country, and that therefore the Court had no jurisdiction.

The case was postponed until August 1 to allow an answering affidavit to be filed by the plaintiff.

COHEN V. FALCONER.

Mr. McGregor applied that the provisional order of sequestration which had been granted against the defendant be superseded.

Granted.

LEWIS V. MINNIE GROSSMAN.

Mr. Gardiner moved for a decree of civil imprisonment against the defendant. The latter some time ago brought an action in the Magistrate's Court for defamation of character, and succeeded, but on appeal to the Supreme Court, the judgment of the Magistrate was set aside, and costs given against the present defendant. It was for these costs, amounting to £13 7s. 1d., that a decree of civil imprisonment was asked.

The defendant appeared in person, and went into the witness-box, and stated that she had no means, and was living with her parents. Her father had raised £10 for her to bring the original action. Her father was a tailor, and she was completely dependent upon him. Witness had never worked for herself, but had helped her father at home. She could make no offer.

Buchanan, A.C.J.: The defendant in this case has gone into the witness-box and stated that she has no means to satisfy the debt, and there is no contradiction of that statement. The Court is therefore not satisfied that the case is one in which an order should be made. It is not necessary to go into the case, except to say that the action for damages which has been appealed against can not be classed as one of those speculative actions which are sometimes unnecessarily brought into court. The application will be refused.

HAVENGA AND DICKSON V. VAN NIEKERK.

Mr. Maskew moved for a decree of civil imprisonment against the defendant on an unsatisfied judgment for £105 10s. A certified copy of the judgment was put in.

Mr. Nathan appeared for the defendant. An affidavit was filed, which went to show that the defendant had been unable to meet the judgment debt owing to military operations in connection with the war having interfered with his business.

Mr. Maskew: We have no answering affidavit, as the defendant's affidavit was only put in late the previous night. The defendant has not shown to the Court that he possessed no means.

The Court, however, held that in the absence of anything to contradict the defendant's statement as to his not being in possession of means the application must be refused.

MARTIENSEN V. C. W. CORLETT.

Mr. Molteno asked that this matter be allowed to stand over until August 1, pending a settlement.

Postponement granted.

PIENNAAR V. MOLLER. { 1900.
July 12th.

Promissory Note—Signature—Provisional sentence.

Where provisional sentence was asked against the same defendant on two promissory notes, one of which bore the signature "G. Muller" instead of "J. G. Muller" the Court refused provisional sentence in the absence of an allegation in the summons that "G. Muller" was the same person as J. G. Muller.

Mr. P. S. Jones moved for provisional sentence on two promissory notes, one for £200 and the other for £60. It appeared that the defendant's name was Johan George Muller, and one of the promissory notes was signed J. G. Muller, while the other, the one for £60, was signed G. Muller only.

Buchanan, A.C.J.: The principle on which provisional sentence is given requires the production of a document signed by the defendant acknowledging the debt to be due by him to the plaintiff. In this case the one promissory note was signed J. G. Muller. This is a liquid document. In the other case, the signature is "G. Muller," but if it had been alleged that this was the defendant's usual signature one might have overlooked the discrepancy between the note and the summons. There is however no such allegation, and the Court, under the circumstances, is only prepared to give judgment on the note signed "J. G. Muller." If the plaintiff wishes to proceed on the second note, he must do so by taking out an illiquid summons.

Provisional sentence for £200 and costs was therefore given.

SCHIVEDBAN V. VAN DER WALT.

Mr. Gardiner moved for provisional sentence on a mortgage bond for £50, with interest from July 1, 1899, and also that the property specially hypothecated be declared executable. The bond had become due by reason of the non-payment of the interest.

Provisional sentence granted as prayed, and the property declared executable.

MASTER V. H. W. F. LAWS.

Mr. Ward moved for the usual order calling upon the respondent to file an account as executor dative in the estate of the late S. J. P. van Eck.

The usual order was granted.

STANDARD BANK V. DE WET AND ANOTHER.

Mr. Gardiner asked that this matter be allowed to stand over until August 23.

Postponement granted.

S.A. MUTUAL V. H. H. ZINN.

Mr. Howel Jones moved for provisional sentence on a mortgage bond together with interest. The bond had become due by reason of the non-payment of interest.

Provisional sentence granted as prayed.

S.A. MUTUAL V. VAN NIEKERK.

Mr. Howel Jones moved for provisional sentence on two mortgage bonds, one for £550 and the other for £150, with interest at the rate of 6 per cent. from July 1, 1899, and also that the property specially hypothecated be declared executable.

Provisional sentence granted, and the property declared executable.

STANDARD BANK V. VAN AAR T.

Mr. Gardiner asked that this matter be allowed to stand over until August 23.

Postponement granted.

STANDARD BANK V. VAN AABDT AND ANOTHER.

Mr. Gardiner applied that this matter also might stand over until August 23.

Postponement granted.

STARCK V. LAUBSCHER.

Mr. Heydenrych moved for provisional sentence on three promissory notes for £380, £295, and £60 respectively, with interest and costs.

Provisional sentence granted.

SAVAGE AND SONS V. IMMERMAN.

Mr. Schreiner moved for provisional sentence on two promissory notes, one for £325 15s. 6d. and the other for £86 7s.

Mr. Searle appeared for the defendant. An affidavit was read, in which the defendant detailed the manner in which his goods had been taken by the Boers when in possession of Griqualand West. He had lost everything he had, and could not satisfy the claim, but it seemed a case in which compensation would be given. Counsel admitted that it was not a legal defence, but defendant was anxious to put the facts before the Court. He thought that a stay of execution might be granted.

Provisional sentence as prayed was granted.

[Plaintiffs' Attorneys, Messrs. Van Zyl and Fuissinné; Defendant's Attorneys, Messrs. Tredgold, McIntyre, and Bisset.]

ILLIQUID ROLL.**MCKILLOP AND ANOTHER V. JOSEPH.**

Mr. P. S. Jones moved for judgment under Rule 319 for £305 19s. 6d., with interest at the rate of 6 per cent. from May, 1900, and costs of suit.

Judgment as prayed.

WARD AND CO. V. ENDLEY.

Mr. Gardiner moved for judgment, under Rule 319, for £75 6s. 2d., balance of account and cash advanced, with interest *a tempore morae* and costs of suit.

Granted.

RAUTENBACH V. WILL.

Mr. Gardiner, for the applicant, asked that this matter be allowed to stand over until August 1. Defendant had put in an affidavit, but there had been no time to answer it.

Sir Henry Juta, Q.C., for the defendant, asked that before the matter was postponed the Court would be asked to refer the matter

of a bill of costs in connection with a certain case which came before the Bechuana-land Concessions Court for taxation to the Taxing Office at Kimberley, or such other office as the Court might determine. There was also an application for removal of bar.

The Court decided that the whole matter should stand over until August 1.

ALEXANDER V. HARRY JONES.

Mr. Gardiner appeared to move for judgment for the sum of £707, being money lent under Rule 329d.

Mr. Burton appeared, and moved for the removal of bar, an affidavit having been filed, in which the defendant denied his indebtedness, and said he had no intention of delaying proceedings so as to defeat justice. He also stated that, owing to his ignorance of legal matters, he left the matter in abeyance until too late. The affidavit further stated that when the plea was proffered to the Registrar it was refused, because the Registrar had a few seconds previous to this accepted notice of bar. He stated that he had a good defence to the action, and wished to go to trial.

The Court granted an order for the removal of bar, and gave leave to file a plea, but directed that the plea must be filed forthwith.

[Plaintiff's Attorney, Mr. C. Brady; Defendant's Attorney, Mr. J. J. Michau.]

PURCELL, YALLOP AND EVERETT V. HARSTELU.

Mr. Gardiner moved for judgment, under Rule 329d, for £38 1s. 2d., goods sold and delivered, with interest *a tempore morae*, and costs of suit.

Granted.

PURCELL, YALLOP AND EVERETT V. P. J. PEDERSEN.

Mr. Gardiner moved for judgment, under Rule 329d, for £90 8s. 1d., goods sold, with interest *a tempore morae*, and costs of suit.

Granted.

WEGNER V. WEGNER.

Mr. Gardiner moved for judgment, under Rule 329d, for £107 19s. 8d., costs incurred in a recent action, and paid by plaintiff on behalf of defendant.

Granted.

SEARLE AND CO. V. KONINGSBERG.

Mr. Gardiner moved for judgment, under Rule 329d, for £97 3s. 10d., goods sold and delivered, with interest *a tempore morae*, and costs of suit.

Granted.

VAN DER SPUY V. SASSON.

Mr. P. S. Jones moved for judgment, under Rule 329d, for £63 4s. 3d., goods sold and delivered, with interest *a tempore morae*, and costs of suit.

Granted.

OOSTHUIZEN V. JOUBERT.

Mr. P. S. Jones moved for judgment, under Rule 329d, for the amount due for the hire of certain sheep, etc., and also for the purchase price of certain lambs and ewes.

Judgment as prayed.

PARSONS V. ESSON.

Mr. Gardiner moved for judgment, under Rule 329d, for £10, balance of capital amount due by defendant, and £29 13s. 10d., taxed costs in the said suit.

Judgment granted as prayed.

ESTATE OF VAN NIEKERK V. VAN NIEKERK.

Mr. Searle applied for an order compelling Mrs. Van Niekerk to furnish an account to the trustee in her husband's insolvent estate of the moneys she had received from her husband between September, 1895, and November, 1899.

The Court ordered the matter to stand over for further information.

LEFFLER V. H. W. JOSEPH.

Mr. Gardiner moved for judgment, under Rule 329d, for £206 5s., being half-share of the brokerage on the sale of certain properties sold by the defendant after he had agreed to share the commission with the plaintiff. Interest *a tempore morae* and costs of suit were also asked.

Judgment granted as prayed.

STEER AND CO. V. BICKMAN.

Mr. P. S. Jones moved for judgment, under Rule 329d, for £28 16s., balance of ac

count for services rendered and cash advanced, with interest *a tempore morae* and costs of suit.

Granted.

— — —
WILEY AND CO. V. COMBRINCK.

Mr. Gardiner moved for judgment, under Rule 329d, for judgment for the value of certain goods sold and delivered, with interest *a tempore morae* and costs of suit.

Granted.

— — —
BADENHORST V. BADENHORST } 1900.
} July 12th.

— — —
Rule 329(d)—Transfer of land —
Delivery of stock.

— — —
Mr. P. S. Jones moved for judgment, under Rule 329d, for the transfer and conveyance of certain two erven at Colesberg, for which £1,000 had been paid, or failing that for damages, and also for the delivery of certain thirty horses and thirty head of cattle, or in the alternative, for damages.

The Court pointed out that they could not give damages on that application, but gave an order for the transfer and conveyance and for the delivery of the stock.

— — —
PEDERSEN AND ANOTHER V. JOSEPH
EDWARDS.

Mr. Gardiner asked that this matter be allowed to stand over until August 1.

Postponement granted.

— — —
OLIVER V. OLIVER.

Mr. P. S. Jones applied for the appointment of curators to administer the property of the respondent, who was at present detained in Valkenberg Asylum.

Mr. Wilkinson appeared for the respondent.

Evidence taken in this case showed that the respondent had for some months been suffering from religious mania. Dr. Dodds, in his evidence, said, however, that the patient was now much better, and it was a case in which he had every hope of recovery.

The names of Mrs. Oliver and C. Fisher Smuts were submitted as curators *bonis*.

Mr. Wilkinson asked the Court to make the appointment of curators without declaring the respondent of unsound mind.

The Court decided that it was not necessary in this case to declare the respondent of unsound mind, and appointed as *curators bonis* the persons abovementioned.

[Applicant's Attorney, J. C. Berrange.]

— — —
DE WAAL AND CO. V. H. PEARCE.

Mr. De Waal moved for judgment, under Rule 329d, for £102 19s. 5d., less £50 paid on account, goods sold and delivered, with interest *a tempore morae* and costs of suit.

Granted.

— — —
REHABILITATIONS

— — —
On motions moved by Mr. P. S. Jones, the insolvent estates of Jacobus Christian Jacobs and Charles Hayne were rehabilitated.

On the motion of Mr. Gardiner, the insolvent estate of Otto Fuchs was rehabilitated.

On the motion of Mr. De Waal, the insolvent estate of Johannes Nicolaas Marais was rehabilitated.

On the motion of Mr. Molteno, the insolvent estate of Ludwig Wilhelm Carl Schroder was rehabilitated.

— — —
In re KEYTER.

Mr. Burton applied for the rehabilitation of the insolvent estate of Anthony Petrus Keyter.

After hearing counsel, the application was refused. The facts appear sufficiently from the judgment.

Buchanan, A.C.J.: The insolvent surrendered his estate in 1894, and now applies for rehabilitation. The insolvent was tried and convicted, and sentenced in 1895 for culpable insolvency, but certainly that did not necessarily imply that his application must be refused. But there are three grounds for refusing the application. In the first place this man was carrying on a large agency business, and his books were badly kept. This alone has been made a ground for refusing a similar application. Then the trustee's report and a civil case which came before the Court showed that the insolvent had been guilty of appropriating trust

moneys. Although he was not tried for this, it was clearly proved in the case mentioned. Then the third ground was a very serious one, viz., that he gave the trustees no assistance in liquidating the estate. We are not prepared at the present time to say when the insolvent should apply again. If he shows that his conduct has since been good, and he comes before the Court again with a similar application, but not in too short a time, the application may be favourably considered.

GENERAL MOTIONS.

THOMAS V. THOMAS.

Mr. P. S. Jones applied for leave to Sarah Thomas to sue her husband *in forma pauperis* for divorce on the ground of his adultery.

The usual order was granted, Mr. P. S. Jones to take the reference.

HENRY V. HENRY.

Mr. P. S. Jones moved for leave to Mary C. Henry to sue her husband *in forma pauperis* for divorce on the ground of his adultery.

The usual order was made, Mr. P. S. Jones to take the reference.

IN THE MATTER OF THE PETITION OF SUSANNA FRANCIS LOUW.

Mr. Nathan moved for an order authorising the cancellation of a certain mortgage bond.

The Court granted a rule *nisi* calling upon all interested to show cause why an order in terms of the petition should not be granted; the rule to be published once in the "Government Gazette" and once in some Dutch newspaper circulating in the district of Calvinia, the rule to be returnable on August 16.

IN THE ESTATE OF THE LATE ROBERT KEMBLEY.

Mr. P. S. Jones moved for an order confirming the sale of certain landed property in the above estate.

The Court granted an order authorising the Registrar of Deeds to pass transfer at the request of the executor testamentary.

IN THE ESTATE OF THE LATE PHILIPPUS JACOBUS FOURIE AND ANOTHER.

Mr. Gardiner moved for an order to vary the terms of a certain will, and to authorise certain transfer.

The motion was ordered to stand over until notice was given to the executors of the survivor mentioned in the will.

IN THE ESTATE OF THE LATE DINAH ORSMOND.

Mr. Searle, Q.C., appeared in this matter, which was for the appointment of an executor dative, and which was previously postponed for further proof as to the death of George Orsmond, the executor in the estate.

Two affidavits having been read giving conclusive proof of George Orsmond's death, the Court granted the order as prayed, the Master to call a meeting of next-of-kin for the appointment of an executor dative.

IN THE ESTATE OF THE LATE JOHN HENRY CHARLES BUTLER.

Mr. Gardiner appeared on behalf of the petitioners, Richard William Rose-Innes and George Bellamy Christian, in their capacity as executors testamentary in the above estate, and moved that the rule *nisi* granted under the Derelict Lands Act be made absolute.

Rule made absolute as prayed

GOODISON V. TATE.

Mr. Gardiner moved for the cancellation of the sale of certain land at Claremont, entered into between applicant and respondent. The price was £600, of which only £50 had been paid.

After hearing the petition, the Acting Chief Justice said that what was asked for was entirely without precedent, and the Court could not make any rule in this case. The proper course would have been by action, and not by motion.

SANDFORD V. GRAAFF-REINET } 1900. MUNICIPALITY. } July 12th.

Municipal Act No. 45, 1882, section 28—Voters—Owners and occupiers.

An occupier of any immovable property within a Municipality constituted under the General

Municipal Act of 1882, who is not otherwise disqualified, is entitled to be enrolled as a voter, notwithstanding that no tenants' rate for the year had been assessed by the Council.

This was an application for an order of Court authorising the respondent Municipality to admit the applicant and some forty other occupiers as voters of the Municipality, and to amend the voters' roll accordingly.

The applicant's affidavit set out that the Mayor and two Councillors of the Graaff-Reinet Municipality constituted a Court held under sections 33 and 34 of Act 45 of 1882, for the purpose of revising the Municipal voters' roll of Graaff-Reinet. That in June last the Court was held and the petitioner appeared in person, and asked for his name to be placed on the roll in respect of property occupied by him. His claim was refused, and his name was not inserted on the roll notwithstanding that none of the disqualifications laid down in the Act were brought against him. His claim was refused on the ground that there was no tenants' rate that would entitle the petitioner to have his name placed on the roll, and that he had no claim to be placed on the roll unless he paid landlords' rate. The petition went on to say that no tenants' rate was assessed in the Municipality, and that no tenants' rate would ever be assessed in the Municipality under the Council as it now exists. Unless it were ordered by the Court the petitioner and the other persons mentioned would be debarred from voting at the forthcoming election of Councillors in August next, and they would thus be deprived of the benefit of any voice in municipal matters generally. It was therefore asked that the Court order that the names of the petitioner and those of the forty persons mentioned on the schedule be inserted on the roll, and that the Resident Magistrate be appointed to make inquiries as to the number of votes each was entitled to.

In an answering affidavit, F. C. Te Water, one of the respondents, said that neither the applicant nor any of the persons referred to in the schedule annexed to the applicant's petition were liable for or had paid any rate in terms of section 28 of Act 45 of 1882. There was no tenants' rate levied in the Municipality of Graaff-Reinet, and the

owner of the immovable property occupied by the applicant was not and had never been in arrears with his rates, and that the applicant had never paid rates in terms of the 135th section of the said Act. Therefore the respondent was not entitled to have his name inserted on the roll of voters as such occupier.

Mr. Schreiner, Q.C., for the applicant: The true test of a man's right to be a voter of the Municipality is the liability to be rated, and not the actual payment of the rates. The respondents would contend that only one person (either owner or occupier) could vote in respect of the same property. In *Haarhoff's* case (7 H.C., p. 136), a general order was granted, allowing the petitioner and certain other persons to be placed on the roll. The Court might make a similar order in this case. In *Dormer's* case, it was held that Dormer had a *locus standi*, for the purposes of making an application to the Court, because he was liable to be rated. I would suggest that if the Court is not ready to grant the order on the Magistrate, it might be granted on the secretary of the Council.

Mr. Searle, Q.C. (for the respondents): Only persons who are actually liable for and do pay rates are entitled to vote; that has been the practice for the last twelve years. The meaning of the words "liable to be rated," is liable to be rated for tenants' rate; this is clear from sections 134 and 135 of the Act. Only actual payment of a rate can give a right to vote. (See sections 125, 126.) On the question of the procedure, it is doubtful whether the Magistrate or anybody else can reverse and set aside the decision come to by the Council's registration officers. These officers have completed their work and discharged their duties; hence no power can revive the Court.

[Solomon, J.: Have these people then no remedy at all?]

For the present they have no remedy. They can only get a declaration of their rights, but the Court will not grant the relief here asked for—at any rate, not in the form asked for. The roll "cannot be added to or altered." The applicant cannot apply on behalf of the other forty persons unless he shows he has some special interest. True, any burgess may have an interest in the correctness, or otherwise, of the roll, but he has not such an interest as will justify him in coming into court.

[Buchanan, A.C.J.: This Court has, in the case of a Parliamentary voters' roll, ordered the re-opening of a Revision Court.]

I admit that; but the words of the Act, of 1892 are not so strong as those of the Municipal Act. The Court refused to interfere in the case of *Crewe v. Botha*.

Mr. Schreiner, Q.C. (in response to a request from the Court that he should put the case of forty-one persons, other than the applicant): A general order has been asked for, in order to prevent a needless multiplicity of applications. A general order was granted in *Haarhoff's* case; and even though Haarhoff was Mayor of Kimberley at the time, the order was granted to him as a citizen, and not as Mayor.

Buchanan, A.C.J.: The applicant in this case, on his own behalf and on behalf of some forty other occupiers in the Municipality of Graaff-Reinet applied to the Court constituted under Act 45 of 1892 to be admitted as voters at the coming Municipal election. They claimed their qualification under the 28th section, which is as follows: "Every person of full age, not disqualified under the provisions of this Act, who on the first day of June in any year is the owner or occupier of any immovable property in any Municipality, and who shall have paid all sums if any then payable by such person in respect of any rates made three months or more before such day, shall be entitled to be enrolled on the voters' roll for such Municipality according to the following scale," and then follows a scale showing a certain number of votes, one or two, or three, according to the value of the said property. The applicants are all occupiers of property, and as they allege not disqualified in any way under the Act. There is no denial of these allegations, and the contention on behalf of the Municipality is that under the Act two rates are leviable, one upon owners of property, and the other upon occupiers of property, and that, as in the Municipality of Graaff-Reinet no rate has ever been levied upon occupiers, such occupiers are not entitled to be registered as voters unless they have paid landlords' rate. Now the Act does not make the right to vote determinable upon the rate, but makes the right to vote determinable upon their being either proprietors or occupiers of property in the Municipality. Both owners and occupiers are liable to be rated, but the qualification to vote does not depend upon their being so. The contention of the Municipality is, I think, on the whole untenable. It

seems clear in the words of the 28th section that the applicants are not disqualified from being voters simply on the ground of their not paying rates. As suggested in the course of argument it might some time be found possible to do for a year even without the landlords' rate, and then all the property owners would be disqualified, or one year there might be a landlords' rate and another year a tenants' rate, and so on, and by these means the people would be deprived of the right given them by the Act to exercise the right to vote. I think therefore the contention of the applicants is perfectly sound, and that they are entitled to be enrolled. Objection has been taken that it is too late now to place these persons on the voters' roll, but this roll is prepared every year, the applicants applied in due time, and came before the Court in ample time to have been placed on the roll, and there is still ample time for them to be placed on the roll before the annual election. In these circumstances they would be deprived of a clear right if they are not placed on the roll. The exact method by which they can now be placed on the roll is not provided by the Act, but under the 32nd section the Court can be called together by seven days' notice by the Municipal Clerk, and there is no reason why that notice should not be given. Therefore the objection can be got over by the Municipal Clerk giving seven days' notice. I think the order to be given in this case should be in the following terms: That the respondents—the Mayor and the two Councillors who constituted the Court under section 33 of the Act—be ordered to admit the applicant and other occupiers who may claim to be voters of the Municipality in respect of the number of votes to which they are severally entitled, and shall forthwith amend the voters' roll accordingly in sufficient time to enable the applicant and other owners of property to vote at the next annual election. The roll prepared for this year has not been shown to be completed, and as the applicants have the right they must be inserted thereon. There is no provision in the Act for a revision or an appeal from the decisions of this Voters' Court, and this order does not constitute a review, but is a remedy for a refusal of

rights to which the applicants are clearly entitled. To obtain this right to vote they came before this Court, and the order will be granted in the terms indicated.

Maasdorp and Solomon, J.J., concurred.

As to costs, Mr. Searle submitted that as the respondents acted perfectly *bona fide* there should be no order as to costs.

Mr. Schreiner argued that the applicant should get his costs.

Buchanan, A.C.J., said that in such cases where the persons exercised some official or judicial function he did not think costs should be given against these persons.

Mr. Schreiner submitted that the Municipality should bear the costs.

Buchanan, A.C.J., pointed out that if it had been the Civil Commissioner who had sat in the Voters' Court instead of the Mayor and two Councillors no costs would have been given, and the Court therefore decided that no order should be given as to costs.

[Applicant's Attorneys, Messrs. J. and H. Reid and Nephew; Respondents' Attorneys, Messrs. Van Zyl and Buissinne.]

REGINA V. WOLMARANS. { 1900.
July 12th.

This was an application by the petitioner to be admitted to bail. Petitioner had removed from Worcester to Smithfield, in the Orange River Colony, and had remained there until May 16, 1900, when, on the occupation of the country by the British troops, he was arrested as a suspect, and lodged in gaol. He was subsequently sent back to Worcester, and although brought before the Resident Magistrate and remanded several times, no additional evidence had been brought against him, and he had not been committed for trial.

Mr. Burton for the applicant.

Mr. Ward on behalf of the Attorney-General.

Mr. Ward: I do not oppose the application. The conditions I would require are that the amount of bail be fixed at £500 personal security and two sureties of £250 each, and that applicant reside at Worcester until the completion of the preliminary examination.

The Court granted an order as suggested by the Crown.

[Applicant's Attorney, J. J. Michau.]

SUPREME COURT

[Before the Hon. Mr. Justice BUCHANAN (Acting Chief Justice), the Hon. Mr. Justice MAARDORP, and the Hon. Mr. Justice SOLOMON.]

IN THE 1ST STATE OF GUSTAVE { 1900.
NISSEN AND CAREL HENNINGS. { July 13th.
TRADING AS NISSEN BROS.

Mortgage bond—Partnership—Absence of partner.

Where land the property of a partnership was registered in the name of H., one of the partners, the Court, H.'s whereabouts being unknown, refused to authorise the passing of a mortgage bond on the land by H.'s partner.

Mr. Gardiner moved for an order authorising Gustave Nissen to pass a certain bond in the name of the firm, the whereabouts of Carel Hennings being unknown. It appeared that the firm carried on business at Burghersdorp, and Hennings was there during the occupation by the Free State forces, and the petitioner believed that he left Burghersdorp before the re-occupation by the British, as he was apprehensive of the results of his presence. Hennings' whereabouts were unknown to the petitioner, the last he had heard of him being a short telegram he received from him from the Free State on February 25 last. Now the firm supporting Nissen Bros. had refused to do so any longer unless a bond was passed for the sum of £6,000 to cover their indebtedness. The firm could not carry on business unless supported, but without an order of Court the bond could not be passed unless Hennings' signature was obtained.

After hearing counsel, the Acting Chief Justice said that the property on which this action was based was registered in the name of Hennings, and as the Court had no authority to mortgage any person's property without his consent no order could be given in this case.

COLONIAL GOVERNMENT V. HARTUNG.

Mr. Ward, for the applicants, said that when notice was given it was an applica-

tion on the part of the plaintiffs for the appointment of a commissioner to take the evidence of the plaintiffs' witnesses at Upington. Since then a consent paper had been filed consenting to the appointment on condition that it was a joint commission for the examination of both defendant's and plaintiffs' witnesses.

An order was granted in terms of the consent paper

CARDWELL V. J. RDAAN. { 1900.
 { July 13th.

Mr. Searle, Q.C., moved for an order to attach certain property and for leave to sue by edictal citation. From the petition it appeared that the applicant had purchased from Jordaan a certain portion, 596½ morgen, of a farm near Steynsburg, paying therefor at the rate of £1 10s per morgen. This was stated to be far in excess of the value of the portion of the farm purchased, but there was a further consideration in an option given to applicant by Jordaan to purchase the remaining portion of the farm, extending to over 200 morgen, for £355 sterling, the said Jordaan giving an undertaking that he would not mortgage or sell the said portion until applicant had notified his intention not to purchase. It was stated, however, in the petition that the said Jordaan had left the farm in July last, and had joined the Republican forces, and the farm had been attached and sold in execution by the High Sheriff on a judgment obtained on certain debts due by Jordaan. Applicant intended to bring an action against Jordaan for breach of contract, and therefore wished to attach the surplus on the sale of the portion of the farm to found jurisdiction, and leave was also asked to sue by edictal citation.

The Court granted an order for the attachment of the surplus *ad fundandum jurisdictionem*, and leave was also given to sue by edictal citation, returnable August 31, personal service to be effected. Leave was also given to serve *intendit* and notice of trial at the same time.

CLINGEN V. CLINGEN.

Mr. Gardiner moved that the rule *nisi*, calling upon the respondent to show cause

why the applicant should not sue him *in forma pauperis* in an action for the restitution of conjugal rights, failing which for divorce, be made absolute.

An affidavit was read showing that the respondent had left for the front about the beginning of this year, and his present whereabouts were unknown to the applicant.

The rule was made absolute, and leave was given to sue by edictal citation, personal service to be effected if possible, otherwise by publication once in the "Government Gazette" and once in a Bloemfontein paper. Leave was also given to serve notice of trial and *intendit* with the citation.

IN THE MATTER OF THE MINOR } 1900.
PERCY JOHN CARDINAL. } July 13th.

Mr. P. S. Jones moved for leave to raise a certain sum of money on property belonging to the minor, who is aged 15 years, for the purpose of his education with the Marist Brothers, Uitenhage.

The Master's report suggested that authority be given to raise £100, the balance after paying initial expense and travelling expenses to the school and the first quarter's fees to be paid into the Guardians' Fund, and that the further payment of fees be made half-yearly by the Master on the certificate of the principal of the school as to the boy's attendance there.

As there was a question as to whether the mother, who made the application, had been appointed tutor to the boy, so that the mortgage could be raised, the matter was allowed to stand over for inquiries to be made.

IN THE ESTATE OF THE LATE HARRIET
TEMPLEMAN.

This was an application to have a rule made absolute authorising the Master to accept a copy of a will in place of the original, which has been lost.

The rule was made absolute.

MARR V MARR. { 1900.
 { July 13th.

Mr. P. S. Jones moved for an order on respondent to pay to applicant the sum of

£30 to enable her to proceed with her action for divorce on the ground of respondent's adultery.

Mr. Gardiner appeared for the respondent.

In her affidavit the applicant stated that she was married to the respondent at Liverpool. She had no means to carry on her action. Her husband was a mason in the employ of the Town Council of Cape Town, and his wages were £4 18s. per week.

There was a replying affidavit by Private Webster, of the Fusiliers, who said that in March last Mrs. Marr had handed to him £140 in gold which she wished him to get changed into bank notes, and she also showed him jewellery to the value of £150, and at the same time told him not to let anyone know that she had the money and the jewellery. He returned the money to her, £60 in Bank of England notes and the rest in gold.

In an affidavit the respondent denied the charges brought against him by his wife, and said that he was bringing a counter-claim against his wife for divorce on the ground of her adultery. He also stated that in January last he had given his wife £30 to pay for the school fees of the two boys, but now he had received a communication stating that the fees had not been paid. During the month of May he had contributed £12 towards the support of the applicant. He was only earning £4 10s. a week, and he had to support himself and the boys and had to pay off heavy debts incurred by his wife while she was living with him.

In a further affidavit the applicant denied the allegation that she had committed adultery, and also denied that the respondent had given her £30 for the boys' school fees. In December last he had given her £10 to purchase clothing for the boys, which she did, and in January last he gave her £14 10s., but that was to pay off some outstanding debts in connection with the hotel and house expenses. She also absolutely denied Private Webster's statements as to the money and the jewellery.

The application was refused.

Buchanan, A.C.J.: In this case the two things which the Court has to consider is whether the applicant is without means, and whether the respondent is able to contribute money towards her costs in the action. On both these points we are not satisfied, either that the applicant is without means or that the respondent can be asked to contribute. The case appears to have already got as far as the pleadings, and making no order will not hinder the applicant from getting any redress to which she may be entitled.

[Applicant's Attorneys, Messrs. Fairbridge, Arderene and Lawton; Respondent's Attorneys, Messrs. Innes and Hutton.]

IN THE MATTER OF THE ESTATE OF
TITIN OF ABOL WAIHARP } 1900,
SALIE. } July 13th.

Mosque — Trust property — Leave granted to sell.

Mr. Gardiner moved, on behalf of the applicant, who is priest in charge of the Malay community at Port Elizabeth and trustee for the said community, for leave to sell certain property. It appeared that the property in question was left in trust to the Malay community in 1853, for use as a place of worship and priest's house. Owing, however, to various extensions in the neighbourhood, the large Malay community which had formerly resided near the mosque had been compelled to leave, and now without exception lived a great distance away from the mosque and priest's house. This caused great inconvenience, and in addition to this the quarter in which the mosque was situated being a busy, and consequently noisy place, was unsuitable for a place of worship. It was believed that the buildings and ground would realise £5,000, and the applicant had had the refusal of a piece of ground much more suitable for the purpose of a mosque, and with buildings thereon, for £3,000, so that it was believed that the sale of the piece of ground on which the mosque at present stood would realise enough to buy that ground and also pay for the erection of a new mosque. The application was the result of a meeting of the congregation.

The Court granted a rule *nisi* calling upon all interested to show cause by August 16 why the prayer of the petition should not be granted, the rule to be publicly read at two successive meetings of the congregation, and to be published once in a Port Elizabeth newspaper.

On the return day, there being no opposition, the rule was made absolute.

IN THE ESTATE OF THE LATE PIETER HEINRICH KOHNE AND PREDECEASED SPOUSE, MARIA DOROTHEA KOHNE.

Mr. Searle, Q.C., moved for an order confirming a certain compromise which had been arranged to settle a family dispute.

The Master's report was favourable. An order was granted as prayed.

IN THE MATTER OF THE PETITION OF JOHN GOTTFRIED GRUBER.

Mr. Searle, Q.C., moved for an order authorising the transfer of a certain piece of ground, with buildings thereon, situated at Port Elizabeth. The ground had, under a marriage settlement, been settled upon the survivor, but the children of the marriage under the settlement also had a contingent interest in the property. Petitioner and his wife were now separated. There was a mortgage on the property, and as the mortgagee was now pressing for the payment of the mortgage, it was desired to sell a part of the ground. The wife had agreed to a subdivision of the ground into three portions, one for the applicant, one for herself, and the other for the children.

It was pointed out that the children had an interest in the property after the death of the survivor, and the matter was allowed to stand over for the wife's consent to an alternative arrangement proposed.

WILLCOCKS V. WILLCOCKS.

Mr. Gardiner moved for substituted service in this matter, which was an action for restitution of conjugal rights, failing which for divorce, in which leave had been given to sue by edictal citation. It had been impossible to effect personal service, although diligent inquiries had been made, and therefore substituted service was asked, as also an extension of the return day.

The Court granted an extension of the return day until October 12, and allowed substituted service, publication to be made in the "Government Gazette" and in the "Daily Telegraph," London.

IN THE MATTER OF THE PETITION OF CONSTANTINE ALEXANDER SCHWEIZER.

Mr. Gardiner moved that the rule *nisi* granted under the Derelict Lands Act be made absolute.

The rule was made absolute.

IN THE MATTER OF THE MINOR STEYN.

Mr. Joubert moved for an order for the partition of a certain farm so that the minor's half-share might be let.

The Master reported that it would be to the advantage of the minor.

An order was granted as prayed.

IN THE ESTATES OF THE LATE DAVID ANDREAS DU TOIT, AND SUBSEQUENTLY DECEASED SPOUSE, HESTER BEATRIX DU TOIT.

Mr. Gardiner moved for an order authorising the sale of certain property, in which minors were interested, to the executors. It was stated that an undertaking had been given to support the minor children until they attained their majority, so that their inheritance might be protected.

An order was granted in terms of the Master's report.

IN THE MATTER OF THE PETITION OF ABRAHAM STEPHANUS NICHOLAAS DE VILLIERS AND CATHERINE MARIA DE VILLIERS. } 1900. July 13th.

Mr. Gardiner moved for an order authorising the registration of an ante-nuptial contract entered into between the above parties on May 19 last. On June 1 the attorney posted it to his correspondents in Cape Town for the purpose of being duly registered, but owing to certain holidays it was not presented for registration within the prescribed time.

The order was granted as prayed, but the Acting Chief Justice said that the attorney ought to pay the costs of the application.

IN THE ESTATE OF THE LATE CHARLES
ISAAC ADAMS.

Mr. Gardiner moved for leave to transfer certain property. There were no minors interested in the matter.

An order was granted as prayed.

REID V. REID.

Mr. Gardiner moved for the appointment of commissioners at Port Elizabeth and in Glasgow to take evidence in this action, which was for a declaration of nullity of marriage, the plaintiff alleging that after her marriage to defendant she found that he had a former wife still alive.

The Court suggested that as nearly all the witnesses were resident at Port Elizabeth the case might be heard at the Circuit Court there.

Ultimately the matter of a commission in Port Elizabeth was allowed to stand over, and the Court appointed a commissioner to take the evidence *de bene esse* of the plaintiff in Glasgow.

IN THE MATTER OF THE PETITION OF BERNARDUS MATHEUS JOHANNES GREYLING AND LOUISA CATHARINA GREYLING. } 1900.
July 13th.

Mr. Howel Jones moved for an order authorising the registration of the ante-nuptial contract entered into by the above parties before a certain person styling himself Acting Landdrost for the district of Barkly East, "Orange Free State."

Counsel said the circumstances were somewhat peculiar. The parties were married at Barkly East on December 11 last year, and as stated in the petition, they were at the time anxious to enter into an ante-nuptial contract upon the usual terms, but at that time the district was invaded by the Orange Free State forces and the country annexed. There not being a notary in the place, they were advised by the party styling himself Acting Landdrost of Barkly East to enter into the said ante-nuptial contract before him, which they did, and the contract was registered in the Orange Free State on December 29, 1899. The Registrar had now refused to register the deed here upon this document.

After hearing counsel the Court granted an order authorising the Registrar of

Deeds to register a notarial document embodying the ante-nuptial agreement between the parties, this notarial document to take the place of an ante-nuptial contract.

IN THE ESTATE OF THE LATE } 1900.
CHARLES ROBERT LANGE. } July 13th.

Judicial sale—Mortgage bond—High Sheriff—Transfer.

In 1870 the Graham's Town Mutual Benefit Society, at that time the 1st and 2nd mortgagees of certain property, there being also a 3rd mortgagee, obtained judgment on their bonds and the property was declared executable.

At the sale in execution, the property was bought in by the Society and transfer, as they thought, of the entire property was passed to them.

Subsequently they discovered that only half of the property had been transferred to them and on making application to the Court for cancellation of the 3rd bond, the mortgagees being a Company which had ceased to exist, they were referred to the High Sheriff the sale having been a judicial sale.

Mr. Searle, Q.C., moved in this matter, which was for the cancellation of a certain mortgage bond so that transfer could be given of certain property in Graham's Town. It appears that there were three bonds over the property, the Graham's Town Mutual Benefit Building Society holding the first two. In 1870 the society obtained judgment on the two bonds, and had the property declared executable, and upon it being put up for sale they bought it in. Subsequently, on a resale by the Society, it was discovered that while the whole property had been sold transfer of half of it only had been given, and transfer of the other half could not now be given unless the consent of the third mortgagee—a company which was not now in existence—could be obtained, or except on the order of Court applied for.

The Court pointed out that it was a judicial sale, and as the Sheriff was a continuing officer the proper course would be to call upon him to pass transfer of the other half.

The matter was allowed to stand over so that the Sheriff might be referred to as suggested.

**IN THE MATTER OF THE FAIRFIELD BRICK
AND LAND SYNDICATE, IN LIQUIDATION.**

Mr. Searle, Q.C., moved on behalf of the official liquidator for orders cancelling the order placing the syndicate in liquidation, and declaring the arrangements made at a shareholders' meeting (with regard to recognising the chairman and directors, passing a mortgage bond, alterations in the trust deed, etc.) a sufficient contract within the meaning of the Companies' Act.

The Court suggested that the petition should be taken as the official liquidator's final report, and this being agreed to the usual order for publication was made.

TITTERTON V. TITTERTON.

Mr. Searle, Q.C., moved that the rule nisi for the appointment of a *curator bonis* be made absolute.

The rule was made absolute as prayed.

REGINA V. BEKKER, { 1900.
July 13th.

Where applicant on an ex parte application complained that he was being confined in a civil gul without lawful cause, in a district in which martial law was in force, an order was granted on the gul to return to the Court by what authority the applicant was being detained.

This was an application made on behalf of Johan Hendrik Nicolaas Bekker, inquiring by what authority he was detained in prison and his property placed under attachment.

The application was made upon notice to the Attorney-General and the Deputy Judge Advocate, Colonel Sinclair. The petitioner alleged that he was a British subject domiciled at Aliwal North, and was 63 years of age.

On March 29 he was arrested at Aliwal North by order of Major Crewe on a charge of high treason, and placed in custody in the gaol at Aliwal North. On April 10 he and other prisoners were driven on foot to the railway-station, and conveyed to Queen's Town. At Queen's Town they were confined in the gaol in cells infested with vermin and were malshalled morning and evening with native and other convicts confined there. He became ill there, and had continued in ill-health ever since. Subsequently he and the others were again sent to Aliwal North, and at various times he was brought before Mr. Hugo, the Resident Magistrate of Aliwal North, who informed him that he was conducting an inquiry on behalf of the military authorities. The applicant was allowed to put questions to witnesses, but was not permitted to have a legal adviser. He had resided at Aliwal North during the occupation of that place by the Free State forces, but said he had never taken up arms against Her Majesty the Queen, and had remained a loyal and obedient subject. At the time of his arrest the forces of the Free State had been expelled from the district, and those British subjects who had taken up arms had been granted passes under the proclamation of General Sir William Gatacre to return to their farms. Since his arrest the applicant said the district had been quiet and peaceful. His property had been placed under attachment by the military authorities. The applicant said he had not been brought before any properly constituted court or judicial tribunal, and that his health was seriously impaired through his being detained in gaol. He now applied for an order calling on the military authorities and the Attorney-General to show on what authority he had been detained, and in default of such authority, for his release; also to inquire by what authority his property had been placed under attachment and he prevented from dealing with it.

In support of the application, an affidavit made by Charles F. Truter, a land surveyor, of Aliwal North, was filed, in which it was said that since March 20 no disturbance had taken place in the district, and no warfare had been waged.

Mr. Burton appeared for the applicant.

Mr. Ward, for the Crown: The Attorney-General has been served with notice of this application, and has

made certain inquiries. The affidavit of Edgar Hamilton Bisset, acting chief clerk to the Attorney-General, was filed, which set forth that he despatched a telegram to the Resident Magistrate of Aliwal North, and received a reply, from which it appeared that the petitioner was not in custody under civil process, but under martial law. I only appear for the Attorney-General, and am only instructed to say that inquiries have been made by the Attorney-General, and these have been laid before the Court in the telegrams read.

[Buchanan, A.C.J.: That is an unsatisfactory position for the Attorney-General to take up.]

Mr. Ward: The prisoner is not in our custody, and we have no control over his detention.

[Solomon, J.: You don't appear for the military?]

Mr. Ward: No, my lord, I only appear for the Attorney-General; I am not instructed to appear for the military.

In reply to the Acting Chief Justice, Mr. Burton said he was instructed that the applicant was in the custody of the gaoler at Aliwal North, who was under the authority of the Commandant there.

Buchanan, A.C.J.: This is an application having in view two objects. One is, that the Court should inquire by what authority the petitioner is being detained in custody; and the other, for an inquiry by what authority his property had been placed under attachment. As to this second prayer, the information before the Court is so vague and insufficient that we are not in a position to deal with it. As to his personal detention, the petitioner alleges that he is being confined in the gaol at Aliwal North without lawful cause. Notice of this application has been given to the Attorney-General, but he has not made any answer, or appeared to justify the detention. It is alleged that the arrest was at the instance of the military. No notice has been given to them or to the gaoler in whose custody petitioner is. The Court, therefore, is bound to treat this as an *ex parte* application. Till notice has been given, we cannot go into the merits. At present no return is before us with which we can deal. When such a return is made, we will then be able to decide upon its sufficiency. The Court will now grant an order requiring the gaoler in whose custody the petitioner now is, to return to this Court by the 1st August next, by what authority the petitioner is being detained.

[Applicant's Attorney, J. J. Michau.]

INCORPORATED LAW SOCIETY V. { 1900.
VERMOOTEN. } July 13th.

Attorney—Suspension—High treason.

An attorney and notary public convicted of high treason suspended from practice, and ordered to transmit his certificate to the Registrar of the Court.

This was an application on behalf of the Law Society to strike O. S. Vermooten's name off the roll of attorneys and notaries on the ground of professional misconduct.

The affidavit of Mr. C. H. van Zyl (president of the society) stated that Vermooten was a British subject, who had been duly admitted as an attorney and notary of the Court, and had taken the oath of allegiance to Her Majesty the Queen. At the Criminal Sessions held at Graham's Town in May last Vermooten was indicted for high treason, and being found guilty, sentenced to four years' imprisonment by the presiding Judge.

An affidavit made by the respondent admitted the statements contained in Mr. Van Zyl's affidavit, but the records of his trial having been put in, he referred the Court to the formal admission therein by the prosecuting counsel that there had been a certain amount of compulsion on the prisoner, which induced him to perform the acts which led to his conviction for high treason. Proceeding, the respondent stated that he was 29 years of age and was a married man, and there had been two children born of the marriage, one of whom had died since his arrest, but his wife and surviving child were dependent upon his labours. He had not practised as an attorney on his own account, but had managed the business of an attorney at Dordrecht. Although when the republican forces occupied that place he performed certain secretarial work for them, he did not do so of his own free will, but did so under threats of fines. He had wished to take the oath of neutrality, but was not permitted to do so because he was of Dutch descent. He denied that he had ever taken up arms or fought against Her Majesty's forces, and said he had only done secretarial work. He now recog-

nised that he should have undergone any penalty rather than yield any service whatever to those who had invaded Her Majesty's dominions, but he could only plead his youth and inexperience. He deeply deplored his action, which had led to such unfortunate results, and expressed sorrow for what he had done. He asked the Court to suspend him from practice for a time rather than strike his name off the roll. He concluded by praying for that act of clemency.

Mr. Searle, Q.C., in support of the application: Vermooten alleged that he had acted under compulsion, but the evidence showed that large numbers of people who had resided in that district left it when it was invaded, and these people were allowed to go. The prosecuting counsel had, at the trial of the respondent, made the remark as to some compulsion having been used after the jury had brought in a verdict of guilty, and probably he did so in reply to some observation from the Bench, but it was after the remark was made that the Court sentenced Vermooten to four years' imprisonment. Then there was evidence that while the enemy were invading the district the respondent was actually riding about armed with armed burghers, so that it would appear that he was on very friendly terms with those people. There was plenty of evidence to that effect upon the record. It did appear that if there was compulsion the compulsion was of a very mild character. I would not have said this but for some statements made in respondent's affidavit. However the Law Society does not wish to press for a severe penalty against respondent, and the Court might suspend his certificate for a period of years, or rather the certificate might be suspended without any time being fixed.

Sir Henry Juta, for the respondent: I have no intention or desire to minimise in any way the gravity of the offence of which the respondent has been found guilty. There have been many cases before the Court where the professional misconduct more nearly affected the character of the person who carries on the profession of an attorney than in this case. Serious as the crime of high treason is, yet there are various degrees of it. I do not wish to follow my learned friend into the record, which would be tantamount to trying the case over again, and would lead

to no result. I do think I am justified in laying stress upon the statement by Mr. Blaine, who prosecuted respondent on behalf of the Crown, as to some compulsion having been used. Vermooten is practically a young man, and has nothing else but his profession as a means of livelihood. I think your lordships would be sufficiently justified in tempering justice with mercy.

Buchanan, A.C.J.: The respondent in this case has been tried before a judge and jury on a charge of high treason, and he was convicted and sentenced to four years' imprisonment, and the explanation which has been made on his behalf in his affidavit to-day I see was fully laid before the Court then. He gave his own evidence fully in extenuation, and although a remark was made by the prosecuting counsel to the effect that the respondent seemed to have acted under compulsion, yet there is a certain importance in the fact that the judge who tried the case imposed a serious sentence, no less than four years. As an attorney of this Court, the respondent on his admission took the oath of allegiance, and when he violated his oath and was convicted of having done so the Law Society was justified, and very properly brought his conduct before this Court to ask for his suspension. A person like respondent was not in a position to plead ignorance or inexperience, as he was a man who had studied the law and passed examinations in law, and knows the law not only practically but from actual study. He acted as an attorney and took the oath of allegiance to Her Majesty the Queen, but in spite of his knowledge of the law practically as well as theoretically, and in spite of his oath of allegiance taken in open Court to be a loyal subject of Her Majesty, he now stands in his present position. It is a very serious matter for a person in his position. At the same time the youth of the respondent and his severe punishment will be taken into consideration, and all the Court will do at present is to order that the respondent be suspended.

Maasdorp and Solomon, J.J., concurred.

[Attorneys for the Society, Messrs. Van Zyl and Buissinne; Respondent's Attorney, Messrs. Walker and Jacobshon.]

SUPREME COURT

[Before the Hon. Mr. Justice BUCHANAN (Acting Chief Justice), the Hon. Mr. Justice MAASDORP, and the Hon. Mr. Justice SOLOMON.]

ADMISSIONS. { 1900.
 { Aug. 1st.

Mr. Searle, Q.C., moved for the admission of Henry Herbert Phear as an advocate of the Court.

Granted, and the oath administered.

Mr. Buchanan moved for the admission of Servaas Alexander Hofmeyr as an attorney and notary of the Court.

Granted, and the oath administered.

Mr. Nathan moved, under Rule of Court 198, for the admission of James Kirkland as an attorney of the Circuit Court. The applicant was an enrolled law agent of Scotland. (See *ex parte Milligan*, 11 J. 111.)

Granted, and the oath administered.

Mr. McGregor moved for the admission of Isaac Johannes Marais as an attorney and notary of the Court.

Granted, and the oath administered.

PROVISIONAL ROLL.

SIR D. TENNANT V. BREDEKAMP.

Mr. P. S. Jones moved for provisional sentence on two mortgage bonds, one for £1,000 and the other for £230, less £200 and £19 10s. paid on account. The bonds had become due by reason of the non-payment of interest. It was also asked that the property specially hypothecated be declared executable.

Provisional sentence granted as prayed, and property declared executable.

TERBLANCHE AND CO. V. DELARNE.

Mr. Buchanan moved for the final adjudication of defendant's estate.

Order granted as prayed.

PFLUGER V. MARIA G. ERASMUS.

Mr. Gardiner moved for the final adjudication of defendant's estate. The defendant was married in community of property to her husband, from whom she had been separated by a notarial deed, in which certain property had been made over to her and the marital power excluded. Sequestration of her estate only was asked.

Order granted as prayed.

PFLUGER V. ANNIE A. KEYSER.

Mr. Gardiner moved for the final sequestration of defendant's estate.

Order granted as prayed.

LEGG V. H. L. BAUMGARTEN.

Mr. Howel Jones moved for provisional sentence on a promissory note for £280 1s. 2d., less £100 paid on account.

Provisional sentence granted as prayed.

STEER AND CO. V. CARL BECKMANN.

Mr. P. S. Jones moved for a decree of civil imprisonment on an unsatisfied judgment of this court for £28 16s., with £7 13s. 8d., costs of obtaining the judgment. Defendant had paid £5 since the issue of this summons. The plaintiff was prepared to take a decree of civil imprisonment, with suspension, pending payment of £1 per month by defendant. The defendant did not appear.

Decree granted as prayed; execution stayed pending payment by the defendant of £1 per month, the first payment to be made on September 1.

HALL BROTHERS V. JAMES HILL GOTT.

Mr. Buchanan moved for a decree of civil imprisonment on an unsatisfied judgment for £63, with £7 taxed costs. The application was before the Court on June 12 last, but ordered to stand over pending the trial of defendant at Criminal Sessions on a charge of embezzlement. Defendant had been acquitted on that charge, and therefore the application was renewed.

Decree granted as prayed.

ILLIQUID ROLL.

SPILHAUS AND CO. AND OTHERS V. MUNT-WYLER.

Mr. Buchanan moved for judgment, in terms of the declaration, under Rule 319, for the sum of £531 9s., in default of plea.

Judgment was granted.

ATKINS V. NORTHCOTE.

Mr. Maskew moved, under Rule 329d, for judgment for £41 5s., less £20 paid on account for rent, with interest *a tempore morae* and costs of suit.

Judgment as prayed.

MARTIN V. ESSON AND ANOTHER.

Mr. P. S. Jones moved, under Rule 329d, for judgment for £2,600, purchase price of certain property in Cape Town sold by plaintiff to defendant, with costs of suit and interest *a tempore morae*. Transfer of the property was tendered.

Judgment granted as prayed.

MOORREES AND CO. V. J. J. VAN DER SPUY.

Mr. De Waal moved for judgment, under Rule 329d, for the purchase price of certain cows, less £10 paid on account.

Judgment granted as prayed.

GOODISON V. HENRY TATE.

Mr. Gardiner moved, under Rule 329d, for the cancellation of a certain contract of sale entered into between the plaintiff and the defendant in February, 1899.

Granted.

OLIVE V. R. A. FALCONER.

This was an application for judgment, under Rule 329d, for £125, professional services rendered. The case had been set down by default, but as there was a motion for leave to enter appearance and defend, this was heard first.

Mr. Buchanan appeared for the applicant (defendant in the case), and Mr. Searle, Q.C., for the respondent (plaintiff in the case).

For the applicant, it was set forth that summons was served on July 17, and on July 19 applicant instructed his attorney to write to plaintiff's attorney tendering the sum of 5 guineas as payment for the services rendered, but on July 21 a letter was received declining this offer. Applicant's attorney had to communicate this to his client, and then on July 25 he went to the Registrar to enter appearance, but found that owing to a misunderstanding he was a day late, and the case had been set down by default. Applicant then offered to pay the costs of the bar, and so save the expense of an application to the Court, but plaintiff refused.

No affidavit was filed on behalf of respondent.

After argument,

Buchanan, A.C.J., said it was sometimes necessary to adhere strictly to the rule, but in this case the defendant had instructed his attorney to enter an appearance, and it was only through an error on

the part of the latter that that was not done. Therefore the bar would be removed and leave granted to enter an appearance, costs to be costs in the case.

Maasdorp and Solomon, J.J., concurred.

[Plaintiff's and Respondent's Attorneys, Messrs. Van Zyl and Buissinne; Defendant's and Appellant's Attorney, Mr. H. P. du Preez.

RAUTENBACH V. WILL. { 1900
Aug. 1st.

This was an application, under Rule 319, for judgment in terms of a declaration which asked for the delivery of certain papers. The case was set down by default, but there was an application by defendant for removal of bar and leave to plead.

Mr. Searle, Q.C. (with whom was Mr. Gardiner), for the plaintiff.

Sir Henry Juta, Q.C., for the defendant.

In his affidavit in support of the application for the removal of bar, defendant stated that he held a commission in Orpen's Horse and was also performing certain work for the military at Upington in connection with the trial of persons charged with high treason, and in consequence of this and the state of rebellion recently existing in the district of Upington, he had been unable to enter an appearance. It also appeared that correspondence on the matter had been going on for a number of years, and there was a bill of costs defendant had against plaintiff in connection with professional services rendered before the Bechuanaland Commission which had sat at Upington in 1893. Plaintiff admitted these costs, and offered to pay taxed costs upon the bill being presented. There was, however, a difficulty in getting the bill of costs taxed, the Masters of the High Court at Kimberley and the Supreme Court held that they had no power to tax the bill of costs, and the Bechuanaland Commission Court had ceased to exist. Defendant in his application stated that he had a further claim against plaintiff in connection with certain £200 he had paid plaintiff on behalf of certain clients for farms with which the papers claimed in the declaration were connected.

Buchanan, A.C.J., said: There are two applications before the Court, the first for removal of bar, and the other for judgment under Rule of Court 319a. It is asked that the defendant be ordered to deliver up certain documents, but the defendant says that certain professional charges have been in-

curred by him in obtaining these documents. The declaration, however, says that the plaintiff has been at all times ready and willing to pay these costs, before the issue of summons, and had tendered payment of the taxed costs. The correspondence shows that the plaintiff had gone even further, and had offered, if a reasonable bill of costs was submitted to him, to pay it without it being taxed. In these circumstances, I am of opinion that judgment should be given on the application under the rules of Court for the delivery of the documents, coupled with an order that the plaintiff pay the defendant his costs for the aforesaid professional services, these costs by consent of the parties to be taxed by the Registrar of the Supreme Court. The defendant states in his petition that he had a further claim against the plaintiff, but this has nothing to do with the claim made by the plaintiff, and in regard to this claim the defendant must proceed in the ordinary course.

The application for the removal of bar is therefore refused, and judgment given for the delivery of the documents, coupled with the order that the plaintiff pay to defendant his taxed costs aforesaid, the Registrar of the Court being appointed by consent to tax these costs.

Maasdorp and Solomon, J.J., concurred.

Plaintiff's (Respondent) Attorneys. Messrs. Walker and Jacobsohn; Defendant's (Applicant) Attorneys, Messrs. Van Zyl and Buissinne.]

LACHIRAM AND OTHERS V. ESTATE OF LACHIRAM—ESTATE OF LACHIRAM V. ISAACS.

This was an application for judgment in terms of a consent paper filed.

Mr. Schreiner, Q.C., appeared for the applicants in both cases, and Mr. Searle, Q.C., for the respondents.

Mr. Schreiner pointed out that the consent paper filed had been drawn up by the parties themselves, without their consulting the attorneys and counsel engaged on either side, and that, as the questions involved were very important, and some of the parties concerned illiterate persons, it would be advisable if the judgment were given, subject to the Master reporting that there was no objection thereto.

Judgment was given in terms of the consent paper subject to the Master reporting that there was no objection.

REHABILITATION.

Mr. Buchanan moved for the rehabilitation of the insolvent estate of Pieter Johannes Smit, jun.

Granted.

GENERAL MOTIONS.

COHEN V. COENRAAD COHEN. { 1900.
Aug. 1st.

This was an action for divorce brought by Mrs. Cohen against her husband on the ground of his adultery.

Mr. McGregor appeared for plaintiff. The defendant was in default, but he had put in a plea in which he admitted the adultery.

Mrs. Cohen (called) said her maiden name was Samuels, and she was the plaintiff in this case. She was married to defendant on August 29, 1886, in New York, U.S.A. After their marriage they lived in New York for a year, and from there they went to Glasgow, where they remained for eight years. Then her husband settled in Cape Town, and witness came here after three and a half years. Proceeding witness deposed to defendant having committed adultery with one Mary Marshall, who was housekeeper to them, on July 5 last year. Witness had not lived with her husband since then, and intended to bring her action for divorce before, but she took ill. Witness claimed custody of the four children—one girl and three boys—all minors, and she asked for an order compelling defendant to contribute towards the support of herself and children at the rate of £5 each per month—£25 per month in all. Since she left defendant he had contributed £20 a month towards their support.

Plaintiff's declaration prayed for decree of divorce, custody of the children, and £25 per month towards the cost of maintaining plaintiff and the children.

Judgment was granted in terms of the declaration.

IN THE MATTER OF THE PETITION OF LOUIS ALMARO DUPASANIE BASSON.

Mr. Buchanan moved that the rule nisi granted under the Derelict Lands Act be made absolute.

Rule made absolute.

MACININDONA V. MACININDONA.

Mr. Buchanan moved for substituted service in a case in which applicant is suing his wife by edictal citation for divorce. He had been unable to serve summons on the parents of respondent as directed in the order granted, although every effort had been made to do so.

Substituted service granted as prayed, one publication to be made in the "Afrikaanse Patriot" and one in the "Government Gazette."

WEGNER V. WEGNER.

Mr. Howel Jones moved in this matter, which was for judicial separation.

There was no appearance for defendant.

Mrs. Wegner, the applicant, said she was married on August 16, 1892, to Carl Wegner, and for two years after their marriage they lived happily together. Then her husband started drinking, and used to beat her with his fists. During the last two years his conduct had been much worse, and he beat her with anything he could get hold of. They had the New York Hotel in Hanover-street, and had to leave in April last year, as Mr. Ohlsson said defendant was too much addicted to drink to look after the place. They then went to their own property at Zonnebloem, where defendant continued his ill-treatment of witness. Last April they were living at Woodstock, and one day when defendant's father was present, defendant, because she would not give him money, caught hold of her by the hair and beat her with a broomstick. Her husband was sentenced to ten days' imprisonment for that assault. On May 2 he again assaulted witness and wanted to hit her with a chopper. She ran away, but he caught hold of her and beat her. For this assault he was fined £5 or a month. He spent ten days in gaol, and afterwards he assaulted witness again, but she withdrew the charge, as she was rather ill at the time. Since the first two years they lived together defendant had not supported her. He drew the rents from certain property in the joint estate, and spent the money on drink. There were two children of the marriage, a boy and a girl. Witness wanted the custody of the children. There were seven houses at Zonnebloem in the joint estate. They were married in community of property, and the houses came to her husband after their marriage. Her husband was at present in gaol.

R. D. H. Barry produced the marriage register, and August C. F. Wegner, the father of the defendant, corroborated as to his son's ill-usage of plaintiff. Witness stated Harte was present when defendant assaulted the plaintiff on the 7th April, and interfered. Witness suggested Mr. E. R. Syfret as judicial receiver in case a division of the estate were ordered.

The Court granted a decree of judicial separation as prayed; an order declaring the plaintiff to be entitled to the custody and care of the children and an order for the division of the joint property, Mr. E. R. Syfret being appointed receiver to divide the estate; judgment to carry costs.

[Plaintiff's Attorneys, Messrs. Scanlen and Syfret.]

HAUMER V. DE VILLIERS.

Civil imprisonment—Act 8 of 1879—

Subsequent release on proof of no property.

Where a person who had been civilly imprisoned showed that he had no property or means where with to pay the debt due the Court on his application ordered his release.

This was an application for an order for applicant's release from prison, where he was confined on a writ of civil imprisonment.

Mr. Buchanan appeared for the applicant.

Mr. Gardiner appeared for the respondent.

In his affidavit the applicant said that he was a tailor residing at Worcester. About October, 1899, he instituted an action in the Circuit Court against A. J. de Villiers for damages by reason of malicious prosecution. The said action was tried on October 7, 1899, and judgment was given for defendant, with costs. At the time of the trial of the said action petitioner was earning about 10s. per day, but subsequently, as his political views differed from those of a large majority of the inhabitants of Worcester, he was boycotted, and his earnings fell off so much that he could not pay the costs. De Villiers then obtained a decree of civil imprisonment against petitioner, and in May last he was lodged in the debtors' prison, where he has been ever since. Petitioner stated that he had no means to satisfy the debt.

In an affidavit by respondent's attorney, it was stated that petitioner was a coloured

man, and supported by the coloured people who held similar views to himself, and that he had been employed even after the prosecution by others, who held different political views. The petitioner's family were not dependent upon him, and some of them were earning their own living. Petitioner had made no offer of payment by instalments.

In a further affidavit by petitioner he repeated allegations as to his being boycotted on account of his political views, and also as to his having no property or means to satisfy the debt. Since his incarceration his wife and three children, aged seven, nine, and eleven years respectively, were dependent upon charity.

Mr. Buchanan: If the Court is satisfied that applicant has no property, the granting of the application must follow. Once the Court finds applicant has no property, all discretion is gone. (See *Field v. Wernikoff*, 12 S.C., 50.)

Buchanan, A.C.J., said: The Legislature of this country, by Act 8 of 1879, abolished civil imprisonment for debt where it is proved to the satisfaction of the Court that the defendant has no property or means sufficient to satisfy in whole or in part any judgment or decree against him. The section of the Act of 1879 prohibits the Court from granting a writ of civil imprisonment where the Court is satisfied that the defendant has no means to satisfy the debt, and I take it that that also authorises the Court to release any person detained under a writ of civil imprisonment when such person could prove that he has no property or means. In this case the petitioner was prosecuted under the Ballot and Franchise Act of 1892, and the prosecution failed, whereupon the applicant sued De Villiers for malicious prosecution. This action was brought before the Circuit Court, and failed. In defending that action, De Villiers incurred costs to the extent of £43, and thereafter had a writ of execution taken out against petitioner for that amount. This writ was not satisfied, and De Villiers obtained a decree of civil imprisonment against petitioner, who, it appears, intended to appear personally before the Court on that occasion, but was prevented from doing so owing to his train being late that morning, so that by the time he arrived in Cape Town a decree of civil imprisonment had been granted. According to the affidavits before the Court the petitioner has not been in a position between the time when the writ

was taken out and his incarceration to pay any portion of the debt. In his affidavit the petitioner distinctly states that he has no property or means, and the respondent merely says in response that the petitioner is a tailor, who has been earning 10s. per day, and has made no offer. The Court is satisfied petitioner has no property or means, and accordingly an order for his release as prayed will be granted. As, however, the respondent was quite within his rights in having petitioner placed in gaol, there will be no order as to costs.

[Applicant's Attorneys, Messrs. Walker and Jacobsohn; Respondent's Attorneys, Messrs. Van Zyl and Buissinne.]

HAYES V. HAROLD H. HAYES.

Mr. Buchanan moved that a rule nisi for restitution of conjugal rights, failing which for divorce, be made absolute. Personal service of the rule had been made at Lourenco Marques, and respondent had not entered an appearance.

Rule made absolute as prayed.

IN THE ESTATE OF THE LATE LOURENS JOHANNES LOTTER.

Mr. De Waal moved that a rule nisi granted under the Derelict Lands Act be made absolute.

Rule made absolute as prayed.

CONRADIE V. CONRADIE AND OTHERS.

Mr. Howel Jones moved that an award of arbitrators be made a rule of Court.

Order made a rule of Court as prayed.

SALIE V. ABRAHAMS.

Mr. Searle, Q.C., moved for leave to Ab-dol Hadien to intervene as co-plaintiff in the abovenamed suit.

Granted.

IN THE ESTATE OF THE LATE CATHERINE BEATTIE.

Mr. Buchanan moved for an order authorising the Master to make certain payments towards the maintenance and education of the grandchildren of the said Catherine Beattie.

Order granted in terms of the Master's report.

IN THE ESTATE OF THE LATE JAN PRE DERIK DENEYS.

Mr. Gardiner moved for an order authorising the transfer of certain property.

[Buchanan, A.C.J.: Are the four lots to be transferred vested in Deney's?]

We say they are.

[Buchanan, A.C.J.: Why does the Registrar of Deeds refuse to pass transfer?]

He seems to have some doubts as to whether the lots are vested in Deney's or one Barry.

[Buchanan, A.C.J.: The Registrar of Deeds must decide that. We cannot, because we have no facts before us.]

I would suggest a rule nisi be granted, calling on Barry to show cause why transfer should not be passed.

[Buchanan, A.C.J.: You must force the Registrar of Deeds to decide. Refer the matter to him.]

No order was made.

REGINA V. LIEBENBERG. { 1900.
Aug. 1st.

This was an application for an amendment of the order granted on the 12th June last.

Mr. Molteno said that the applicant, Liebenberg, was a farmer residing at Kenhardt, and had been arrested on a charge of high treason, but admitted by the Supreme Court to bail, himself in the sum of £1,000 and two sureties of £500 each, with a further condition that he should reside in the Cape Division pending trial. Owing to his absence from his farm he was likely to be a heavy loser, while his residence in Cape Town involved considerable expense, and he therefore applied that the order admitting him to bail be varied so that while bail should be in the same amount he should be permitted to reside on his farm pending trial.

It would be necessary to enter into new recognisances, and it was asked that these be entered into at Kenhardt.

Mr. Ward said the Attorney-General had no objection to the application being granted, provided the bail bond at present in force remained binding until the new bond was entered into.

The application was granted.

IN THE MATTER OF THE MINORS MORRE

Mr. Nathan moved for leave to mortgage certain property.

Order granted in terms of the Master's report.

MORAVIAN MISSIONARY SOCIETY V MONA AND OTHERS.

Mr. Searle, Q.C., for the defendants in the above action, moved for the removal of the trial of this cause to the ensuing Circuit Court at Queen's Town.

Mr. Gardiner appeared for the respondents, who, while preferring that the case should be heard in the Supreme Court, would, if it was to be removed at all, prefer that it should be removed to Cathcart, as being more convenient.

The Court granted an order removing the case for trial to the Circuit Court at Cathcart; costs to be costs in the cause.

[Applicants' Attorneys, Messrs. Fairbridge, Arderne and Lawton; Respondents' Attorneys, Messrs. Van Zyl and Buissinne].

IN THE MATTER OF THE MINOR PETER
ROBERT MCGREGOR.

Mr. De Waal moved for an order authorising the Master to make certain payments towards the education of the minor.

Order granted in terms of the Master's report.

IN THE MATTER OF THE MINOR ZITA
BERYL CASTLEMAN.

Mr. Molteno moved for an order authorising the Master to make certain payments towards the maintenance and education of the minor.

Order granted in terms of the Master's report.

IN THE MATTER OF DANIEL JACOBUS VAN NIEKERK, SEN., ALLEGED TO BE OF UNSOUND MIND.

Mr. Buchanan, on behalf of the wife of the above, moved for the appointment of a curator ad litem.

Order granted as prayed, the Resident Magistrate of Aberdeen being appointed curator ad litem; summons to be returnable next sitting of Graaff-Reinet Circuit Court, to be served personally on the alleged lunatic.

IN THE MATTER OF THE MINOR JEANETTE
J. J. DE KOCK.

Mr. Molteno moved for an order authorising the Master to make certain payments towards the maintenance and education of the minor.

Order granted in terms of the Master's report.

IN THE MATTER OF THE MINOR FALKINER.

Mr. Howel Jones moved for an order authorising the Master to make certain payments towards the maintenance and education of the minor.

Order granted in terms of the Master's report.

LEONARD V. LEONARD.

Mr. Gardiner moved for leave to the applicant to sue his wife in forma pauperis for divorce on the ground of her adultery.

The applicant, a coloured man, appeared in person, and said he had been married six years, and there were no children of the marriage. Nine months ago his wife left him, and was now living with a countryman of applicant's named Davis. Applicant was a dock labourer and earned 4s. per day, but he did not have work every day.

Mr. Gardiner was appointed applicant's counsel, and a rule nisi, returnable on August 9, was granted calling upon respondent to show cause why her husband should not sue her in forma pauperis for divorce.

The Court then adjourned until this (Thursday) morning.

REGINA V. LOUW. { 1900.
 { Aug, 2st.

High treason—Application for bail refused.

This was an application by the accused for release on bail.

The petition set forth that the applicant was nineteen years of age, and was in gaol awaiting trial on two charges, viz., deserting from service as a policeman and high treason. An affidavit by applicant's attorney was read, in which it was stated that at the preliminary examination of accused, the accused said that two years ago, with the consent of his father, he engaged himself as a constable to serve in the police force at Philip's Town. It was said that when the Free State burghers occupied Philip's Town accused and the other constables would be sent to De Aar to await further orders there. In or about the month of December last it was ascertained that the Free State and Transvaal burghers were likely to come to Philip's Town, and as accused was afraid that if he went to De Aar he would be called upon to take part in the war, he deserted, and went to Colesberg. His presence there was reported by those who knew him as a constable in Colesberg to the Free State General. He was taken to be a spy and was not allowed to leave the laager, and afterwards he accepted a rifle and bandolier of cartridges. He had no chance of leaving, but he managed in time to get away, threw away his rifle and cartridges, and recrossing the Orange River at Doorn Kloof, returned to Philip's Town. The accused had been in

gaol since April 8. The penalty for desertion from the police was a fine of £10, or a month's imprisonment.

Mr. Ward read a letter written by accused to his parents. In this he said: "I must tell you, my dear father and mother, that I am gone away to laager at Colesberg. I am gone as a fugitive. . . . If it is the Lord's will, I may again meet my beloved father and mother, and if it should not be, yet be satisfied."

The evidence taken at the preliminary examination showed that after accused went to Colesberg he was out on patrol with the Boers, and presumably could have got away if he liked.

Mr. Buchanan, for the applicant: There are two charges—one which involves the penalty of a fine, the other, high treason—and it is because of this latter charge that the Magistrate referred the matter to this Court. This Court has discretion. We need not show that accused is innocent. The question is, will the course of justice be evaded or delayed. Bail was refused in Vermooten's case (*Supra*, p. 17) because of the existing facilities for accused to rejoin the Boer forces. In this case the seat of the war is far removed from Philip's Town. There is no chance of accused going back to the Boers. His voluntary return shown an intention not to go back to the Boer forces. Bail has been allowed in several cases since Vermooten's case.

Mr. Ward: The offence is a very serious and aggravated one, since it was committed by a policeman. The position of accused aggravates the offence. Unfortunately for accused the letter written to his parents militates strongly against the affidavit made by his attorney.

Mr. Buchanan, in reply: The accused, if allowed out on bail, could report himself once a week. His freedom might be confined to some place where any possibility of joining the Boer forces again would be lessened.

Buchanan, A.C.J., in giving judgment, said: The applicant in this case has been committed for trial on two charges, one of deserting from the police force, and the other for the crime of high treason. The latter is a capital offence, and consequently the Magistrate could not grant bail. This Court, however, has the power to grant bail in all cases, but in the case of a capital offence like this the Court requires a strong case to be made out before interfering, especially where the Crown opposes the application. In the present case the applicant is not a man of any substance, and I am

not satisfied with the affidavit made by the applicant's attorney, which does not contain a single sworn statement by the prisoner himself. There is the statement made by the prisoner before the Magistrate, of which the attorney says: "I believe this to be a true copy," but there is no evidence before us to justify us in this case in admitting prisoner to bail. There is nothing in the affidavit to show that the prisoner would come up if admitted to bail to stand his trial. The affidavit is a feeble one, and added to this is the fact that the Attorney-General appears for the Crown to oppose the application. In these circumstances such a case has not been made out as will induce the Court to exercise its discretion and grant bail. No order will be made.

[Applicant's Attorney, Mr. Gus Trollip.]

SUPREME COURT

[Before the Hon. Mr. Justice BUCHANAN (Acting Chief Justice), the Hon. Mr. Justice MAASDORP, and the Hon. Mr. Justice SOLOMON.]

ADMISSION. { 1900.
Aug. 2nd.

Mr. Buchanan moved that Pieter Edward Scholtz be admitted as an attorney and notary of the Court.

Order granted.

PROVISIONAL ROLL.

GOURLAY AND OO V. CARNEY AND ANOTHER.

Mr. Gardiner moved for provisional sentence for £475 5s. 3d., being the balance of a promissory note for £500, with interest at the rate of 8 per cent. from April 13, 1900. The interest was due under a special agreement put in, and referred to in the promissory note. There was also an illiquid claim, under Rule 329d, for £91 17s., account stated.

Provisional sentence granted as prayed on the liquid claim, and judgment on the illiquid claim.

STRANGMAN V. BEYERS.

Mr. Fuchanan moved for provisional sentence for £90 5s. 4d., on a cheque which

had been presented and not paid, together with interest from June 19, 1900, and costs of suit.

Provisional sentence granted as prayed.

PARSONS V. ESSOM. { 1900.
Aug. 2nd.

Mr. Gardiner moved for a decree of civil imprisonment on an unsatisfied judgment for £39 13s. 10d., with costs amounting to £8 8s. 9d. A writ of execution had been issued, and a return of *nulla bona* had been made.

The defendant, John J. C. Essom, appeared in person, and in reply to the Court, said that he was at present out of employment, having been last employed by Mr. Stewart, civil engineer. He had already paid £24, and offered to pay the judgment debt by instalments of 10s. per month.

Mr. Gardiner pointed out that none of the judgment debt, £39 13s. 10d., had been paid.

[Buchanan, A.C.J., said that the declaration showed that of the £39 13s. 10d. claimed, £29 13s. 10d. was the amount of costs due, the remaining £10 being due under a compromise in consideration of the withdrawal of action.]

Mr. Gardiner said he would like to cross-examine defendant as to his means.

The defendant, in reply to the Court, said on oath that he had no means or property whatever.

Cross-examined by Mr. Gardiner: He had been out of employment for three weeks. As engineer's clerk to Mr. Stewart he received £200 a year. All that had gone in trying to start a business, which had failed. He had tried to get employment, but had failed. The original money he had collected for Mr. Parsons, in connection with which this debt was due, was expended on Mr. Parsons's behalf. Witness had recently bought some property jointly with Mr. Hopkins for the sum of £2,600, and he then said they would be able to pay £500 on account. That was fully a month ago. Defendant expected to get the money in time, as soon as he could get news from his father. He would then be able to pay the amount they agreed upon, £200 jointly, and the balance of the purchase price was to be on mortgage.

[Buchanan, A.C.J.: If that is the case, surely you can pay more than 10s. per month?]

Witness: Not until I get news from home,

The Court granted a decree of civil imprisonment, but stayed execution pending the payment of £2 per month, the first payment to be made on September 1.

Leave was given to the plaintiff to apply again, if he could at any time show that the defendant could pay more than £2 per month.

IN THE MATTER OF THE PETITION OF JAMES KIFT.

Sir Henry Juta, Q.C., moved in this case which was for leave to institute an action *in forma pauperis* against the Town Council of Cape Town for damages. The petition showed that the applicant was James Kift, a boy of twelve years of age, and he was assisted in the action by his father, Robert Kift, a grocer's assistant in Cape Town. The boy had been employed in a store in St. George's-street. On the evening of February 27 last he was proceeding on his way home up Church-street. Just after passing Long-street he noticed a wire hanging from a house. He caught hold of this wire, which proved to be an electric wire fully charged, and as a result he sustained injuries which would prove permanent, among them being the loss of one hand. Accordingly it was desired to institute an action against the Town Council for £2,000 damages, but the father had no property or means, and now applied for leave to sue *in forma pauperis*.

In reply to the Court as to whether he would take the reference,

Sir Henry Juta said he had already made full inquiries, and was prepared to certify at once, so that a rule *nisi* could be granted.

The Court granted a rule *nisi* calling upon the Town Council to show cause on August 9 why petitioner should not sue *in forma pauperis* for damages.

ROSEN V. CLEMENS ALIAS OTTO.

Mr. Buchanan moved that the rule *nisi* granted by Mr. Justice Solomon on July 24 for delivering up certain property be made absolute.

Granted.

IN THE MATTER OF THE PETITION OF THE DIRECTORS OF THE ZUID AFRIKAANSCH E ZENDELINGS GENOOTSCHAP (THE SOUTH AFRICAN MISSIONARY SOCIETY). } 1900. Aug. 2nd.

Mr. Schreiner, Q.C., moved that the rule *nisi* granted authorising the sale of certain

property be made absolute. The property in question was the old cemetery ground in Somerset-road, which had been granted by the Crown to the society, without any special restrictions, for the purpose of burying heathens and slaves, and there was now no use for it. Proceeding, counsel stated that it was intended that the remains of those who had been buried there should be removed to Maitland Cemetery, where a memorial would be erected. The Crown had not assented or dissented to the proposal, but had referred the parties to the Court. The rule had been duly published, and there was no appearance for the Crown.

Rule made absolute as prayed.

IN THE MATTER OF THE CAPE COMMERCIAL BANK, IN LIQUIDATION.

Mr. Schreiner presented the fifteenth and final report of the liquidators of the Cape Commercial Bank.

The usual order for publication was made.

IN THE MATTER OF THE FAIRFIELD BRICK AND LAND SYNDICATE, LIMITED, IN LIQUIDATION.

Mr. Searle, Q.C., presented the report of the official liquidators, in which the cancellation of the order placing the company in liquidation was asked, and also for reduction of capital, registration of amendments in the trust deed, etc., in connection with the reconstruction of the syndicate.

The report was confirmed.

THE TRUSTEES OF THE INSOLVENT ESTATE OF JACOB KRACHMAL V. KIRSTEIN. } 1900. Aug. 2nd.

Cape Town Municipal Acts, No. 26 of 1893, and No. 26 of 1897—Preference—Rates—Insolvent Ordinance, section 8.

The trustees of an insolvent estate, in distributing the proceeds of the sale of landed property situate within the Municipality of Cape Town, held entitled to award in full to the Council the amount of the rates assessed upon the property within a year of the sale, in preference to the claims of holders of mortgage bonds upon the property annexed on the ground that such payment was a payment made

with the object of realising the property to the best advantage, and that the position of the mortgagees was not injuriously affected by such payment, as the price, which the land realised, would not have been so high if the purchaser had had to pay the rates.

This was an application on notice calling upon the respondent to show cause why his objection to the confirmation of the first and final liquidation and distribution account in the above estate—on the grounds that the item stated as £53 2s. 2d. paid for Municipal rates was not a preferent charge against the said estate, and that this amount, if due by the insolvent, should rank concurrently—should not be expunged, and the account be confirmed as framed, and further why respondent should not pay the costs of this application.

The affidavit of William George Steytler, one of the co-trustees in Krachmal's insolvent estate, stated that the item of £53 2s. 2d. was an amount owing to the Town Council of Cape Town in respect of a Municipal rate due on insolvent's immovable property situate in Cape Town that the said rate, by virtue of section 97 of Act 26 of 1893, fell due on March 15, 1900, the day on which insolvent's estate was sequestered, and was consequently a debt due in the administration of the insolvent's estate, and further that by virtue of section 102 of the said Act, the said rate constituted a charge against the property rated and was recoverable by the Council from the owner or any future owner thereof, for which reasons deponent considered that the trustees were bound to pay the same as a debt due by the estate. It was also stated that the claim of the said Abraham Epstein against the said insolvent's estate consists of a mortgage bond for £250, dated September 23, 1896, and therefore passed subsequently to the promulgation of Act No. 26 of 1893.

In his replying affidavit, the respondent, Abraham Epstein, submitted that the allegation in Mr. Steytler's affidavit that the item of £53 2s. 2d. "is consequently a debt due in the administration of the insolvent estate," was not properly set forth, being a conclusion in law as to which the ruling of the Court was desired, and not an allegation of fact. Proceeding, respondent said the Municipal authorities had failed to prove

the debt in the ordinary course at any of the meetings of creditors held in terms of the Insolvent Law of this colony; that the trustees, notwithstanding that the said debt has not been proved as above nor paid by them to the Town Council as part of the costs of administration, have included the item in the liquidation and distribution account framed by them as ranking preferently to his (respondent's) claim; that he had been informed, and had good reason to believe that if the said item of £53 2s. 2d. be not expunged or ranked as a concurrent debt, his claim would be proportionately reduced, and the whole of the said £53 2s. 2d. would be paid at his expense.

In a further affidavit, Mr. Steytler said that the trustees in their report proposed that they should sell the insolvent's immovable property by public auction, and failing what was in their opinion a sufficient bid that they should sell the property by private treaty. The report was unanimously adopted by the creditors at the third meeting on May 4 last. Subsequently on May 28 the insolvent's landed property was put up to sale at public auction, free and unencumbered—the trustees treating the claim of the Town Council for municipal rates as being part of the costs of the administration—and was knocked down to the highest bidder at £3,135.

Mr. Schreiner, Q.C., appeared for the trustees, and Mr. Searle, Q.C., for the respondent.

As the Town Council was interested it was joined with the trustees in making the application.

Mr. Schreiner, Q.C.: This rate being a statutory charge, there was no necessity for us to prove. This is a first charge on the property. It became due and payable on the day of sequestration. Assessed rates can be recovered from the occupier, as being a charge on the property. The objection was lodged because of some remarks made in *Mossel Bay Municipality v. Holloway's Trustee* (3 J., 50). These rates constitute a right in rem.

The trustee has treated the amount as costs of administration, under section 8 of Act 6 of 1843. He had to clear the property before it could be sold; if he had not done so, he could not have sold to a person without informing such person of the debt due to the Town Council. If he did not, he would be acting *mala fide*. Epstein is estopped. The trustee is a future owner. The rates due for one year fell as a charge on the trustee.

This he brings up in the account as part of the costs of administration incurred, in order to render the property available for sale.

Mr. Searle, Q.C.: There are no grounds for saying these rates form part of costs of administration. The rates fell due on the morning of sequestration, but in point of time were earlier. Therefore they were due before insolvency. Krachmal was owner when the rates fell due. The trustee says these rates are preferent. But see section 178 of Act 26 of 1893. This section sets out what should be preferent charges. See also section 3 of Act 25 of 1897, which refers to the liability of owners for paving, etc., and says it is a first charge. Sections 4 and 10 are similar. Section 11 very carefully protects mortgages before the Act. This mortgage took place after the passing of the Act. The trustee is not a future owner, who can be liable in any way at all. He can sell, and the purchaser becomes liable for the rates.

[Solomon, J.: But should not the trustee tell the purchaser of these charges?]

No, not necessarily. The purchaser must find out what is due under the Acts.

Postea (August 2, 1900).

Mr. Searle, Q.C. (continuing): The liability for rates which are due by a previous owner who goes insolvent does not pass to a succeeding purchaser from the trustee.

[Solomon, J.: Is not the object of the section to meet cases where the owner cannot pay, so that the Town Council may come down on the future owner?]

No, not in cases of insolvency. See sections 275, 276, of Act 40 of 1889, which only applies to Divisional Council rates, and not Municipal rates.

[Buchanan, A.C.J.: Is not the Town Council the same as a bond holder?]

No.

[Buchanan, A.C.J.: If there is a charge on the land, the Registrar of Deeds should not pass transfer.]

Then there would not be a future owner.

[Buchanan, A.C.J.: Surely the purchaser from the trustee is a "future owner"?]

Not in cases of insolvency. The Council was bound to prove on the insolvent estate. Section 102 gives these rates no preference over mortgages. The words "recoverable from future owner" are not sufficient to give that preference. (See *Holloway's Trustee v. Mossel Bay Municipality* (3 J., 50), Municipal rates have no preference by common law. My learned friend says section 102 gives them a preference. [Mr. Schreiner: No, I did not go to that length. I say that

this amount is part of costs of administration.] A debt due before insolvency cannot form part of the costs of the administration. The insolvency took place on March 15, but at dawn that day the rates fell due. The Council must prove on the insolvent estate. They admit they could have done so, and therefore, if they can, why should they be allowed this privilege. Mere authorisation to the trustee to sell does not affect the rights of parties. See *S.A. Association v. Van Standen* (9 J., p. 95) in regard to a judicial sale. At p. 98 *Lange v. Liesching* is referred to. See also *Treasurer-General v. Bosman's Trustee* (2 Juta, 262; *Hunter's Trustee v. Colonial Government* (Juta, IV., 443).

Mr. Schreiner, Q.C., in reply: The trustee considered he was doing his duty in freeing the property from this statutory charge. I admit that the rates do not form a preferent charge against the mortgagees. But the trustee was bound before selling to free the estate from these rates, or otherwise to sell under the condition that the purchaser paid the rates. *Lange v. Liesching* decided that secret and unregistered rights should not come in in the case of a judicial sale. (But see also *Dreyer's Estate* (Buch., 1868, p. 246). 246.)

C.A.F. Postea (August 7, 1900).

Buchanan, A.C.J., in giving judgment, said: This is an application to expunge an objection lodged by the respondent to the liquidation and distribution account framed by the trustees of the insolvent estate. Several questions of considerable importance have been raised in argument, though in the determination of this application they do not all require to be decided. The estate of Krachmal was sequestrated on March 15 last. Previously thereto the Town Council of Cape Town had levied a rate on the landed property belonging to the insolvent, which rate was payable on the same day that the sequestration was ordered. The claim for the rate was not proved on the estate, but the trustees have in their account awarded to the Council the amount in full. The only asset in the estate was the landed property, over which respondent held a third mortgage. The proceeds of the property being insufficient to pay his bond in full, the respondent objected that the rates were not a preferent charge against the estate. The trustees justified their award on the ground that the rate was a debt due in the administration of the estate, and also because by the 102nd section of the

Cape Town Municipal Act No. 26, 1893, the rate was a charge against the property, and was recoverable by the Council from the future owner as well as from the insolvent. On referring to the 102nd section, we find that it makes it lawful for the Town Council to sue either the owner or occupier of landed property within the Municipality for any rates thereon assessed, and then concludes with the following proviso: "Any and every rate assessed under the provisions of this Act shall, in so far as the owner of any property is concerned, be and be deemed to be a charge upon the property rated, and recoverable against the owner at the time such rate was levied, or any future owner; provided always that no future owner of property shall be liable for any rates which became due and payable at any period more than one year prior to the date upon which he became owner of the said property." The decision in *in re Dreyer's Estate* (Buch., S.C. Rep., 1868, p. 246) was cited to support the contention that the trustees were to be regarded as future owners, and also that rates were payable by them in administering the estate. In that case, however, the rates in question had accrued after sequestration, and on reference to the records it will be found that they had been assessed for several years during which it was alleged that through laches the trustees of that estate had held over the property. Those rates were not, as in this case, liabilities of the insolvent existing at the date of the sequestration. It is admitted that the rate in this case was provable against the estate, and in that sense therefore it was not a charge incurred in administration like the rates were in *Dreyer's case*. It was contended for the mortgagee that even if the rate had been proved, the Town Council would not have been entitled to rank in preference over his bond. It has frequently been decided in this Court that by common law municipalities do not enjoy any tacit hypothecation for rates. The only special legislative provisions existing on the point are to be found in the Cape Town Municipal Acts and in the Divisional Council Act. It will be noticed that though the 102nd section of the Cape Town Act makes rates a charge against the property, they are not specifically given priority over other charges already existing. It is doubtful if any claim for such a preference could be maintained, for on reference to the 178th section of the same Act, it will be found that the cost of work and materials expended by the Council

in doing certain work under their regulations for the benefit of private property is made a first claim on such property and preference expressly given thereto over any other debt, obligation, or mortgage. And the same provisions are contained in the amending Act, No. 25, 1897, sections 3, 4, and 10; the 11th section, however, reserving preference over charges for money expended by the Council to mortgagees already in existence at the date of the passing of the Act. This distinction seems to be based on the same principle as that which governed the preference of the *fisc*, namely that such taxes as are imposed for the preservation of the property (and hence also for its permanent benefit or improvement) supersede all prior encumbrances, but as to other taxes such a preference did not exist. (See *Hunter's Trustees v. Colonial Government*, 4 Juta, 448.) As to Divisional Councils, the 275th section of Act No. 40, 1889, requires that before passing any transfer there shall be produced to the Registrar of Deeds a receipt or voucher showing that the rates last due to the Council have been paid. In *Smuts v. Catheart Divisional Council* (13 S.C. Rep, 259), the Council sought to claim the payment of all rates due before giving their receipt; and if that contention had been sustained it would have had the effect of creating a preferent lien for rates in favour of the Council. But the Court held that a purchaser from the involvent estate was concerned only with the last rate due, and was entitled to a receipt upon tendering that rate only, leaving the Council to its ordinary remedy of proving its claim on the insolvent estate for any previously assessed rates. As the liability for the rate in this case accrued before sequestration, and therefore the claim might have been proved upon the estate, there is great force in the contention that if this was to be reduced to a question of the marshalling of claims in the distribution of the estate, the mortgagee might have a preference for his claim over the Town Council's claim for rates. But even if that was so, it would not dispose of this application, which has been based on another ground. No doubt a sale in insolvency has all the consequences and effect of a judicial sale, as far as passing the property to the purchaser free of mortgages and such like encumbrances is concerned. But there would remain the liability imposed by the statute on the future owner, for any rates which were due and payable within a year prior to the date upon which he became owner of the property.

The effect of this provision of the 102nd section appears to me to place the purchaser of property from an insolvent estate in regard to one year's Cape Town Municipal rates very much in the same position as was the purchaser in the case already cited, with regard to Divisional Council rates. The 102nd section of the Municipal Act does not interfere with any recourse the purchaser might have against the seller. It is not necessary to discuss that question in this instance, as here we have a distinct contract made with the purchaser. The trustees, in selling the property by the conditions of sale, expressly contracted that the purchaser should only be liable for rates accruing after the day of sale, and they relieved him of liability for any rates which had accrued before that date. The creditors had given the trustees a free hand to dispose of this property in such manner as they should deem best either by public or private sale or through a broker. The mode adopted was a sale by auction, and the condition as to the payment of rates was a reasonable one to make under the circumstances. It would be in the interest of the creditors that the sale should not be hampered by any uncertain liabilities hanging over the property. The purchaser no doubt must be presumed to know the law, and to be aware that there was a liability for one year's rates attaching to the property, but the trustees had the special knowledge whether or not these rates had been paid, and it would only have been right and above board for them to inform intending purchasers of such a liability if it had not been discharged. The trustees contracted to relieve the purchaser of this liability, and such a condition of the contract was within their authority. It was open to the respondent to have moved the Court if he had any objection to find with the conditions of sale, but he did not do so. Without good reason he cannot now object to the contract made by the trustees. Moreover, I cannot see how this condition prejudiced the creditor. If the purchaser had been told the rates were unpaid he would have taken the fact into consideration in making his purchase, and would have given so much the less for the property. As he was told he would not be liable for any such rates, presumably he gave an increased price for the property. In this way the amount available for the creditor remains the same. It is only in this sense that the rates could be included in the costs of administration. It was really a payment made with the object of realising the property to the best

advantage. Taking this view in my opinion the respondent's objection to the account must be overruled. As to costs, under ordinary circumstances they might have been allowed out of the estate, but the result in this instance would be the same, as they would then be deducted from the dividend payable to the respondent. The application to expunge the objection to the account will therefore be granted with costs.

Maasdorp, J., said: I concur generally in the judgment delivered by the Acting Chief Justice, but I desire to make some remarks on certain of the questions raised during the argument of the case. It was questioned whether after the sale of the property in question by the trustee in the insolvent estate (a sale which has the effects of a judicial sale in execution), any claim or charge against the property possessed by the Cape Town Municipality is or is not extinguished. It was argued that in case of a judicial sale the property sold passes clear of all previous incumbrances into the hands of the purchaser, and that the rights of the creditors attach only in their order of priority on the proceeds of the sale. That may be so where the rights against the property claimed by a third party is derived from the insolvent, or is an incident or a consequence of a debt due by the insolvent to such third party. As is the case where there is a lien or charge upon property in respect of a conventional or tacit hypothec for a debt due by the insolvent. But it is otherwise if the claim made by such third party is irrespective of and independent of such debts. Section 102 of Act 26 of 1893 makes the rate assessed a charge upon the property rated and recoverable from any person who is or becomes the owner of it within twelve months after the rate became due and payable. The liability of such future owner, therefore, which is made a charge upon the land, is a debt directly due from such owner, and that is so notwithstanding the fact that the owner or occupier at the time the rate was levied is also liable. If that is so then the rate is a continuing charge or encumbrance attached to the land and running with it for a period of twelve months, as against all purchasers in insolvency or otherwise within that period. What then is the duty of a person who sells property encumbered in this manner? Under ordinary circumstances a seller who is aware of an encumbrance on the property of which the purchaser is ignorant, is bound in all fairness to inform the pur-

chaser of it. The purchaser may know that under the law the property may be chargeable with rates, but only the seller can know whether the rate has been paid. It seems to me the seller of property must be taken to sell it free of an encumbrance of this kind, or he may inform the purchaser of it, and thus enable him to regulate the price accordingly. A trustee in insolvency, whether he sells privately or by public auction, is not in this respect in a different position from any other seller. He must deal fairly with and pay fair attention to the interests of all parties to the transaction. By vote of the creditors it was left to the trustee in this case to sell the property by private sale or by public auction. He might reasonably make it a condition of the sale that the purchaser shall take the property with its burdens, or that the burdens shall be discharged by him out of the proceeds of the sale. If he had sold it with the encumbrances the loss in respect of the diminished price would have fallen on the mortgagee. It is only just and equitable that the payments made to free the property from charges adhering to it in order to facilitate the sale, and thus enhance its value, should come out of the purchase price and go in reduction of the amount awarded to the mortgagee. I am also of opinion that the objection to the account must be expunged.

Solomon, J., said: The question raised in this application is whether the trustee of this insolvent estate was justified in paying to the Cape Town Municipality the sum of £53 2s. 2d., being a year's rates due upon certain landed property belonging to the insolvent, and in thus reducing by that amount the money realised by the sale of the property before distributing the proceeds amongst the mortgagees. The rates, it appears, fell due on the 15th March, as is provided by section 97 of the Cape Town Municipal Act, 1893, and on the same day the insolvent estate was sequestrated. It has been contended on behalf of the respondent that the liability for the rates accrued at the first moment of that day, and that in point of time the rates became due prior to the sequestration of the estate, which took place in the course of the same day. In the view which I take of the case, it is unnecessary to determine the question of priority, though I might point out that the general rule of English law appears to be that "as regards judicial acts the day is not divided into fractions, but the judicial

act is presumed in law to have been performed at the first moment of the natural day" (*Wright v. Mills*, 4 H. and N., 488). But even assuming that the respondent's contention with regard to priority in point of time is correct, I am of opinion that our judgment in this case must be in favour of the applicant. The decision of the case turns upon the effect which is to be given to the proviso to section 102 of the Municipal Act 26, 1893, which is as follows: "Provided also that any and every rate assessed under the provision of this Act shall in so far as the owner of any property is concerned be and be deemed to be a charge upon the property rated, and recoverable against the owner at the time such rate was levied or any future owner: provided always that no future owner of property shall be liable for any rates which became due and payable at any period more than one year prior to the date upon which he became owner of the said property." Now the first question to be determined is whether the person who purchased the property from the insolvent estate would upon receiving transfer thereof be a "future owner" within the meaning of this proviso. That such person is a future owner is quite clear, but it is argued that the proviso was not intended to apply to the case of persons who had purchased property in an insolvent estate. The argument is that the Municipality should have proved the amount of the rates in the insolvent estate; that upon such proof the debt would be discharged, and that the property would pass into the hands of the purchaser free from any liability for these rates. I see no reason, however, for limiting the plain meaning of the words used in the proviso, or for holding that a purchaser from a solvent proprietor is a future owner of such property, and that a purchaser from an insolvent estate is not. The object of the provision no doubt was to protect the Municipality from loss by enabling them to follow the property itself without regard to the person who might have been the owner at the time when the rates fell due. And such a provision was of course more particularly required in the case of an owner becoming insolvent, and so unable to pay his rates. To limit the application of the words "future owner" in the direction contended for by the applicant would, as it appears to me, to a great extent defeat the very object with which the proviso was framed. Where the original owner is solvent, the remedy

From the records, it appeared that Wolfaardt, in his evidence, said he was a farmer residing at Elandsveit, near Ladismith, and that on the day of the assault he was attending a sale when Mr. Herbert came up, and snatched his (Wolfaardt's) cap off his head. Wolfaardt asked him what he wanted and he said he wanted the flag that was on the cap. Witness had only a piece of faded ribbon on his cap, which he told Mr. Herbert he had bought with Queen Victoria's money. Later on Mr. Herbert again knocked his cap off, and threw it on the ground, and witness said to him, "It is a pity I am under security to keep the peace otherwise I would give you a thrashing." After that Mr. Herbert knocked off his cap for the third time. In cross-examination the complainant said that he only had three pieces of ribbon in his cap, and he could not say whether they were the Transvaal colours, as he had never been there. Another witness corroborated complainant's statement as to Mr. Herbert coming up and taking Wolfaardt's cap off at the time of the sale, but said that Mr. Herbert did not use any particular force. There appeared to be a small flag on Wolfaardt's cap. For the defence, Henry Newman said he was a refugee from the Transvaal, and saw Wolfaardt wearing the Transvaal colours on his cap. He had a ribbon and a flag. Wolfaardt had been constantly sporting these colours and annoying refugees by his behaviour. Other witnesses deposed to the Magistrate having merely taken the cap off, without any violence, to see what the colours were that Wolfaardt was wearing. The appellant said that he asked Wolfaardt what colours he was wearing, at the same time lifting the cap off his head. Wolfaardt said he had bought the flag with Queen Victoria's money from a British storekeeper, and if the latter could sell it he could buy it, and nobody could prevent him. Appellant asked him to allow him to see the flag, but Wolfaardt refused to do so. Further evidence was given corroborating this.

The Magistrate, in his reasons for his decision, said he found that Mr. Herbert walked up to Mr. Wolfaardt on the day of the sale and took off the latter's cap. This he held to be an assault.

Sir Henry Juta, Q.C., for the appellant: The action complained of did not constitute an assault. No injury or corporal hurt was done. No force was used. The parties were on intimate terms. The essence of an

assault is the intent to do corporal hurt. There was no such intent here, nor any offensive intention. See *Roscoe's Criminal Evidence* (p. 284), and *Russell on Crimes* (Vol. III., p. 304), as to what constitutes an assault.

Mr. Ward, for the Crown, was not called upon.

Buchanan, A.C.J., in giving judgment, said: The appellant in this case states that he was attending a public sale at which the complainant was also present, and being informed that the complainant was guilty of irritating behaviour, by going about the crowd wearing Transvaal colours, the appellant went up to him and said: "Wolfaardt, what colours are you wearing?" at the same time lifting the cap off his head. The appellant wanted to see the cap, but before he could examine the colours the complainant took the cap back again. The case came before the Acting Resident Magistrate two months after the assault. All the circumstances show that it was a most trivial matter, and perhaps the Magistrate might have dismissed the case altogether. The Magistrate has, however, held that technically the act complained of was an assault. That is really what it amounts to, technically an assault, and the Magistrate fined the appellant 5s. Now we must look at the circumstances of the parties. It is said that this was done in a friendly way. It seems to have been done because the complainant was wearing what Mr. Herbert believed to be the Transvaal colours, and he wanted to take the cap of Wolfaardt's head to satisfy himself. It would have been wiser not to have done so, and the appellant was wrong in taking the cap off, and looking at the position of the parties, the Magistrate who tried the case held that technically there was an assault. The Magistrate was right in inflicting a fine of a small amount. This conviction does not reflect upon Mr. Herbert's character in any way. The appeal must be dismissed.

[Appellant's Attorneys, Messrs. Sauer and Standen.]

REGINA V. FOSTER. { 1900.
{ Aug. 2nd.

Liquor Licensing Act—Condition of licence—Native servant.

A licence was conditioned that the holder should not supply liquor to a native in service without a permit from his master. A native

who had been engaged as a day labourer had left his master's employ, but was under agreement to re-enter his service on a future day. The canteen keeper was convicted of contravening the condition of his licence in having sold liquor to the native after the agreement had been made but before the actual resumption of service.

On appeal, the conviction was quashed.

— — —
This was an appeal from a decision of the Resident Magistrate of Clanwilliam in a case in which the appellant had been fined for contravening a condition endorsed by the Licensing Board on his licence under Act 28 of 1898. The condition was that appellant should not supply liquor to any native in the employ of any person unless a permit signed by such employer was produced by the person to be supplied. In the present case he did supply liquor to one Landsman, who was alleged by the prosecution to be a servant of a Mr. Hendricks, of Zeekoewlei, Clanwilliam.

The ground of the appeal was that Landsman, at the time he bought the liquor, was not a servant in Hendricks's employ. He had been employed as a day labourer at a daily wage by Hendricks up to May 12, but he left on that day, and did not go back again, and it was contended that being a day labourer he could not be forced to go back. There was a new arrangement entered into under which Landsman was to have gone back to Hendricks on May 14, but he had not gone back at the time the liquor was purchased. It was also contended that Landsman was not a native under the Act.

Sir Henry Juta, Q.C., for the appellant: The person supplied was not a servant at the time; he had already settled with his master, and there was no legal contract to return. Nor was he a native. In *Queen v. Parrott* (9 Sheil, 480) it was held that a person who showed all the outward characteristics of a native, although there was a slight infusion of European blood, was a native. This person was, however, merely a coloured man. The Act does not deal with merely coloured people. It mentions the natives to be dealt with. There is nothing here to show that

this person was a native. On the question of servant, see *Queen v. Andries* (9 Juta, 18). In that case there was an agreement. The person sold to here was a daily labourer.

Mr. Ward: I submit he was a servant.

[Buchanan, A.C.J.: There must be a subsisting valid contract. Was he liable to prosecution?]

The master says he was not.

[Solomon, J.: Was he not a day labourer?]

No. He was a servant.

Buchanan, A.C.J.: It is admitted that this native bought the liquor without a permit. It has been suggested that Landsman was not a native, but this ground of defence was not raised in the Court below. Throughout the proceedings he had been treated as a native, and we cannot now in the absence of evidence make this a ground upon which to quash the conviction. The main ground of appeal is that by the conditions of his licence the canteen-keeper is entitled to sell liquor to any native not in the employ of any other person. I endorse the Magistrate's conclusion that the mere statement by the native supplied with liquor as to his not being in any person's employ is not of itself a sufficient protection to the canteen-keeper. If a canteen-keeper sold to a native he sold at his own risk, and if that native was proved to be in anybody's service, and the liquor had been sold to him without a permit, the canteen-keeper would be liable to be prosecuted for a breach of the conditions of his licence. In the present case the native was a day labourer, and had completed his term of service on the 12th May. It was said that he was to re-enter Hendricks's service on the 14th May under a new agreement, but at the time the liquor was sold he was not in anybody's service, and therefore on the simple ground that at the date of the sale he was not a servant, the conviction must be quashed and the appeal allowed.

Maasdorp and Solomon, J.J., concurred.

[Appellant's Attorney, Mr. P. M. Brink.]

ESTATE OF WILLIAMS V. } 1900.
GIDEON. } Aug. 2nd.

Promissory note—Section 9, Act 20 of 1856—Presentation—Protest.

In a suit in the Court of the Resident Magistrate on a promissory note for an amount exceeding £20, the 9th section of

Act No. 20, 1856, does not make the production of a protest of dishonour compulsory, but it depends on the terms of the document whether or not a protest is necessary.

This was an appeal from a decision of the Resident Magistrate of Herbert in a case heard at Douglas. The respondent Williams had been summoned upon a promissory note for £30, but the exceptions were taken:

(1) That the note was not presented at due date nor since.

(2) That no place of payment was mentioned in the note.

(3) That no certificate of protest was attached to the summons.

(4) That the note was negotiable, being made to order, and both parties being resident in the same district.

In support of his claim, plaintiff's agent quoted section 86 of Part IV., of Act 19 of 1893.

The Magistrate upheld the third exception, and in doing so, referred to section 95 of Part V. of Act 19 or 1893 and section 9 of Act 20 of 1856. Judgment was consequently given for the defendant.

Plaintiff appealed.

Mr. De Waal, for appellant: Was presentment necessary? If so, was it made? Plaintiff gave defendant fourteen days' notice before due date. [He was stopped by the Court.]

The respondent was in default.

Buchanan, A.C.J.: Under section 9 of the Magistrate's Court Act, in a suit on a promissory note for an amount under £20, no protest of presentation and dishonour is necessary. The Magistrate seemed to have upheld the exception taken in this case from having construed this section to mean that if the note was over £20 a protest was necessary. But it is not every note which requires a protest even when sued upon provisionally in the Supreme Court. It depends on the terms of the note whether or not a protest is necessary. This note was not in the body thereof made payable at any particular place, and, without any protest, provisional sentence would have been given upon it in the Supreme Court. The Magistrate was therefore wrong in upholding the exception. Another exception taken was that the note had not been presented for payment at the due date or since. This might have been a good exception had an endorser been concerned, but this action was

against the maker of the note. In such a case the summons could be taken as a demand, and if there had been any tender then there might have been a question as to the costs. But no tender has been made. In the circumstances the appeal will be allowed with costs, and the case remitted to the Magistrate, to be dealt with on its merits.

Maasdorp and Solomon, J.J., concurred.
[Appellant's Attorney, V. A. van der Byl.]

LE ROUX V. HEATLIE. { 1900.
{ Aug. 2nd.

Trespass—Injury.

Where a defendant had found an ox belonging to plaintiff trespassing on his land and had in order to drive it out thrown a stone at it, and broke its leg, with the result that it died, the Magistrate on an action being brought for the value of the ox gave judgment for £8 10s. and costs.

On appeal, the Magistrate's decision was upheld the Court finding that there was sufficient evidence to support the fact that defendant had thrown the stone and caused the death of the ox.

This was an appeal from a decision of the Resident Magistrate of Worcester in a case in which Le Roux had been sued for £8 10s., the value of an ox belonging to Heatlie, and which it was contended had been killed through the action of the appellant. Le Roux occupied a portion of the farm belonging to Heatlie, and for the latter it was contended that the ox having got on to Le Roux's portion, Le Roux, in driving it off, threw a stone at it, and broke its leg, with the result that it died. This was denied by Le Roux, and the hypothesis was set up that the ox having strayed on to the appellant's ground, it had been kicked by a horse, and thus sustained the injury which resulted in its death. The ox was injured late in the evening, and defendant sent word to the plaintiff that the animal was lying on his farm disabled. Next morning the plaintiff proceeded to defendant's farm to remove the ox, but on his arrival there, it was found to be dead.

Plaintiff (respondent) accordingly sued defendant for the value of the ox and obtained judgment for the sum of £8 10s. and costs.

Defendant appealed.

Mr. McGregor (for the appellant): The Magistrate did not make a judicial inference from the facts. We do not ask the Court to disbelieve the witnesses. The Magistrate has lost sight of the fact that the onus is on the plaintiff. The inferences to be drawn from the evidence are equally balanced. Therefore the Magistrate was wrong in inferring in favour of the plaintiff. The onus of proving that defendant did throw a stone and thereby cause the injury was on the plaintiff. This onus he did not fully discharge. Strictly, there was no *injuria* here. There was no unlawful act. The ox was wrongly on defendant's farm, and consequently there was no wrongful act committed in throwing a stone at it. There was contributory negligence on the part of plaintiff in not, when notified, proceeding to fetch the ox away until fifteen or sixteen hours had elapsed. See *Pollock on Torts* (p. 405).

Buchanan, A.C.J.: The law provides for the impounding of cattle trespassing, and the recovery of certain charges, but it does not allow the person on whose ground the cattle trespassed to do any injury to the cattle. In this case, where the cattle had been in the habit of trespassing among appellant's barley, one can understand the appellant losing his temper and throwing a stone, but unfortunately in this case the stone has done such injury as to cause the death of the ox. The evidence supports the judgment, and the appeal must therefore be dismissed with costs.

[Appellant's Attorney, J J. Michau.]

OCTOBER V. HENNING. { 1900.
 { Aug. 2nd.

Criminal prosecution—Malicious prosecution—Malice.

H. on information which he believed laid a charge of theft against O. The Magistrate acquitted O. the evidence of the informer not being reliable. O. then sued H. for £20 damages for malicious prosecution, but failed to obtain judgment.

On appeal, the Magistrate's decision was upheld, the Court

finding that as H. had no reason for disbelieving his informant he had not acted without reasonable and probable cause he being under no duty to personally interrogate O. before prosecuting him.

This was an appeal from a decision of the Assistant Resident Magistrate of Aliwal North in a case in which the appellant had brought an action for damages against Henning on the ground of malicious prosecution. It appeared that Henning had lost an ox, and three weeks later he was informed by an old servant, Kleinbooi, that he (Kleinbooi) had seen appellant and another man driving it towards Basutoland. Upon this Henning had October and the other man prosecuted, but both were acquitted. October then brought his action for £20 damages for malicious prosecution.

The evidence led showed that Henning fully trusted October, and had on more than one occasion lost oxen which were subsequently returned to him by October when found by the latter to have strayed on to his premises. Kleinbooi had previously been ordered, according to native custom, to pay to October a certain number of goats as a penalty for attempting to criminally assault October's daughter-in-law.

The plea in the civil action for damages instituted against Henning for malicious prosecution was that the arrest of October was not made at the instance of defendant, and that if the Magistrate found that the arrest was made at his instance and request, then there was reasonable and probable cause.

The Magistrate, in giving judgment for defendant, with costs, found that the arrest was effected at the request of the defendant, but that there was no malice.

Plaintiff appealed.

Sir Henry Juta, Q.C. (for the plaintiff and appellant): Respondent has acted in a most reckless manner. He knew October as a perfectly honest man for a considerable period, and then without making any inquiry brings this charge against him. See *Kaplan v. Abrahamson* (9 E.D.C., p. 86). This case was of a totally different nature, because there very strong grounds of suspicion existed, whereas here there were none at all.

Mr. McGregor (for the respondent): There is no evidence that respondent was actuated by spite or malice; in fact the evidence goes

to show quite the contrary. Respondent had reasonable and probable cause for suspicion; his informant was a man who had been in his service for a period of more than a year. The case of *Rademeyer v. Van der Merwe* (reported in 12 Juta) was quite different. The Court would never lay it down as a doctrine that he was bound to make personal inquiries from the accused. Such a doctrine would defeat the ends of justice. See *Spiegel v. Miller* (1 Juta, p. 264), *Van Noorden v. Wiese* (2 Juta, p. 43). The duty of proving malice does not lie on the prosecutor; it is rather that the defendant has to prove the absence of malice.

Buchanan, A.C.J.: The respondent having lost an ox, was informed by an old servant named Kleinbooi that about three weeks before he had seen the appellant and another man driving the ox towards Basutoland, meaning to imply thereby that they were stealing it. Acting upon that information, the respondent sent for the police, and had October and the other man arrested. Henning gave his evidence before the Magistrate, and called as his witness Kleinbooi, who detailed what he alleged he had seen. In cross-examination, however, it was shown that some time before Kleinbooi had attempted to criminally assault October's daughter-in-law, and in accordance with native usage had been compelled to pay a certain number of goats as atonement. The Magistrate probably taking this into consideration in connection with the credibility of Kleinbooi, dismissed the charge against October. The latter then commenced his action against Henning for malicious prosecution, and although Henning said that he did not tell the police to arrest October, that arrest was due to his action. Henning's second defence was that he had acted without malice and with reasonable and probable cause, and that was the real question which the Court had to decide. The Magistrate, after hearing the action for damages, found that defendant had reasonable and probable cause, and therefore dismissed the case. In his reasons for his decision, the Magistrate said that owing to the state of the country at the time the respondent would have been entitled to have the appellant arrested on less conclusive evidence than during ordinary times. From this view I strongly dissent. The exceptional circumstances did not at all justify that, but on the contrary, there ought to have been more conclusive evidence if possible than would be required

in ordinary times. In this case it has been shown that there was no express or positive malice on the part of Henning, and the question now is, did he show such recklessness in setting in motion the law as would support an action for damages? Henning acquired his information from Kleinbooi, and I feel convinced that he was unaware of the animus Kleinbooi had against October. Henning has acted without malice because he believed a person whom he had every reason to believe, having found that person reliable before. Under these circumstances the Magistrate was justified in drawing the conclusion that Henning was not actuated by malice either express or implied. The appeal will be dismissed, but in coming to that decision we do not find that October was guilty of theft. On the contrary, if the prosecution had been instituted in consequence of an affidavit made by Kleinbooi, and an action for damages for malicious prosecution instituted against Kleinbooi, it is very probable that the Magistrate would have come to a different conclusion.

The appeal was accordingly dismissed, with costs.

[Appellant's Attorneys, Messrs. Walker and Jacobsohn; Respondent's Attorneys, Messrs. Sauer and Standen.]

SUPREME COURT

[Before Hon. Mr. Justice BUCHANAN (Acting Chief Justice), the Hon. Mr. Justice MAASDORP, and the Hon. Mr. Justice SOLOMON.]

CABBITA v. DU PREEZ. { 1900.
Aug. 3rd.

Pleading — Exception — Variance —
Different causes of action.

An exception to a declaration that different causes of action were included in one suit over ruled.

A substantial variance between the summons and the declaration is a ground of exception, but on application made the Court may give leave to amend the summons.

Argument on an exception to the plaintiff's declaration.

The summons claimed (a) payment of the sum of £100, being the balance of a sum of £200 paid by the plaintiff to the defendant in or about the month of April, 1894, for 200 shares in the Green and Sea Point Water Syndicate, which the defendant has failed to account for, together with the interest thereon from April 30, 1899; (b) the sum of £350 for money lent and advanced by the plaintiff to the defendant on or about February 21, 1896, with interest from that date at the rate of 7 per cent per annum, and also for £143 0s. 6d., less £5 paid on account, due on a promissory note bearing date August 20, 1896, with interest thereon from October 20, 1896.

In his declaration the plaintiff dropped the claim for £100 on the share transaction, but claimed the £143 0s. 6d., less £5 paid on a promissory note (on which provisional sentence had been obtained, but the defendant had entered appearance to contest the claim), and the £350, with interest at the rate of 7 per cent. per annum, for money lent, and further claimed sums of £5, £175, and £80, together with interest *a tempore morae*, for moneys lent and advanced. All these extra claims had accrued before the date of the summons.

Before pleading the defendant took the following exception to plaintiff's declaration: Defendant states that the allegations and claims in the declaration show a material variance from those in the summons; that it is contrary to good law and judicial practice to include in the declaration claims founded on distinctly different causes of action to those in the summons; that the defendant is prejudiced and embarrassed thereby, and is precluded from pleading to the declaration in its present form. Wherefore the defendant prays that the declaration may be quashed, with costs, or in the alternative that so much thereof as is a variation from the summons be struck out with costs.

Plaintiff, in his answer to defendant's exception, denied that any embarrassment or prejudice had been caused to the defendant by the inclusion in the declaration of claims not made in the summons, such claims being of the same nature as and closely connected with the claims in the summons, and having accrued before the date of the summons. He further states that the defendant has pursued the wrong course in excepting wholly to the declaration instead of pleading thereto subject to any exception as he might be in law entitled to take, and that it will be more convenient and expeditious,

and less expensive to both parties that those claims be heard in one action. The plaintiff therefore asked that the defendant be ordered to plead forthwith, leaving to him any such legal exception as might be held to accrue to him in this case.

Mr. Buchanan (in support of the exception): The variance between the summons and the declaration is fatal to the validity of the latter. The variance has prejudiced the defendant. The object of the summons is not merely to bring the defendant into Court; it must state concisely the cause of action. Here the cause of action as stated in the declaration has not been disclosed in the summons.

[Buchanan, A.C.J.: Technically you are right; but supposing plaintiff sues on another summons?]

We asked them to amend their summons before coming into Court. See the *English Rules of Court* (order 20, rule 4). In his statement of claim a plaintiff may alter the claim made in the summons if the causes of action be the same, but he may not do so if the causes of action be different. See *The United Telephone Co. v. Tasker and Co.* ("Law Times," p. 59), where it was held to be irregular to introduce into the statement of claim a demand not mentioned in the writ.

Mr. P. S. Jones (for the plaintiff): The claims are all of the same nature. If we had taken out a new summons for the three items excepted to and then declared, the Court would have suggested the consolidation of the others. The summons is merely a notice to defendant to appear in Court. See *Le Roux v. Prins* (2 Juta, p. 405), where there were two causes of action, viz., damages for civil and damages for criminal arrest. There the Chief Justice (De Villiers) said that the policy of the Court was to sweep away as far as possible all technical exceptions. No injustice would be done to stand by allowing the declaration to stand. If he will be prejudiced, he should show it by affidavit. A Supreme Court summons is not as important as one issued in the Magistrate's Court. The declaration fully discloses the cause of action in the Supreme Court, whereas in the Magistrate's Court this is done by the summons, there being no other statement of claim. *Le Roux v. Prins* is very strongly in our favour, because there the causes of action were different, while here they are similar.

Buchanan, A.C.J.: This declaration is excepted to on two grounds. First, that there is a material variance between the

summons and the declaration, and secondly, that the plaintiff has included in the declaration claims founded on different causes of action, and that he (the defendant) is prejudiced and embarrassed thereby. As to the second exception, the causes of the action are sufficiently similar to be included in one action. The claims made are first on a promissory note; and secondly for moneys lent and advanced, and there is nothing in these different demands to embarrass or prejudice the defendant in pleading thereto. As to the other exception, it is urged that the variance is so slight that the Court should not take notice of it, but there can be no doubt that it is a substantial variance. There is a substantial claim made for a large sum of money not indicated in any way in the summons. The defendant is therefore entitled to take the exception. However, I do not think that costs should be given at present. There could have been no objection to amending the summons and so removing the ground of complaint, if the plaintiff had applied for leave to amend. It is not a case calling for the issue of a new summons. The exception as to variance will be allowed, but leave will be given to the plaintiff at his own expense to amend the summons. The Court might disregard a mere technical objection, but there must be some attention paid to the Rules of Court. They must be substantially complied with, and that has not been done in this case. The plaintiff will be allowed to take steps to put his summons in order, and the defendant will have leave to plead within eight days, costs of the application to be costs in the cause.

[Plaintiff's Attorneys, Messrs. J. and H. Reid and Nephew; Defendant's Attorneys, Messrs. Silberbauer, Wahl and Fuller.]

SUPREME COURT

[Before the Hon. Mr. Justice BUCHANAN (Acting Chief Justice), the Hon. Mr. Justice MAASDORP, and the Hon. Mr. Justice SOLOMON.]

LUNDERSTEDT V. LUNDERSTEDT. { 1900.
Aug. 7th.

This was an action for divorce brought by William John Lunderstedt against his

wife, on the ground of her adultery with one Edward Jack White. Plaintiff also asked for the custody of the minor child of the marriage.

Mr. P. S. Jones appeared for the plaintiff; the defendant was in default.

William John Lunderstedt, the plaintiff, said he was a butcher, and was employed at Stellenbosch. On September 5, 1882, he was married at Fauresmith to defendant. After living a year together at Fauresmith, they lived in Kimberley and Johannesburg. Defendant returned to Kimberley, and witness followed her a year later. Next they went to Bloemfontein, where witness left her owing to her misconduct, and went to East London. She followed later, and begged witness to make it up, which he did. Witness had to go to King William's Town, and on his return to East London he found defendant had removed to another part of the town, and was living with one Edward Jack White. She continued to live with White, being known as Mrs. White, and witness went to Kimberley. So far as witness knew she was still living with White.

Charles Lunderstedt, a young man about seventeen years of age, and the only issue of the marriage, deposed that when his father went to King William's Town in 1897 his mother had misconducted herself with White. Witness left the house the next day, and when his father returned informed him of what had taken place. His mother went to reside in another part of East London with White. Witness and his father went to Kimberley, and afterwards witness returned to East London, and for a time lived in the same house as his mother and White. Witness gave further evidence in support of the allegation of adultery against defendant, and a letter was put in in which defendant gave herself out as Mrs. White.

This concluded the evidence.

The Court granted a decree of divorce as prayed, plaintiff to have the custody of the minor child of the marriage.

[Plaintiff's Attorney, Gus. Trollip.]

BRITISH SOUTH AFRICA COM- } 1900.
PANY V. TRUSTEES OF LYLE } Aug. 7th.
BROTHERS AND WRIGHT.

Insolvency—Set-off—Act of insolvency.

Where a right of set-off exists before sequestration, such right continues after insolvency except in

the cases in which it is specially restricted by the Insolvent Ordinance.

The 28th section of the Insolvent Ordinance, No. 6 of 1843, requires that the person claiming the benefit of the set-off had not notice, at the time when his cause of debt accrued, of the order for sequestration having been made, or of any act of insolvency in virtue of which such order shall have been made :

Held, that the notice required by the 1st section of Act No. 3 of 1884, by the insolvent of his intention to apply for the surrender of his estate is not an act of insolvency within the meaning of the 28th section of the Ordinance.

This was an appeal from a decision given by the High Court of Southern Rhodesia, in a stated case in which John Meikle and Richard Leslie Bell, of Umtali, in their capacity as trustees of the insolvent estate of Lyle Brothers and Wright, were the plaintiffs, and the British South Africa Company the defendants. The stated case after setting forth the usual formal allegations as to the names, etc., of the parties to the suit, went on to say: 3. On March 23, 1899, the British South Africa Company and Lyle Brothers and Wright entered into a certain contract. 4. On July 28, 1899, Lyle Brothers and Wright published a notice in the "Government Gazette" that it was their intention to apply on August 30, 1899, to a judge of the High Court for leave to surrender their estate as insolvent. 5. The defendant company was aware of the said publication of the said notice. 6. On August 30, 1899, the application was granted, and the estate of the applicants placed under sequestration. 7. At the date of the order placing the estate of Lyle Brothers and Wright under sequestration the defendant company was indebted to Lyle Brothers and Wright in the sum of £508 for mealies, meal, forage, and produce sold and delivered to them under the aforesaid contract. 8. From August 1, 1899, Lyle Brothers and Wright failed to supply the defendants with produce and goods as required by the defendants in terms of their said contract, and in consequence, between August 1 and 29,

1899, the defendants purchased such produce and goods from other persons. 9. The difference between the price fixed in the said contract and the price paid to such other persons for such goods and produce amounted to £427 5s. 8d., of which £317 6s. was in respect of purchases from H. Harris and Co., the sureties for Lyle Brothers and Wright under the said contract. 10. The defendants contend that they are entitled to set off against this debt of £508 to the insolvent estate the said sum of £427 5s. 8d. 11. The plaintiffs contend that the defendants are not entitled to set off the said sum or any portion thereof. 12. The questions for the determination of the Court are: (1) If it is competent for the defendants to set off against the debt to the estate any sum in respect of purchases made after the notice of the insolvent's intention to apply for the surrender of their estate above referred to in paragraph four, but before the acceptance of the surrender above referred to in paragraph six; and if so, what amount. If (1) is answered in the affirmative; (2) is it competent for the defendants to set off the sum of £317 6s., part of the sum of £427 5s. 8d., in respect of purchases made from the sureties to the contract referred to in paragraph three of the case after the publication of the said notice of intention to surrender, or if the defendant should not have purchased from the sureties at the contract rates only and not in excess of such rates; wherefore the plaintiffs and the defendants prayed the judgment of the Court.

The sixth clause in the contract was the one bearing upon the case, and it read as follows: In the event of the contractors failing or refusing to supply, at such times and in such quantities as may be required, any of the goods enumerated in the schedule appended, the company's representatives may, with or without notice being given to either the contractors or their sureties, forthwith obtain elsewhere such goods . . . and any additional cost that may be thereby incurred shall be recoverable from the contractors.

The case was heard in the High Court of Southern Rhodesia, before Mr. Justice Watermeyer, and the judgment of the Court was that the defendants should pay to the plaintiffs the sum of £508, and that in regard to the sum of £427 5s. 8d. claimed by the defendants as a set off against the £508, they only be entitled to prove as concurrent creditors against the insolvent estate; defendants to pay costs.

In giving judgment in the High Court of Southern Rhodesia the Hon. Mr. Justice Watermeyer said that the 28th section of the Insolvent Ordinance provided that where there were mutual credits or debts between an insolvent and another person capable of compensation the account should be stated and the balance only should be proved or paid on either side, but there was an important proviso as follows: "Provided that the person claiming the benefit of such set-off had not when such credit was given, or when the cause of his debt accrued, notice of the order for sequestration having been made, or of any act of insolvency in virtue of which such order shall have been made." Upon the interpretation of that proviso the decision of the case must depend. As against the insolvents themselves the B.S.A. Company would have had an undoubted right to set the two sums against one another, and pay over the balance only, and the question now was whether they had the right to do this against the other creditors, or whether they should pay to the estate the full sum of £508, and prove as concurrent creditors for the sum of £427 5s. 8d. That would depend on the interpretation of the proviso above quoted. It was admitted that the B.S.A. Company were aware of the notice of intention to surrender. This notice was not in itself an order for sequestration. The plaintiffs therefore could only succeed by showing that this notice was an act of insolvency by virtue of which the subsequent order was made. Proceeding, his lordship traced the history of the proviso and Acts 38 of 1884 and Ordinance 6 of 1843, and in conclusion said that in his opinion the words act of insolvency in the proviso to section 28 were not to be read in the limited sense of section 4, but must be construed as any act from which insolvency would in ordinary course supervene, and from which it had in fact supervened. He therefore gave judgment for the plaintiffs in terms of paragraph 11 of the stated case.

Against this judgment the defendants, the B.S.A. Company, appealed.

Mr. Solomon, Q.C. (with Mr. Schreiner, Q.C.), appeared for the appellants.

Mr. Searle, Q.C. (with Mr. P. S. Jones), appeared for the respondents.

Mr. Solomon, Q.C.: Section 28 of Act 6 of 1843 cannot apply unless there has been actual proof of debt. Here there has been no actual insolvency, unless notice to surrender be an act of insolvency. For an enumeration of the acts of insolvency, see sections 4, 21, and 129 of the Ordinance. A

notice of intention to surrender may be withdrawn at any time before actual surrender. Notice of intention to surrender is never evidence *per se* of insolvency. Acts of insolvency are very strictly construed. See *Bring v. Norden* (3 Menz., 271); *Brink's Trustees v. De Villiers* (1 Roscoe, p. 270); *Hiddingh's Trustee v. Norden* (3 Menzies, p. 288). In the case of voluntary surrender nothing but sequestration can deprive a creditor of his right of set-off.

Mr. Searle, Q.C.: According to section 4 of Act 6 of 1843, it was an act of insolvency to give an undue preference. Now, anyone who took advantage of such undue preference would have notice of an act of insolvency. Act 38 of 1884 puts a notice of surrender on the same footing as an act of insolvency. The effect of the notice is to stop the person giving notice from trading; this being so, the appellants could not acquire any further indebtedness by respondent to them. *Hiddingh's Trustee v. Norden* is in our favour, while *Brink's Trustees v. Norden* is not in point. The argument that an assignment was proof of insolvency goes very far; assignment does not usually result in insolvency.

Buchanan, A.C.J.: In the Court below it was admitted that as between the contractors and the company there would, before sequestration, have undoubtedly been the right to set off the sums against each other, but it was contended that under the 28th section of the Insolvent Ordinance, the defendant company had no longer this right. Looking at the 28th section, we find that the right to set off between creditors is fully recognised, subject only to the restrictions placed upon it by the section. This section provides that the person claiming the benefit of the set-off must when such credit is given or the cause of debt accrued not have had notice of the order of sequestration having been made. In this case at the time the set-off accrued the order of sequestration had not been made. The section goes on to say that such person also must not have had notice of any act of insolvency in virtue of which such order shall have been made. In this case there is no act of insolvency on which any order of sequestration was granted, as it was a voluntary surrender. These words apply to a compulsory sequestration. This section has been modified by the Act of 1884, which requires the insolvent to give notice of his intention to apply for leave to surrender his estate, and the learned Judge in the Court below held that this notice was the act upon which the sequestration was

granted. But an act which was necessary to secure the voluntary sequestration is not an act of insolvency unless it is expressly made so by the Insolvent Ordinance, and this act of giving notice has not yet been made an act of insolvency. There may be a great deal to be said in favour of extending the law, making it more in accordance with the English law, and making this giving notice an act of insolvency, but until it is so enacted the Court cannot interfere and deprive the creditor of a right allowed him under the law as it now stands. The construction of this section was discussed in the case of *Brink's Trustees v. Haupt and De Villiers*. His lordship quoted the judgment in this case, and went on to say: This act of advertising the intention of petitioning for a surrender cannot in my opinion be brought under the 4th section of the Ordinance. Had this been an action for an undue preference, it is difficult to see how it could have succeeded. On these grounds I think the learned Judge in the Court below misconstrued the law in saying that the giving of notice of intention to surrender was an act of insolvency. The law does not make it so, and the Court cannot make it so. The judgment of the Court below will therefore be set aside, and judgment entered in the Court below in terms of defendants' contention in paragraph 10 of the stated case, with costs in the Court below and costs of appeal.

Maas dorp and Solomon, J.J., concurred.

Appeal allowed accordingly, with costs.

[Appellant's Attorneys, Messrs. Van Zyl and Buissine; Respondent's Attorney, Gus. Trollip.]

SUPREME COURT

[Before the Hon. Mr. Justice BUCHANAN (Acting Chief Justice), the Hon. Mr. Justice MAASDORP and the Hon. Mr. Justice SOLOMON.]

VAN DER MERWE V. VAN DER MERWE. { 1900.
Aug. 8th.

This was an action for divorce by the wife, by reason of the alleged adultery of the husband.

Mr. Buchanan appeared for the plaintiff. The defendant was in default.

R. D. H. Barry, a clerk in the Colonial Office, produced a copy of the certificate of the marriage between the parties.

The plaintiff, Christina Maria Isabella van der Merwe, said she was married to the defendant on January 21, 1891. After their marriage they resided in the district of Prieska on witness's father's farm. A male child was born of the marriage, and was now in plaintiff's custody. They remained on the same farm until 1897, when her husband deserted her for no reason. She knew a girl called Johanna Cilliers, who lived near the farm. Witness had noticed an intimacy between defendant and the girl, but she could prove nothing. Last October defendant was tried criminally in connection with a charge of concealment of birth, for which he received nine months' imprisonment, and the girl Cilliers received eighteen months' imprisonment. Defendant was released from gaol last July, since when he had not supported the plaintiff. Defendant earned about £10 a month. Plaintiff asked for the custody of the child of the marriage.

Mr. Buchanan said he had proposed to call the girl with whom it was alleged that the defendant had committed adultery, but she was still in gaol, and had not been sent down as a witness to the Court, although she had been subpoenaed.

The case was postponed until August 9, to afford the plaintiff the opportunity of calling the girl Cilliers as a witness.

Postea (August 9).

Johanna Adriana Cilliers said that at present she was in the House of Correction serving a sentence for concealment of birth. She knew the husband of the plaintiff in this suit, who lived near her in the Prieska district. Defendant had been tried with her on a charge of concealment of birth. Proceeding, witness gave evidence in support of the allegation of adultery, and said that at one time she and defendant had lived together as man and wife.

Mr. Buchanan said he had no evidence as to defendant's means, and plaintiff would have to leave the question of maintenance in abeyance until she had such evidence.

The Court granted a decree of divorce as prayed, with costs, the plaintiff to have the custody of the minor child of the marriage, and leave was reserved to her to apply at some future time for maintenance.

SUPREME COURT

[Before the Hon. Mr. Justice BUCHANAN (Acting Chief Justice), the Hon. Mr. Justice MAASDORP, and the Hon. Mr. Justice SOLOMON.]

ADMISSIONS. { 1900.
 { Aug. 9th.

On motions moved by Mr. Buchanan, Mr. George Denoon was admitted as an advocate, and Messrs. Abraham Peter Theron, Andrew Francois du Toit, and George Andrew Peter Stegman were admitted as attorneys and notaries.

REHABILITATION.

Mr. Nathan moved for the rehabilitation of Christian Jacobus Rabie, J.J.son.
Granted.

PROVISIONAL ROLL.

PEREIRA AND OTHERS V. ANDERSON.

Mr. Gardiner moved for the final sequestration of defendant's estate.
Granted.

At a later stage Mr. Gardiner applied for the appointment of a provisional trustee in the above estate to carry on the business, which was that of a hotelkeeper and shopkeeper.

This also was granted.

MCKILLOP AND ANOTHER V. JOSEPH.

Mr. P. S. Jones moved for the final sequestration of defendant's estate.
Granted.

MASTER V. SKMTER.

Mr. Ward moved for the usual order for the filing of an account by defendant as an executor dative.

Mr. Buchanan appeared for the defendant.

The defendant is executor dative in an estate in which there is a farm situated in the district of Colesberg. The heirs reside in England, and correspondence has been going on for two and a half years for the disposal of the farm, but no decision has yet been come to. Defendant filed an affidavit excusing himself because of his inability to obtain legal proof of heirship from one of the alleged heirs, who was absent in England.

Buchanan, A.C.J., said that the executor must fulfil his duties, and judgment would be given against him to file an account within three months. If the defendant wanted more time he must apply to the Court later on.

MASTER V. E. HEARNS AND E. J. GIBBONS.

Mr. Ward moved for the usual order for the filing of an account by executors dative.
Granted.

WARD AND CO V. ENDLEY.

Mr. Gardiner moved for a decree of civil imprisonment against the defendant on an unsatisfied judgment of the Court for £75 6s. 2d., with costs.

There was no appearance for the defendant.

The order was granted as prayed.

DE WAAL V. JOUBERT.

Mr. Gardiner moved for provisional sentence on a Resident Magistrate's Court judgment for £28 9s.

Provisional sentence as prayed with costs.

ILLIQUID ROLL.

COLONIAL GOVERNMENT V. MATHYS.

Mr. Ward moved, under Rule 329d, for judgment in default of plea. The return of service of summons was that the copy had been affixed to a tent which was the last known place of residence of the defendant.

The service was held good.

Granted.

MOOREKES V. AMYOTT.

Mr. Buchanan moved, under Rule 329d, for judgment for £84 10s., goods sold and delivered, with interest *a tempore morae*, and costs of suit.

Judgment granted as prayed.

DE VILLIERS V. ABDULLAH.

Mr. Buchanan moved, under Rule 329, for judgment for £380 6s., purchase price of certain sheep sold by plaintiff to defendant, less £95 paid on account, with interest *a tempore morae*, and costs of suit.

Judgment granted as prayed.

HEDLEY BROTHERS V. BARNARD,

Mr. Buchanan moved, under Rule 329d, for judgment for £53 8s. 11d., goods sold and delivered, with interest *a tempore morae*, and costs of suit.

Judgment granted as prayed.

WEIL V. BAUMGARTEN.

Sir Henry Juta, Q.C., moved for judgment for £189 9s. 6d., in default of plea.

Judgment granted as prayed.

**CATHCART V. JANSENVILLE LI-
CENSING COURT.**

{ 1900,
Aug. 9th.

Liquor Licensing Act, No. 28 of 1883, sections 47 and 52.

Objection may, by virtue of the 47th section of the Liquor Licensing Act No. 28 of 1883, be taken by a Licensing Court of its own motion, but such objection must be founded on one of the grounds specified in the 52nd section of the Act.

This was a motion by way of a summons under Rule of Court 190, to have the proceedings of the Jansenville Licensing Court, held on March 7 last, reviewed.

The petition showed that the applicant had been four years the holder of a retail wine and spirit licence at Klipplaat, the premises having been licensed for twenty years. On March 7 the Court refused to renew the licence, and this decision was brought under review, it being contended that there had been gross irregularity. A number of affidavits were put in on both sides. For the applicant it was stated that a petition, which had not been signed by half the registered voters in the ward, had been allowed to be put in at the Licensing Court, while no attention was paid to a petition in favour of the renewal signed by more than half the registered voters in the ward. It was also alleged that the day before the sitting of the Licensing Court the members met and decided to do away with country licences. This, it was contended, was a further irregularity. It was also contended that the premises in question had always been well conducted, and also that a licence at that place was highly necessary, and much inconvenience would be caused to the travelling public if it were refused. On the respondent's side, however, affidavits were put in alleging that

the place was a curse to the neighbourhood, and had led to the demoralisation of young farmers in the neighbourhood.

Mr. Schreiner, Q.C., for the applicant: We admit that to be holders of a licence for a period of three years without any complaint having been made, does not give the holder a positive claim for renewal. But a licensee such as the applicant is should be distinguished from other applicants when he applies for a renewal. No complaints had been made, and no reasons for the refusal were given. The members of the Licensing Court have not exercised their discretion in a judicial manner. In this instance they held a meeting beforehand, and made up their minds not to allow country licences. This was not a proper exercise of their discretion. See section 52 of Act 28, 1883. The proceedings here were grossly irregular.

[Buchanan, A.C.J.: But this Court has no power to grant a licence.]

Yet the Court can rule that the licence was not refused on legal grounds. A person has a right to a licence unless any of the reasons mentioned in Act 28 of 1883 debar him. The only plausible objection that can be raised here is that the licence was not necessary. The real reason assigned was that country licences are mischievous. The mischievousness or otherwise is not the question on which the Licensing Court has to decide. They were not acting on any legal principle, they acted *mala fide*. They lay down a principle beforehand, and then act on it. Their decision was based on a mistake in law. This Court can, on general grounds, review their decision. See *Hopkins v. Sutherland, Licensing Court* (15 Juta, p. 101), and *Barnett v. Namaqualand Licensing Court* (8 Juta, p. 231). This Court can give some directions to the Licensing Court on what principles to proceed, because, if the Court merely ordered them to take further evidence, the subsequent proceedings would resolve themselves into a farce, because the persons hearing the evidence would have already determined not to grant the licence.]

Mr. Ward, for the respondents: The argument of my learned friend would make the Supreme Court a general Licensing Court for the whole Colony. The Licensing Court was not bound to hear evidence, but the members could act on their own knowledge. Of course they must give the applicant an opportunity of proving the necessity for the licence. Here the applicant had that opportunity. There was no *mala fides*. The members of the Court did what they considered

to be their duty; they held that the renewal was unnecessary. There were legal and valid reasons for a refusal. The trend of modern practice is to do away with these vested interests in licences, and to leave the Licensing Courts a free hand to deal with them.

Mr. Schreiner, Q.C., in reply.

Buchanan, A.C.J.: Under the 48th section of the Act the Licensing Court is not bound to grant the renewal of a licence. It is prohibited from doing so if a sufficient number of inhabitants objected, but if a sufficient number did not object, the Licensing Court could of its own motion take into consideration any matter that was within its own knowledge and that was an objection to the renewal, and could decide thereon on its merits. In this case there were petitions for and against the licence, but these did not constitute the grounds of the refusal. The Court took an objection itself, but they gave the applicant no opportunity of meeting the objection before they decided upon it, and that was an irregular proceeding. The objection to the renewal was not founded upon the 52nd section of the Act, and it was the 52nd section only which specified the objections which might be taken to the renewal of any licence. The affidavit of Mr. Grobbelaar against a renewal was characteristic of the rest. His ground of objection was that as the population was a farming one, he believed that these cantons were a curse to the neighbourhood and should not be allowed to exist. He was also of opinion that all country licences should be taken away, as they were a nuisance. These might be very good grounds for a personal objection against licences being granted at all, but as a member of the Licensing Court he must consider the grounds of objection specified by law, and on which he must determine the case. The Court is, therefore, of opinion that the application should be granted, and the resolution of the Licensing Court set aside. This Court, however, has no power to grant a licence. That power is vested solely in the Licensing Court. The case will be remitted to the Licensing Court for determination upon its merits, and the Court will point out that in coming to a conclusion, the Licensing Court must be guided by the 52nd section of the Act. Costs will be given against the respondents *ex officio*.

Maasdorp and Solomon, JJ., concurred.

Application remitted accordingly to the Licensing Court for determination upon the merits, with costs against the Court *ex officio*.

[Applicant's Attorneys, Messrs. Godlonton and Low; Respondent's Attorneys, Messrs. J. and H. Reid and Nephew.]

GENERAL MOTIONS.

LEONARD V. LEONARD.

Mr. Gardiner moved that the rule for leave to sue for divorce *in forma pauperis* be made absolute.

Rule made absolute as prayed, Mr. Gardiner being appointed counsel and Messrs. Van Zyl and Buissinné attorneys.

SEYDELL V. BOLTMAN. { 1900.
{ Aug. 9th.

Insolvency—Set-off—Ordinance No. 6 of 1843, sections 28, 130.

Where an application for execution against an unrehabilitated insolvent had been refused with costs, the creditor making the application

Held not entitled to set off against the costs so incurred his debt, which had originated before the sequestration and which had been proved on the estate.

This was an application on notice of motion for an order calling upon defendant to show cause why a writ of execution issued on the 28th of July should not be set aside. The execution was levied for the failure to pay the costs of a certain suit, and the plaintiff claimed the right to set off this debt against debts owing to him by defendant.

Mr. Gardiner, for the plaintiff and applicant: The estate of the respondents had been sequestrated, and before they obtained their rehabilitation they had come into possession of certain property. Now, the insolvency of these persons does not interfere with the ordinary common-law rule of set-off. We are not deprived of our right to claim compensation. Section 28 of Act 6 of 1843 does not apply, since it referred only to debts which had occurred after sequestration and before proof of debts. Here the debt accrued before sequestration. Novation of a kind is brought about by a confirmation of accounts. See *Gamaur's Trustees v. Saban Joseph* (Buchanan, 1876, p. 229). The non-proof by a creditor of his claim on the estate of an insolvent debtor does not de-

prive such creditor of the right to set off his claim against a debt due by him to the insolvent.

Mr. Molteno, for the respondent: This application has been before the Court under the 127th section of Act 6 of 1843. The application was then refused with costs. Now we have the trustee asking that the insolvent, to whom costs had been granted, should be made to pay his own costs.

Mr. Gardiner in reply.

Buchanan, A.C.J.: As between the applicant and the debtor in the absence of insolvency these costs might have been compensated by the debt. But when sequestration intervened, the 28th section of the Insolvent Ordinance expressly conferred the right of set-off to a cause of debt which had accrued before the order for sequestration was made. The costs which were awarded to the debtor accrued long after sequestration. In the case cited, of *Trustees of Van Niekerk v. Tiran* (1 Juta, 358), where a set-off was allowed of costs incurred in an application for civil imprisonment, the question of insolvency did not arise. There is some force in the argument that the creditor's debt is not extinguished by sequestration, and that on a second surrender he would, by section 130 of the Ordinance, be allowed to prove for any balance due under the first sequestration. But that does not meet the objection founded on the 28th section. For the 130th section to come into force there must be a second sequestration, and then as far as the creditor's rights are concerned, the section provides that the last order for sequestration must be treated as if it had been the only order ever issued. This application must be refused with costs.

Maasdorp and Solomon, J.J., concurred. Application refused accordingly, with costs.

[Applicant's Attorneys, Messrs. Fairbridge, Arderne and Lawton; Respondent's Attorneys, Messrs. Walker and Jacobsohn.]

LAUGHTON AND CO. V. } 1900.
ANDREWS AND CO. } Aug. 9th.

Auditor—Partnership—Books—Retention.

Auditors ordered to deliver to the managing partner of a firm the books of the firm which they had received for the purpose of auditing and which they had been directed to retain by one of the partners.

This was an application for the delivery of certain books of account and documents handed to respondents for audit.

The petition and affidavits showed that the applicants carried on business in Cape Town as Laughton and Co. Mrs. Pfuhl was a partner in the firm, and last year, owing to some disagreement, the books were handed to the respondents to be audited. Applicant said that he was managing partner in the firm, and as such gave the books, etc., to the respondents to audit, but the latter now refused to deliver up the books and documents, whereby great loss and inconvenience were caused in carrying on the business of the firm. The respondents contended that it was on behalf of Mrs. Pfuhl they had received the books, etc., and now they had been instructed by her agent—her son—not to deliver them up to applicant. They therefore placed themselves in the hands of the Court. The deed of partnership was read, and showed that the applicant was to be managing partner, and that the books should be kept at the place of business of the firm, and be open to both parties for inspection. The deed of partnership did not bear the £2 stamp necessary, and the Court ordered that this stamp be affixed, and further imposed a fine of 10s., to be paid to the Registrar.

Mr. Schreiner, Q.C., for the applicant: The respondent has nothing to do with the books of a safe-going concern; they were merely sent to him for audit. He could retain them as a lien for any work he might do on them. But his charges in that respect have been tendered to him. The managing partner has the right to the books, and no one can retain them as against him.

Sir Henry Juta, Q.C., for the respondents: The respondent was not employed by Laughton. The books were given to him for audit with a view to a dissolution of partnership. The books are not Laughton's property. They belong to the firm, and both parties are owners of them. Now, both had agreed to hand them to respondent for audit, and so there they had to remain, neither having any right to claim them as against the other. One partner cannot withdraw instructions given by both conjointly.

Buchanan, A.C.J.: The terms of the deed of partnership gave Laughton the sole right of managing the business, Mrs. Pfuhl being what was known as a sleeping partner, and the deed of partnership further provided that these books and documents were to be kept at the place of business, and both part-

ners were to have free access at times to examine them. I can therefore see no grounds at all for refusing the application, and I do not think the respondents are justified in retaining the books and documents. Therefore the order will be granted as prayed, with costs.

[Applicant's Attorneys, Messrs. Godlonton and Low; Respondent's Attorneys, C. W. Herold.]

KIFT V. TOWN COUNCIL OF CAPE TOWN.

Sir Henry Juta, Q.C., moved that the rule for leave to sue for damages *in forma pauperis* be made absolute.

The rule was made absolute, Sir Henry Juta being appointed counsel, and Messrs. Van Zyl and Buissinne attorneys.

TRUTER V. AITCHESON.

This was an application by defendant for removal of trial to Circuit Court at Richmond.

Mr. P. S. Jones appeared for the applicant, and said that a consent paper had been filed. The parties to the suit and the witnesses all resided at Britstown, and it would save all expense if the case were removed to Richmond.

An order was granted as prayed, costs to be costs in the cause.

QUEEN V. VAN DER MERWE. { 1900. Aug. 9th.

Mr. Maskew moved that the applicant, Van der Merwe, who was in gaol on a charge of murder, be allowed out on bail.

Mr. Ward appeared for the Crown, and said he did not oppose the application.

It appeared that the applicant had previously been out on bail in connection with the same charge, and the Court granted an order as prayed, bail being fixed at the same amount as before.

[Applicant's Attorney, Paul de Villiers.]

IN THE INSOLVENT ESTATE OF LOUIS CRAMER.

Mr. Maskew moved for an order authorising the Master to call a meeting for the election of a new trustee.

Granted.

IN THE MATTER OF THE MINOR JAN VAN KERKEN HAABHOFF.

This was an application on behalf of the father and natural guardian of the minor for leave to sell certain property.

Granted.

L 4

IN THE MATTER OF THE LUNATIC STEPHANUS JOHANNES JACOBUS COETZEE.

Mr. P. S. Jones moved for removal of curator and appointment of new curator.

An order was granted as prayed, the son, Joseph Adriaan Coetzee, being appointed curator of the person and property of the lunatic.

SUPREME COURT

[Before the Hon. Mr. Justice BUCHANAN (Acting Chief Justice), the Hon. Mr. Justice MAASDORP, and the Hon. Mr. Justice SOLOMON.]

JAMPIES V. JAMPIES. { 1900. Aug. 10th.

This was an action for divorce brought by the husband against his wife on the ground of her adultery with one Davids.

Mr. Searle, Q.C. (with whom was Mr. Buchanan), appeared for the plaintiff.

Mr. McGregor appeared for the defendant.

The case for the plaintiff was that he resided at Wellington, and the defendant, to whom he was married on October 8, 1883, resided at Wynberg, they having, in April, 1898, agreed by a notarial deed to separate, owing to differences having arisen between them. Since that time defendant had been living in adultery at Wynberg with one Davids. The plaintiff had commenced an action for divorce in April, 1897, but had subsequently withdrawn his action.

For the defendant it was contended that plaintiff was not entitled to a divorce, having committed adultery with one Lena Carolus both before and after the notarial deed of separation, and also with two other women, one named Anna Gouss and the other Petersen.

The plaintiff admitted the adultery with Lena Carolus, who had had a child of which he was the father, but said that that was five years before the date of the deed of separation. He admitted having been intimate with Lena up to within two months of the deed of separation, but stated that defendant had condoned that, cohabiting with him after she knew about it. The other charges he denied.

The plaintiff was a native, and all the parties in the suit and the witnesses called were coloured.

prive such creditor of the right to set off his claim against a debt due by him to the insolvent.

Mr. Molteno, for the respondent: This application has been before the Court under the 127th section of Act 6 of 1843. The application was then refused with costs. Now we have the trustee asking that the insolvent, to whom costs had been granted, should be made to pay his own costs.

Mr. Gardiner in reply.

Buchanan, A.C.J.: As between the applicant and the debtor in the absence of insolvency these costs might have been compensated by the debt. But when sequestration intervened, the 28th section of the Insolvent Ordinance expressly conferred the right of set-off to a cause of debt which had accrued before the order for sequestration was made. The costs which were awarded to the debtor accrued long after sequestration. In the case cited, of *Trustees of Van Niekerk v. Tiran* (1 Juta, 358), where a set-off was allowed of costs incurred in an application for civil imprisonment, the question of insolvency did not arise. There is some force in the argument that the creditor's debt is not extinguished by sequestration, and that on a second surrender he would, by section 130 of the Ordinance, be allowed to prove for any balance due under the first sequestration. But that does not meet the objection founded on the 28th section. For the 130th section to come into force there must be a second sequestration, and then as far as the creditor's rights are concerned, the section provides that the last order for sequestration must be treated as if it had been the only order ever issued. This application must be refused with costs.

Maasdorp and Solomon, J.J., concurred.

Application refused accordingly, with costs.

[Applicant's Attorneys, Messrs. Fairbridge, Arderne and Lawton; Respondent's Attorneys, Messrs. Walker and Jacobsohn.]

LAUGHTON AND CO. V. } 1900.

ANDREWS AND CO. } Aug. 9th.

Auditor—Partnership—Books—Retention.

Auditors ordered to deliver to the managing partner of a firm the books of the firm which they had received for the purpose of auditing and which they had been directed to retain by one of the partners.

This was an application for the delivery of certain books of account and documents handed to respondents for audit.

The petition and affidavits showed that the applicants carried on business in Cape Town as Laughton and Co. Mrs. Pfuhl was a partner in the firm, and last year, owing to some disagreement, the books were handed to the respondents to be audited. Applicant said that he was managing partner in the firm, and as such gave the books, etc., to the respondents to audit, but the latter now refused to deliver up the books and documents, whereby great loss and inconvenience were caused in carrying on the business of the firm. The respondents contended that it was on behalf of Mrs. Pfuhl they had received the books, etc., and now they had been instructed by her agent—her son—not to deliver them up to applicant. They therefore placed themselves in the hands of the Court. The deed of partnership was read, and showed that the applicant was to be managing partner, and that the books should be kept at the place of business of the firm, and be open to both parties for inspection. The deed of partnership did not bear the £2 stamp necessary, and the Court ordered that this stamp be affixed, and further imposed a fine of 10s., to be paid to the Registrar.

Mr. Schreiner, Q.C., for the applicant: The respondent has nothing to do with the books of a safe-going concern; they were merely sent to him for audit. He could retain them as a lien for any work he might do on them. But his charges in that respect have been tendered to him. The managing partner has the right to the books, and no one can retain them as against him.

Sir Henry Juta, Q.C., for the respondents: The respondent was not employed by Laughton. The books were given to him for audit with a view to a dissolution of partnership. The books are not Laughton's property. They belong to the firm, and both parties are owners of them. Now, both had agreed to hand them to respondent for audit, and so there they had to remain, neither having any right to claim them as against the other. One partner cannot withdraw instructions given by both conjointly.

Buchanan, A.C.J.: The terms of the deed of partnership gave Laughton the sole right of managing the business, Mrs. Pfuhl being what was known as a sleeping partner, and the deed of partnership further provided that these books and documents were to be kept at the place of business, and both part-

ners were to have free access at times to examine them. I can therefore see no grounds at all for refusing the application, and I do not think the respondents are justified in retaining the books and documents. Therefore the order will be granted as prayed, with costs.

[Applicant's Attorneys, Messrs. Godlonton and Low; Respondent's Attorneys, C. W. Herold.]

KIFT V. TOWN COUNCIL OF CAPE TOWN.

Sir Henry Juta, Q.C., moved that the rule for leave to sue for damages *in forma pauperis* be made absolute.

The rule was made absolute, Sir Henry Juta being appointed counsel, and Messrs. Van Zyl and Buissinne attorneys.

TRUTER V. AITCHESON.

This was an application by defendant for removal of trial to Circuit Court at Richmond.

Mr. P. S. Jones appeared for the applicant, and said that a consent paper had been filed. The parties to the suit and the witnesses all resided at Britstown, and it would save all expense if the case were removed to Richmond.

An order was granted as prayed, costs to be costs in the cause.

QUEEN V. VAN DER MERWE. { 1900. Aug. 9th.

Mr. Maskew moved that the applicant, Van der Merwe, who was in gaol on a charge of murder, be allowed out on bail.

Mr. Ward appeared for the Crown, and said he did not oppose the application.

It appeared that the applicant had previously been out on bail in connection with the same charge, and the Court granted an order as prayed, bail being fixed at the same amount as before.

[Applicant's Attorney, Paul de Villiers.]

IN THE INSOLVENT ESTATE OF LOUIS CRAMER.

Mr. Maskew moved for an order authorising the Master to call a meeting for the election of a new trustee.

Granted.

IN THE MATTER OF THE MINOR JAN VAN KERKEN HAAEHOFF.

This was an application on behalf of the father and natural guardian of the minor for leave to sell certain property.

Granted.

IN THE MATTER OF THE LUNATIC STEPHANUS JOHANNES JACOBUS COETZEE.

Mr. P. S. Jones moved for removal of curator and appointment of new curator.

An order was granted as prayed, the son, Joseph Adriaan Coetzee, being appointed curator of the person and property of the lunatic.

SUPREME COURT

[Before the Hon. Mr. Justice BUCHANAN (Acting Chief Justice), the Hon. Mr. Justice MAASDORP, and the Hon. Mr. Justice SOLOMON.]

JAMPIES V. JAMPIES. { 1900. Aug. 10th.

This was an action for divorce brought by the husband against his wife on the ground of her adultery with one Davids.

Mr. Searle, Q.C. (with whom was Mr. Buchanan), appeared for the plaintiff.

Mr. McGregor appeared for the defendant.

The case for the plaintiff was that he resided at Wellington, and the defendant, to whom he was married on October 8, 1883, resided at Wynberg, they having, in April, 1898, agreed by a notarial deed to separate, owing to differences having arisen between them. Since that time defendant had been living in adultery at Wynberg with one Davids. The plaintiff had commenced an action for divorce in April, 1897, but had subsequently withdrawn his action.

For the defendant it was contended that plaintiff was not entitled to a divorce, having committed adultery with one Lena Carolus both before and after the notarial deed of separation, and also with two other women, one named Anna Gousa and the other Petersen.

The plaintiff admitted the adultery with Lena Carolus, who had had a child of which he was the father, but said that that was five years before the date of the deed of separation. He admitted having been intimate with Lena up to within two months of the deed of separation, but stated that defendant had condoned that, cohabiting with him after she knew about it. The other charges he denied.

The plaintiff was a native, and all the parties in the suit and the witnesses called were coloured.

prive such creditor of the right to set off his claim against a debt due by him to the insolvent.

Mr. Molteno, for the respondent: This application has been before the Court under the 127th section of Act 6 of 1843. The application was then refused with costs. Now we have the trustee asking that the insolvent, to whom costs had been granted, should be made to pay his own costs.

Mr. Gardiner in reply.

Buchanan, A.C.J.: As between the applicant and the debtor in the absence of insolvency these costs might have been compensated by the debt. But when sequestration intervened, the 28th section of the Insolvent Ordinance expressly conferred the right of set-off to a cause of debt which had accrued before the order for sequestration was made. The costs which were awarded to the debtor accrued long after sequestration. In the case cited, of *Trustees of Van Niekerk v. Tiran* (1 Juta, 358), where a set-off was allowed of costs incurred in an application for civil imprisonment, the question of insolvency did not arise. There is some force in the argument that the creditor's debt is not extinguished by sequestration, and that on a second surrender he would, by section 130 of the Ordinance, be allowed to prove for any balance due under the first sequestration. But that does not meet the objection founded on the 28th section. For the 130th section to come into force there must be a second sequestration, and then as far as the creditor's rights are concerned, the section provides that the last order for sequestration must be treated as if it had been the only order ever issued. This application must be refused with costs.

Maasdorp and Solomon, J.J., concurred. Application refused accordingly, with costs.

[Applicant's Attorneys, Messrs. Fairbridge, Arderne and Lawton; Respondent's Attorneys, Messrs. Walker and Jacobsohn.]

LAUGHTON AND CO. v. } 1900.
ANDREWS AND CO. } Aug. 9th.

Auditor—Partnership—Books—Retention.

Auditors ordered to deliver to the managing partner of a firm the books of the firm which they had received for the purpose of auditing and which they had been directed to retain by one of the partners.

This was an application for the delivery of certain books of account and documents handed to respondents for audit.

The petition and affidavits showed that the applicants carried on business in Cape Town as Laughton and Co. Mrs. Pfuhl was a partner in the firm, and last year, owing to some disagreement, the books were handed to the respondents to be audited. Applicant said that he was managing partner in the firm, and as such gave the books, etc., to the respondents to audit, but the latter now refused to deliver up the books and documents, whereby great loss and inconvenience were caused in carrying on the business of the firm. The respondents contended that it was on behalf of Mrs. Pfuhl they had received the books, etc., and now they had been instructed by her agent—her son—not to deliver them up to applicant. They therefore placed themselves in the hands of the Court. The deed of partnership was read, and showed that the applicant was to be managing partner, and that the books should be kept at the place of business of the firm, and be open to both parties for inspection. The deed of partnership did not bear the £2 stamp necessary, and the Court ordered that this stamp be affixed, and further imposed a fine of 10s., to be paid to the Registrar.

Mr. Schreiner, Q.C., for the applicant: The respondent has nothing to do with the books of a safe-going concern; they were merely sent to him for audit. He could retain them as a lien for any work he might do on them. But his charges in that respect have been tendered to him. The managing partner has the right to the books, and no one can retain them as against him.

Sir Henry Juta, Q.C., for the respondents: The respondent was not employed by Laughton. The books were given to him for audit with a view to a dissolution of partnership. The books are not Laughton's property. They belong to the firm, and both parties are owners of them. Now, both had agreed to hand them to respondent for audit, and so there they had to remain, neither having any right to claim them as against the other. One partner cannot withdraw instructions given by both conjointly.

Buchanan, A.C.J.: The terms of the deed of partnership gave Laughton the sole right of managing the business, Mrs. Pfuhl being what was known as a sleeping partner, and the deed of partnership further provided that these books and documents were to be kept at the place of business, and both part-

ners were to have free access at times to examine them. I can therefore see no grounds at all for refusing the application, and I do not think the respondents are justified in retaining the books and documents. Therefore the order will be granted as prayed, with costs.

[Applicant's Attorneys, Messrs. Godlonton and Low; Respondent's Attorneys, C. W. Herold.]

KIFT V. TOWN COUNCIL OF CAPE TOWN.

Sir Henry Juta, Q.C., moved that the rule for leave to sue for damages *in forma pauperis* be made absolute.

The rule was made absolute, Sir Henry Juta being appointed counsel, and Messrs. Van Zyl and Buissinne attorneys.

TRUTER V. AITCHESON.

This was an application by defendant for removal of trial to Circuit Court at Richmond.

Mr. P. S. Jones appeared for the applicant, and said that a consent paper had been filed. The parties to the suit and the witnesses all resided at Britstown, and it would save all expense if the case were removed to Richmond.

An order was granted as prayed, costs to be costs in the cause.

QUEEN V. VAN DER MERWE. { 1900.
Aug. 9th.

Mr. Maskew moved that the applicant, Van der Merwe, who was in gaol on a charge of murder, be allowed out on bail.

Mr. Ward appeared for the Crown, and said he did not oppose the application.

It appeared that the applicant had previously been out on bail in connection with the same charge, and the Court granted an order as prayed, bail being fixed at the same amount as before.

[Applicant's Attorney, Paul de Villiers.]

IN THE INSOLVENT ESTATE OF LOUIS CRAMER.

Mr. Maskew moved for an order authorising the Master to call a meeting for the election of a new trustee.

Granted.

IN THE MATTER OF THE MINOR JAN VAN KERKEN HAABHOFF.

This was an application on behalf of the father and natural guardian of the minor for leave to sell certain property.

Granted.

IN THE MATTER OF THE LUNATIC STEPHANUS JOHANNES JACOBUS COETZEE.

Mr. P. S. Jones moved for removal of curator and appointment of new curator.

An order was granted as prayed, the son, Joseph Adriaan Coetzee, being appointed curator of the person and property of the lunatic.

SUPREME COURT

[Before the Hon. Mr. Justice BUCHANAN (Acting Chief Justice), the Hon. Mr. Justice MAASDORP, and the Hon. Mr. Justice SOLOMON.]

JAMPIES V. JAMPIES. { 1900.
Aug. 10th.

This was an action for divorce brought by the husband against his wife on the ground of her adultery with one Davids.

Mr. Searle, Q.C. (with whom was Mr. Buchanan), appeared for the plaintiff.

Mr. McGregor appeared for the defendant.

The case for the plaintiff was that he resided at Wellington, and the defendant, to whom he was married on October 8, 1883, resided at Wynberg, they having, in April, 1898, agreed by a notarial deed to separate, owing to differences having arisen between them. Since that time defendant had been living in adultery at Wynberg with one Davids. The plaintiff had commenced an action for divorce in April, 1897, but had subsequently withdrawn his action.

For the defendant it was contended that plaintiff was not entitled to a divorce, having committed adultery with one Lena Carolus both before and after the notarial deed of separation, and also with two other women, one named Anna Gouss and the other Petersen.

The plaintiff admitted the adultery with Lena Carolus, who had had a child of which he was the father, but said that that was five years before the date of the deed of separation. He admitted having been intimate with Lena up to within two months of the deed of separation, but stated that defendant had condoned that, cohabiting with him after she knew about it. The other charges he denied.

The plaintiff was a native, and all the parties in the suit and the witnesses called were coloured.

The plaintiff and several witnesses gave evidence in support of his allegations.

For the defence, Lena Carolus deposed that she had been intimate with plaintiff before and after his wife left him. Anna Gousa also deposed to having been intimate with plaintiff.

After hearing Mr. Searle, and without calling on Mr. McGregor, the Court refused to grant a decree of divorce.

Buchanan, A.C.J.: In this action the plaintiff brought his wife into court to answer a claim for divorce on the ground of her adultery. This adultery has been clearly proved, and is not denied, the defendant coming into court and admitting that she was living openly with the man with whom she was charged with having committed adultery, but it was a fundamental rule in all these matrimonial cases that the person who came into court must do so with clean hands, and the plaintiff in this case did not do so. Some time before the plaintiff and the defendant separated, a woman had a child to the former. This, however, was five years before the separation, and if the plaintiff had had nothing more to do with this woman the condonation shown might possibly have assisted the plaintiff's case. But on the evidence it was shown that this intercourse did not cease, but continued up to the time of the separation and afterwards. It was not so clear as to whether plaintiff had committed adultery with the other two women, but the evidence of Lena seemed to be perfectly reliable. I am prepared to believe Lena, and therefore the divorce can not be granted. As to whether plaintiff should pay defendant's costs the Court has to take into consideration that the defendant was still living with the man Davids, but, on the other hand, if the Court discouraged giving costs in this case it might discourage a defendant in a similar case from coming into court and showing that the plaintiff was not entitled to a divorce. Under the circumstances the action will be dismissed with costs.

Maasdorp and Solomon, J.J., concurred.

SUPREME COURT

[Before the Hon. Mr. Justice BUCHANAN (Acting Chief Justice), the Hon. Mr. Justice MAASDORP, and the Hon. Mr. Justice SOLOMON.]

In re PRIZE MASHONA. { 1900.
Aug. 13th.

Costs—Order of Court—Interpretation.

This was an application for an order on the captors of the Mashona to pay the costs or expenses unnecessarily incurred in bringing the steamship Mashona whilst under seizure as prize from Algoa Bay to Table Bay, as well as the costs incurred in taking her back to Algoa Bay, and the expenses consequent thereon. The amount of expenses claimed was £1,530, viz., £1,230 for coal consumed and £300 for demurrage.

Mr. Schreiner, Q.C. (with whom was Mr. Molteno), for the applicants.

Mr. Solomon, Q.C. (with whom was Mr. Searle, Q.C.), for the respondents.

Mr. Schreiner, Q.C.: This is practically an action to recover the price of the coal consumed in consequence of these unnecessary voyages. The vessel, which had been seized, has been released by order of this Court, sitting as an Admiralty Court. The vessel has been removed in contravention of section 16 of the Naval Prize Act of 1864. Now "ship" includes everything belonging thereto which is necessary for navigation, e.g., sails, masts, ropes, etc., and coal. The ship has not been handed back in the true sense of the word. We have made the application in the present form because we could not bring an action, as it would have had to have been brought in England, according to section 51 of the Act of 1864. By a clause in the Charter Party, the charterers must pay for the coal. The Court ordered the ship to be returned in the same condition as she was in when captured, and so everything wrongly taken must be handed back; that is what the Court meant by restoration. The sending of the ship to Table Bay was illegal, and the master protested at the time. Coal was illegally consumed in the course of the voyage. This must be paid for. We merely ask the Court to interpret its order in regard to restitution, and not to alter it. The Court will decide this matter on equitable grounds. If this application is refused, the charterers will really derive no benefit from the previous decision of the Court.

Mr. Solomon, Q.C.: The applicants cannot make any claim for the coal under the restitution order.

[Buchanan, A.C.J., referring to the original judgment, said the captors were not condemned to pay the costs save in so far as costs had been unjustly incurred in bringing the ship round to Cape Town.]

The charge for the coal is in the nature of a claim for damages. If damage has been sustained by the charterers, why do they not bring an action? This they have not done; we do not come into Court to meet any such claim. This claim might have been made in the form of an action. The claim was before the Court at the time of the granting of the order for restitution, but it was not pressed; so how can they now come and ask for a variation of the order? There was no breach of the statute in taking the vessel to Table Bay. The applicants wish something to be read into the order which the Court never meant.

Mr. Schreiner, Q.C., in reply: We could not make any claim for damages because by section 51 of the Naval Prize Act of 1864 this claim would have to be made in England.

Buchanan, A.C.J.: In March last the Supreme Court sat as a Prize Court to adjudicate on the question of the capture of the S.S. Mashona. There was a great number of parties before the Court—claimants of the cargo, the owners of the ship, and the charterers of the vessel—and the Court made an order with reference to certain cargo, condemning it as a lawful prize. The Court also postponed the order of condemnation as to other portions of the cargo, and then the Court further ordered that the ship be restored and that the costs of the captors, save and except the expense of bringing the said ship from Algoa Bay to Table Bay should be paid by the charterers and owners, one paying the other to be absolved; no order was made as to the other costs. These latter words are not in question in this case. They refer to the costs of action incurred by the charterers and owners, and the costs incurred by the claimants of cargo, and do not refer to the question now in dispute before the Court. On this order of Court the charterers have given notice to the captors that they will apply for an order on the captors to pay the costs and expenses unnecessarily incurred in bringing the S.S. Mashona from Algoa Bay to Table Bay. These are specified as being 58 tons of coal consumed in bringing the vessel

round from Algoa Bay to Table Bay, and the 100 tons of coal consumed on the return voyage, the increase being alleged to be due to the barnacles that had grown on the vessel, and 328 tons of coal which the ship consumed in keeping up steam in Table Bay, which would not have been necessary in Algoa Bay, the harbour being at all times comparatively empty there, whereas it was blocked and crowded here, and also a sum of £300 as being demurrage for detention of the vessel for four days in bringing her round here. I think it is clear in the first place that by no possible construction of this order of Court can any of those claims be brought under it, except possibly that for the coal consumed on the voyage from Algoa Bay to Table Bay, viz., 58 tons, but the slow voyage back owing to the barnacles, the consumption of coal in Table Bay and the demurrage are certainly not included in any order. The only question that can possibly be brought up is what is the meaning of these words: "The expense of bringing the ship from Algoa Bay to Table Bay." I have no doubt that the costs of the captors which were given to them included not only the costs of the action, but also any expenses which they incurred in bringing the ship round; that the captors were held to have done wrong in bringing the ship from Algoa Bay to Table Bay, but that once in Table Bay she was to be treated as if originally captured here, and therefore the order of Court could only possibly apply to any expenses in bringing the vessel round here. These, it is clear, the captors could not recover from the charterers and owners. If the captors have taken from the charterers things which were necessary in that bringing round of the ship from Algoa Bay to Table Bay it may be that by an action or proceedings properly brought by them they might recover these amounts, but I see a great difficulty in altering the order of Court in the present circumstances. As it at present stands the Court cannot give any costs whatever. In my opinion if these 58 tons of coal had been brought to the notice of the Prize Court at the time very probably the order would have been given for the captors to restore it, but that is the only item. Another reason for not interfering with the order of Court is that the whole case is under appeal, and if we made any order now, it may lead to very serious complications hereafter. No order will be made except that the applicants pay the costs of this application.

Maasdorp and Solomon, J.J., concurred.

[Applicants' Attorneys, Messrs. Van Zyl and Buissinne; Respondents' Attorneys, Messrs. Fairbridge, Arderne and Lawton.]

QUEEN V. LIEBENBERG. { 1900.
Aug. 13th.

Bail—Murder.

Application by a prisoner awaiting trial on a charge of murder to be admitted to bail refused.

This was an application for the release of the applicant, Liebenberg, on bail.

Mr. Rubie appeared for the applicant.

Mr. Ward appeared for the Attorney-General.

The petition stated that the applicant is in gaol at Victoria West on a charge of murder, and, further, at present was about to be indicted on a charge of attempted murder, and also on a charge of assault with intent to murder. In an affidavit the applicant said he was sixteen years of age, and resided with his father on his farm in the division of Kenhardt. On the afternoon of April 1 last Jan, April, and Solomon, three natives, were in the employ of deponent's father. The natives were missed next morning, and deponent and his father went in pursuit, and came up with them about one o'clock the same day. The natives consented to return, but first went to drink at a spot some ten yards distant. They then had a conversation in their own language, and immediately thereafter Solomon caught hold of deponent's father by his bandolier (both deponent and his father having their guns with them). April also tried to get hold of deponent, and some six Hottentot women on the spot rushed at his father, some with axes and some with kerries. April also went over to deponent's father, and the latter was struggling with the three men and getting tired. The natives would not tell his father what they wanted, and he said that if they did not let him go he would tell deponent to fire on them. His father then told deponent to shoot, and he loaded his gun. His father again asked him to fire, and he did so, the bullet going through two of the natives, and killing one of them, April. Deponent's father afterwards reported the matter to the nearest Field-cornet. Deponent fired at the natives because he feared harm to his father, the latter being very weak with the struggle and in great danger, while deponent was

personally too weak to attack the natives with his hands, and his father told him to fire.

Mr. Rubie referred to *Regina v. Rose* (15 Cox, 550). There was every reason to believe the father's life was in danger. No harm or defeating of the ends of justice could happen by admitting the applicant to bail.

Mr. Ward: This is a most serious case, and the Attorney-General considers that he cannot consent to the application for bail. The applicant's statement as to what took place when he and his father came up does not agree with the evidence of other witnesses given at the preparatory examination, it being to the effect that the father had first pointed his gun at the natives. Another important element is that the applicant is a man of no means, while his father has fled and is not standing his trial.

Buchanan, A.C.J.: Until recently a person charged with a capital crime could not be admitted to bail, but the Legislature has chosen to give the Supreme Court discretion to admit to bail in all cases. Still, in a case where a capital crime is involved, the Supreme Court will proceed with very great caution in admitting to bail. It is very difficult, especially in capital crimes, to go fully into the question as to whether bail should be given or refused without prejudging the same before the case comes before a jury. We have the evidence in this case taken at the preliminary examination, and we are not prepared at the present time to discuss the details, but the strong fact that the father is a fugitive from justice and is not standing his trial is certainly very strong evidence that bail should not be granted, particularly as the trial will take place before long. In this case the Attorney-General opposes the application, the father has fled, and the trial will come on very shortly, and on these grounds the Court in this case cannot grant bail. We do not wish to go into the merits of the case in any way so as to prejudge it. The application will be refused.

Maasdorp and Solomon, J.J., concurred.
[Applicant's Attorney, Gus. Trollip.]

IN THE MATTER OF THE PETITION OF MARY DAVIDS.

Mr. McGregor moved for an order restraining the sale of petitioner's goods, pending the hearing of an application on August 31.

The Court granted a rule nisi, operating as a temporary interdict.

REGINA V. NAUDE. } 1900.
REGINA V. BEKKER. } Aug. 13th
" " 16th.

Writ de libero exhibendo—High treason—Procedure—Martial law.

Martial law having been necessarily and properly proclaimed in a district of the colony, and it appearing that the necessity for the continuance of martial law still existed, the Court refused to interfere with the military authorities in charge of the district in regard to the detention of a person arrested and confined by them in gaol within the district.

When it has been established that martial law is necessarily in force, the responsibility for acts done thereunder must be taken by the authorities administering it. The Supreme Court will neither grant its aid to carry it out, nor assume any responsibility for its administration.

These two applications being similar in their nature, were heard conjointly. They were for orders for the discharge of the applicants from the custody of the military authorities and for the removal of the attachment placed on their property by the military authorities.

The affidavit of J. D. Naude set forth that he was a farmer domiciled at Noordhoek, in the district of Barkly East, and was 63 years of age. In April last he was arrested at his farm on a charge of high treason and taken to Barkly East and placed in the common gaol there, where he was stripped and searched in the manner prescribed for prisoners. He was afterwards removed to the prison at Barkly East, where he was still detained. At various times petitioner and other persons had been taken to the Court-house at Barkly East, where an inquiry had been held on behalf of the military authorities by the Magistrate, and petitioner and the other persons were allowed to put questions to the witnesses, but were not allowed the assistance of legal advisers. He had never been brought before any proper judicial tribunal charged with any offence against the laws of this colony. He had never taken up arms or

committed any offence against Her Majesty, and was innocent of the charge brought against him. In November, 1899, the district was occupied by the Republican forces, but there had never been any fighting there, and when on March 11 last Major Hook, with seven men, came into the district and re-occupied it on behalf of Her Majesty, the Republican forces retreated. There had been no fighting at any time in the district since the proclamation of war and the district was quiet and peaceful. The communication with Cape Town and other parts of this colony had never been interrupted, and mercantile business had been carried on as usual. The military had also taken an inventory of petitioner's live-stock and property, and would not allow him to sell or alienate, or in any way deal with the same. About May 13 last he had over £500 standing to his credit in the local branch of the Standard Bank, £318 14s. 3d. of which was the balance of the estate of his late father and mother, of which he was executor, and which has to be paid out to the heirs. He drew a cheque for that amount, but the Standard Bank, acting under orders from the military authorities, refused to cash it. Applicant further stated that he was suffering from diabetes, and the confinement was injuring him.

There was an answering affidavit by General Sir F. W. E. F. Walker, in which he stated that it was essential that the proclamation of martial law should continue in existence as the district bordered on the Orange River Colony, where a state of war existed, and a number of persons in the district had been in rebellion. Owing to the hostilities in the Orange River Colony still existing there was great unrest among the inhabitants of Barkly East, and it was necessary to have some summary power. A quantity of arms and ammunition had been brought into the district by the enemy, and a large quantity of these arms and ammunition was concealed in the district, so that martial law was necessary for dealing with this state of affairs.

There was also an affidavit from Colonel Sinclair, D.A.A.G., as to the necessity for martial law. It was also stated that the military authorities had given permission for the cashing of the cheque referred to by petitioner.

The case for Bekker was similar, except that he is confined at Aliwal North. In his case some time in July, 1900, the Court granted an order calling upon the gaoler there to show by what authority Bekker was

detained, and it was shown that it was under the authority of the military, who controlled the gaol.

Mr. Molteno for the applicants: The matters before the Court raise the question of the application of martial law. The military wish to justify their action in incarcerating persons and impounding their property by the answer "martial law." Now, we ask, what is martial law, and is it a justification? In a recent issue of the "Journal for Comparative Legislation," G. G. Phillimore states as the opinion of Lord Dundas that martial law can only be constitutionally proclaimed where there is absolute and continuing necessity. Martial law must only be proclaimed in self-defence for the purposes of self-preservation, and not for the purposes of inflicting punishment. Now, here we have martial law proclaimed necessarily at first, but later it is still exercised when necessity has ceased to exist. This is not just. Martial law in its exercise, just as in its inception, must be limited by necessity. There is nothing to prevent the exercise of ordinary civil jurisdiction. The Court will now decide whether the continuance of martial law is a legal use of the prerogative of the Crown. The question of necessity is one for the decision of the Court, and not of the Executive. The military authorities cannot inflict punishment some time after the commission of an offence; they can shoot anyone caught red-handed in rebellion. If the courts are open, the continuance of martial law is illegal. In *Gordon's* case, Cockburn, L.C.J., said that absolute necessity was required to justify the exercise of martial law. In *Milligan's* case (U.S.A.) courts martial were held to have no power of punishing rebels when the civil courts could deal with them. The threatened invasion is no justification for martial law. The test of "necessity" is, can the Courts sit and not do they sit? The R.M. Courts are actually sitting, and therefore any other can sit. *Clode's* opinion is that only necessity can justify a departure from the ordinary law. Lord Campbell says that if the ordinary courts are open, and if the proceedings can be conducted in the civil courts, people cannot be dealt with by martial law. It is not sufficient to prove as a justification the proclamation of martial law, but necessity must be shown. In *Bekker's* case the district is quiet and peaceful; this is admitted. In *Naude's* case the proclamation of martial law took place on March 5; the acts of treason alleged took place prior to that date; my argument here is that the proclamation has no retrospective effect.

Mr. Searle, Q.C., for the Attorney-General: My learned friend says that as soon as the courts are open the necessity for martial law ceases; the authorities he has alluded to are applicable to English circumstances where only rebellion occurred. Here we have both rebellion and a war still going on. The one cannot be disassociated from the other. The proclamation and exercise of martial law are necessary not only to suppress active rebellion, but also to prevent possible insurrection. If rebellion, sedition, or insurrection is probable, martial law can be continued. See *Finlayson's Commentaries on Martial Law* pp. 121. 271). A spirit of rebellion may exist long after military operations have ceased, and this has occurred here. The General's reasons are good; we find also that in the reasons given by the Magistrate, he says rebellion is still smouldering. If any great wrong or injustice is done, the Courts will interfere; nothing unjust has been done; preparatories have been held in both these cases.

[Solomon, J.: The Magistrate, however, acts on behalf of the military; why does he not act in his ordinary capacity?]

I because the present arrangement seems to work better; he is under the control of the military authorities; under ordinary circumstances he cannot give bail in treason cases, but the military authorities allow him to do so.

[Solomon, J.: Is martial law necessary in these districts?]

Yes, distinctly so. The war is still going on; the magistrates on the spot say it is necessary, the General's opinion is that it is necessary, and these views are supported by *Finlayson*. (See above.)

[Solomon, J.: Can this Court then interfere?]

Only when there is a great injustice done, or there is a miscarriage of justice. See *Finlayson* (pp. 58, 60, 61) and *Clode on Martial Law* (edition 1874, p. 173).

Mr. Molteno in reply: The rebellion has been quelled, and the invaders have been driven from the Colony, and with these satisfactory results martial law ought to become a thing of the past. The attachment of these men's property is under any circumstances illegal.

Postea (August 16).

Buchanan, A.C.J.: The applicant Bekker last month petitioned the Court to inquire by what authority he was detained in custody in the gaol at Aliwal North, and why his property had been placed under attachment by the military authorities. As there was

then no appearance on behalf of the Crown to oppose the application, it was treated as having been made *ex parte*, and in consequence the gaoler having the custody of the prisoner was required to make a return to the Court, which he has now done. The applicant Naude, who is under detention in the adjoining district of Barkly East, has filed a similar petition, and as the Crown is now represented the parties have agreed that one decision should govern both cases, and they have asked to have both applications taken together. The second prayer in the petitions relating to the attachment of property has not now been argued or pressed. In the case of Bekker the Court at the previous hearing did not consider it had sufficient information before it to justify any order being made, and in the case of Naude the applicant has been allowed to draw the money about which he complained from the bank. Both applicants were arrested by the military authorities, and are being detained in districts in which martial law has been proclaimed, and from which it has not yet been withdrawn. They are both in the custody of gaolers acting under military orders. Applicants' counsel contends that though martial law was originally properly and necessarily proclaimed in these districts, this necessity no longer exists, and that the Court should now determine that it is at an end, and consequently that the petitioners should be released from custody. He has argued exhaustively the question of the scope and object of martial law, with a view of establishing that when the circumstances which justified its proclamation have ended it no longer had any validity. It was urged that though war, invasion, and rebellion necessitated the proclamation of martial law, rebellion having been suppressed and invasion repelled, martial law should be declared at an end notwithstanding that war still rages across the border. The Court only last term in *Fourie's case* *Supra*. p. 195) discussed at length the subject of martial law, and it was then laid down that in the districts in which it was necessitated the jurisdiction of the Court was suspended. This ruling was in strict accord with the views expressed in the only two reported cases decided in this Court which I have been able to discover, viz., in 1852 in the case of *Standen v. Godfrey* (1 Searle, 61), and in *re Willem Kok and Nathaniel Balie* in 1879 (9 Buch. S.C. Rep., 45). In this later case there is also the dictum of the learned

Chief Justice to the effect that martial law cannot continue in force after the occasion which gave rise to it ceased to exist. I would prefer to put the proposition thus: That as necessity justifies the proclamation of martial law, so also does necessity justify its continuance. I do not concur in the contention of counsel that because certain of the Courts of law are open therefore martial law cannot exist. As we know in one part of this Colony a Court was recently actually engaged in criminal trials by jury to the accompaniment of a bombardment, and yet it was admitted that martial law was necessary and was in fact in force at the time at the same place. The Courts must not only be open, but also be in the full, proper, and unobstructed exercise of their jurisdiction. Where martial law is paramount the civil judicature is stayed. The two jurisdictions cannot work concurrently. As was said by Wylde, C.J., in the case cited, by the existence of martial law the process of the Court would become neutralised, and the Judges would no longer minister under the Royal Charter, but upon the sufferance and under the will of the Commander-in-Chief. That is not a position to which the Supreme Court can with due regard to its dignity and proper function submit. No doubt the supremacy of arbitrary force instead of the recognition of the free course of duly constituted law and order is repugnant to all judicial ideas, and will not readily be concurred in. But after all the safety of the State is the highest law, and when the necessity arises the Court must acknowledge the functions of another department of the Government, and not attempt futile and ineffectual opposition thereto. As has been admitted, martial law was properly proclaimed in these districts by the Executive Government, and that proclamation has not yet been withdrawn. This fact might not alone be taken to be conclusive as to the necessity if there was evidence of any wanton insistence by the Executive of martial law; but it is strong evidence of such a necessity when it appears that the Executive is not acting arbitrarily, and has after inquiry withdrawn the proclamation in those districts in which in their opinion it could safely be done. The districts in question here in the opinion of the Executive do not come within that category, and they therefore oppose these applications. The military forces are also necessarily in actual control of these districts, and responsible officers have put forward facts which in their opinion require the continued enforcement of martial law. True

the Acting Magistrate of one of the districts has in terms given his opinion that martial law should cease in his district, but in contradiction of his own opinion he gives cogent reasons for its continuance. He states *inter alia* that though invasion has been repelled the rebellious element is by no means subdued, and is still sullen and defiant; and also that if martial law were suddenly to cease the effect would be disastrous. The Magistrate of the other district reports in favour of its continuance, and we also have the fact that the usual Circuit Courts have not yet been proclaimed to be held in these districts. To meet all this evidence the allegations of the applicants are of the baldest character, and are manifestly incomplete in the details given of the events which have actually occurred in these districts. In the face of the evidence put before us by the Crown, and of its opposition to these applications, it needs a much stronger case to justify the Court in assuming that martial law has ceased, and that the Court can now resume the exercise of its usual functions in these districts. And until martial law has ceased, I do not think the Court should interfere with the department of State specially charged with the safety of the country and with the duty of restoring peace and order. When it has been established that martial law is necessarily in force, the responsibility for all acts done thereunder must be taken by the authorities administering it. This Court can neither grant its aid to carry it out, nor assume any responsibility for its administration. As long as martial law is necessary the mode by which alone it can be made effective, when tested by the rules prevailing in a court of justice in times of peace, is in itself illegal. To attempt control over the acts of those entrusted with the administration of martial law, and to condemn only certain of their proceedings would in effect be to ratify their other acts, and thus to justify the very measures which the civil law cannot tolerate. While martial law lasts it is not the time to question the validity of acts which are considered to be necessary by the authorities in charge. When the proper time does arrive, as has consistently been laid down by this Court, the persons who have committed wrongful acts, whether they be military officials or others, may be made amenable to the law. That time is not the present, and therefore in my opinion no order should now be made on these applications.

Maasdorp, J., said: The arguments advanced in this case traversed largely the same ground that was passed over in the case of *Fourie*, which was decided lately, and it will consequently be unnecessary to go fully into the consideration of points which were disposed of in the judgment then delivered. In giving my decision in that case I endeavoured not to give expression to any opinion not absolutely necessary for its decision, and in this case I shall again endeavour not to travel beyond its requirements. In the case of *Fourie* I was of opinion that in a district which was the scene of active military operations, and where in consequence in point of fact the ordinary functionaries for the administration of criminal and civil law did not and could not perform their work, the proclamation and exercise of martial law became an absolute necessity in the interest and for the safety of the State, and the jurisdiction of this Court was wholly suspended. The question now arises whether there are any circumstances distinguishing this case from the previous one. In the case of *Fourie* it seemed to me that the bare allegation that martial law had been proclaimed was not in itself sufficient to oust the jurisdiction of this Court, without proof of the paramount necessity of the proclamation and of exercise of martial law. Referring to the law and practice of other countries in similar cases, I find that by Act of Congress in the United States of North America it was enacted in March, 1863, that where the Court issued a writ of Habeas Corpus during the continuance of the rebellion, it shall be a sufficient answer by the military officer having the custody of any person, that he detained him under authority of the President, and further proceedings under the writ should therefore be suspended. Among the Continental nations of Europe there are provisions in their laws for the declaration, during war or rebellion, of a state of siege, by virtue of which the civil law is suspended or, at least, made subordinate to the military. The action of the Government in this respect cannot in these countries be called in question by the law courts. We have 10 similar statutory provisions in our law, and this Court is obliged to vindicate its jurisdiction except where it is put an end to for the time being by the paramount necessity of State in case of war or rebellion where the safety of the State is involved. The Court did not refuse relief to the applicants in this case upon the bare fact, of which

it had judicial notice, that martial law had been proclaimed in the districts in which the acts complained of took place. Notwithstanding its knowledge of the existence of that proclamation, it granted a rule nisi calling upon one of the respondents to justify the detention of the applicant. The military authorities, who are responsible for the detention of the applicants, did not content themselves with setting up the proclamation of martial law as in itself a bar to the exercise of the ordinary jurisdiction of this Court, but have endeavoured to prove the absolute necessity of that proclamation, and of the exercise of martial law in the districts in which, acting under martial law, they have arrested and now detain the applicants. It now remains to decide whether they have made out a good case. It appears from the evidence that the district of Aliwal North, bordering upon the territories of what was lately the Orange Free State, was invaded and overrun by the military forces of that State in November last. Large numbers of the inhabitants of the district rose in rebellion, and, taking up arms, joined the forces of the enemy, and in conjunction with them carried on active warfare against the British and Colonial troops. Eventually, after considerable and prolonged fighting, the invaders and insurgents were driven back, the former expelled from the Colony, and many of the latter forced to surrender. Large numbers of the rebels, after giving up their arms, were permitted to retire upon parole to their homes, and others were detained in custody. The presence of these persons in the district would alone seem to necessitate the presence of a large military force there. But it further appears that there still exists grave unrest among the inhabitants, which requires more summary dealing than is possible in the proceedings of the ordinary courts of law. The Acting Magistrate of Aliwal North (in whose opinion, it must be said, martial law is no longer needed) says the garrisons should remain in the district, and adds: The rebellious element, though broken, is by no means subdued; it is still sullen and defiant. In the midst of this population it is alleged, large numbers of weapons of war with ammunition are concealed. In the neighbouring State the enemy, with whom so very many of the inhabitants of the district made common cause, is still waging war. The General Commanding the troops in this colony, in

view of the condition of the district as here described, gives it as his opinion that it is essential that martial law should continue to be of effect in the district. Looking at all the circumstances of the case, I am not prepared to say that the General is wrong in his opinion, and that the Government is wrong in maintaining martial law. On the contrary, it seems to me that the condition of things in the district is not a condition of peace in which the ordinary civil and criminal courts could carry on the proper and unobstructed exercise of their judicial functions, and the military occupation of the district is, under the circumstances, in the nature of an operation of war, although for the time being no active hostilities are carried on. It seems to me the ordinary civil magistrates with the ordinary police force could not possibly deal with a disaffected, sullen, and defiant population, among whom there are numerous persons who may be called prisoners of war on parole, and that at a time when active war is still carried on in the neighbouring State. If that is so, then it follows that affairs in the district can, for the time being, be administered only by the military authorities enforcing martial law. The same may be said of the district of Barkly East. Where it is once established that martial law exists as a matter of paramount necessity this Court will not interfere with the proceedings of courts martial while such necessity continues. In *Fourie's case* I held that the necessity was abundantly proved by the fact that the functions of civil Courts were actually suspended, the magistrates and police having by the enemy and rebels been driven from the districts, in this case I am of opinion that the necessity is proved by the facts of the case as above set forth. But it is argued that this case must be distinguished because, as a matter of fact, the Magistrates' Courts are open and sitting to hear cases in the districts of Aliwal North and Barkly East. In view of the facts of this case, I repeat that in spite of the fact that the courts are open, they cannot under the circumstances be said to be in the proper and unobstructed exercise of their functions. But there is abundant authority for saying that there is nothing to prevent the military, while administering martial law, from allowing the Courts of law to take cognisance of matters which do not clash or conflict with the proceedings of courts martial. The existence of such civil courts is no proof that martial law has become unnecessary. It seemed to be contended in the argument of counsel for the appli-

cants that the refusal of their application would be a denial of justice. But if the refusal proceeds on the ground that martial law being a paramount necessity this Court cannot interfere, I do not think it follows that justice will be denied to the applicants. Courts martial are expected to administer justice, and although they employ a different procedure, they are guided by the same principles of right and justice which prevail in the ordinary law court of the Colony. The applicants, together with a number of other persons, were taken prisoners upon the charge of high treason by the military, and under warrant issued by the military authorities they were now detained in custody while a court-martial inquiry into their cases is taking place. This Court cannot in my opinion interfere with the court-martial proceedings. The applications must be refused.

Solomon, J., said: The first question raised in this case, and the one to which the greater part of the arguments was addressed, is whether or not as a fact martial law must be taken to be still in force in the district of Aliwal North. This part of the case has, however, been so fully dealt with that I do not propose to discuss the question at length. I would merely say that, taking into consideration the fact that the proclamation issued by the Governor and the Executive Council is still in force in that district; that the rebellion which took place was merely an incident in a general war between Great Britain and the two Republics, which is still raging in the adjoining territories; that, though active rebellion has been suppressed (to use the words in the telegram of the Resident Magistrate of Aliwal North, which was strongly relied upon in support of the applicant's contention), "the rebellious element is by no means subdued; it is still sullen and defiant"; that consequently it is important that the exceptional powers which have been placed in the hands of the military for the safety of the country should not be suddenly taken away; for these and for other reasons which I need not now discuss, I do not feel justified in coming to the conclusion that martial law is no longer in force in that district. In my opinion, however, that does not conclude the question which we are asked to determine, and I proceed, therefore, to discuss what is the effect of a proclamation of martial law upon the rights and liberties of the inhabitants of the district. The answer to that question depends upon the view that is taken

with regard to the basis upon which martial law rests. Now there are two theories upon the subject: the one, which is advocated by a writer like Finlayson, who contends that it is an ancient and undoubted prerogative of the Crown to proclaim martial law, and that such proclamation justifies and legalises all acts committed under the authority thereof. This author was quoted by Mr. Searle, who argued the case on behalf of the Crown; but I can only say that after considering fully all the available authorities on the subject, I have come to the conclusion that Finlayson's statement of the law is at variance with all the best authorities on the subject, and that at the present day his views are practically exploded. The other theory regarding martial law, which I without hesitation adopt, is that advocated by jurists such as Fitz-James Stephen, Dicey, and others, a theory which has been approved of by such eminent judges as C. J. Cockburn and Lord Blackburn, which has been adopted by the Supreme Court of the United States, and which appears to be now generally accepted as the correct legal view on this important subject. According to this theory martial law is nothing more nor less than the law of self-defence or the law of necessity. It is put in force in times of public danger, when the maxim *salus reipublice extrema lex* applies, and when in consequence it becomes necessary for the military authorities to assume control and to take the law into their own hands for the very purpose of preserving that constitution which is the foundation of all the rights and liberties of its subjects. When such a state of things arises in any district, the ordinary rights and liberties of the inhabitants are subordinated to the paramount interests of the safety of the State. And in this view of the matter a proclamation of martial law confers no rights upon the military authorities which they would not have in time of danger apart from such proclamation, and is looked upon merely as a notification to the inhabitants that they must submit to the new rule which has come into force in the district. But both the justification for proclaiming martial law and the actual exercise of authority thereunder are strictly limited by the necessities of the situation. The arbitrary powers with which under martial law the military are armed are only justifiable on the ground of necessity; nor can they interfere with the rights and liberties of the inhabitants further than is required

by the exigencies of the situation. And accordingly, whenever any arbitrary act on their part is challenged by the person whose rights are interfered with, the test which has to be applied, in order to determine whether the act is justifiable or not, must always be the test of necessity. If it answers that test, the act, even though it may be a gross interference with personal liberty, is justified; but if it fails to do so, the act is illegal and unwarrantable. And in applying this test the condition of the district and the extent of the danger are all-important elements in the consideration of the question; for acts which under one set of circumstances and in one district may be reasonable and necessary, would in another district and under different circumstances be wholly unjustifiable. As has been well put in *Bishop's Criminal Law*: "Martial law is applied to varying circumstances. It may operate to the total suspension or overthrow of the civil authority; or its touch may be light, scarcely felt or not felt at all by the mass of the people, while the courts go on in their ordinary course, and the business of the community flows in its accustomed channels." It is thus impossible to predicate of any given act done under martial law, whether it is justifiable or not, without a full inquiry into all the circumstances of the case and the extent of the danger involved. But then the question must necessarily arise, by whom is the test to be applied? Is the opinion of the General in Command that an act is necessary to be deemed a conclusive answer in every case, or is it open to a court of justice to decide this question for themselves? The case which I understand is put forward on behalf of the Crown is that as long as martial law is in force the military authorities alone are the judges of what is necessary, and that no act done within that district by them can be inquired into by the Court until martial law has ceased to be in force. If that view be correct, then we are in this position, that however gross or unwarrantable may have been the interference with the rights and liberties of any person, the Court cannot intervene to protect him during the subsistence of martial law. In other words, the jurisdiction of the Court is ousted from the district, and where a person's liberty is interfered with the Court is as powerless as if the writ of Habeas Corpus had been suspended. I must say, however, that I am unable to accede to that contention, nor can

I find sufficient authority for the argument that in a case where personal liberty is infringed a proclamation of martial law has even greater effect than an Act of Parliament suspending Habeas Corpus. To the authority of an Act of Parliament the Court must of course submit without question: but in my opinion nothing less than an Act of Parliament can take away from the Supreme Court the right or relieve it of its duty of deciding for itself whether an act is justifiable or not. Of course the condition of the country may be such that the Courts of justice are of necessity closed: or the particular act challenged may be an act so essentially of the nature of an active military operation that the Court would as a matter of course accept the opinion of the military authorities as conclusive on the question. Or again the Court may in its discretion, if it deems it inadvisable in the interests of the State, refuse to allow the military authorities to be harassed by judicial proceedings while active military operations are in progress, and postpone an inquiry into their conduct until a more convenient time arrives. But where in a case like the present the acts complained of are acts intimately connected with the administration of justice, I do not think the Court is debarred, merely because martial law is in force, from satisfying itself that the acts complained of are under the circumstances proper and necessary. It would take up too much time if I was to refer to the authorities which have led me to these conclusions; but I might refer in passing to the opinion of the Attorney-General and the Solicitor-General of England, quoted in *Forsyth's Opinions*, at page 189, where the law is laid down very clearly to the following effect: "Nor do we apprehend that by such proclamation of martial law, the ordinary course of law and justice is suspended or stopped, any further than is absolutely necessary to answer the then military service of the public and the exigencies of the province." I am aware that the view I have ventured to express differs from that taken by C. J. Wyld in the case of *Standen v. Godfrey* (1 S., 60), and which was quoted by the Acting Chief Justice in the case of *Regina v. Fourie*, decided in this Court last term. But it will be found that in *Standen v. Godfrey* C. J. Wyld was not delivering the judgment of the Court upon a question at issue, but was merely expressing his opinion upon a point which he had himself raised in an undefended provisional case, and upon which the other judges did

not think it desirable to express any opinions; so that it is not an authority which is in any way binding upon this Court. On the other hand, I think that the case of *Fourie*, in which the Supreme Court in April last granted a rule calling upon the military authorities to produce before this Court the body of the applicant, who was detained in a district under martial law, and to justify his detention, is an authority for the proposition that this Court did not then consider that its powers were suspended in such a district. The opinion which I have now expressed is the same view which I took in the case of *Fourie*, in which I joined in refusing the application, not because I thought that the Court had no power to interfere, but because I held that his detention was justified in the circumstances of that case. That decision I still adhere to, and as it appears to have been much misunderstood, I may point out that the judgment in that case is supported by the very high authority of the Supreme Court of the United States in the case of *Milligan*, which was quoted by counsel in the present application, and with which I was unacquainted when *Fourie's* case was before the Court. *Milligan*, like *Fourie*, had been sentenced by a court-martial, and applied to the Court for his discharge. I do not know whether the application was made before or after the termination of the war, but the circumstances were entirely different from those in *Fourie's* case, and I only refer to the case in order to quote a portion of the judgment of Davis, J., who gave the opinion of the majority of the Court, and which is peculiarly applicable to *Fourie's* case. After laying down that martial law did not justify the conviction and sentence of *Milligan*, Davis, J., continues thus: "It follows from what has been said on this subject that there are occasions when martial rule can be properly applied." (And by martial rule it seems clear that he was referring to trial by court-martial, which was the subject before the Court.) "If in foreign invasion or civil war the Courts are actually closed, and it is impossible to administer criminal justice according to law, then on the theatre of active military operations where war really prevails, there is a necessity to furnish a substitute for the civil authority thus overthrown to preserve the safety of the army and society." *Fourie's* trial took place on the theatre of active military operations, in a district from which the Resident Magistrates and Justices of the Peace had been expelled, and where it was

impossible to administer criminal justice according to law; and in these circumstances trial by court-martial in a case where prompt and speedy punishment was most desirable for the purpose of suppressing the rebellion was both reasonable and necessary. But I pass on now to apply the principles which I have laid down to the facts of this case, and I would first point out that in my opinion neither *Fourie's* case nor *Geldenhuys' case*, which were heard last term, are authorities in the present application. For as regards *Fourie's* case, the facts were entirely different from the facts in the present case. *Bekker* has not been tried or convicted by a court-martial. There are no active military operations going on in the district where he is detained, and the Resident Magistrate's Court is open and is performing its ordinary duties. Then as regards *Geldenhuys' case*, I must again point out, as I did in the course of that case, that *Geldenhuys* did not apply for his release on the ground that he was being illegally detained. His application was that the Court should admit him to bail, and he thereby impliedly recognised the proceedings of the military court which had made a preliminary inquiry into his case. But as we pointed out, it was impossible for this Court to recognise the tribunal before which he was brought, or to give any directions to that tribunal with regard to the discharge of its duties. This case, therefore, is not in any way governed by the previous decisions of the Court, and must be decided upon its own merits. We find, then, that the applicant was arrested on 20th March by Major Crewe on a charge of high treason, and lodged in Aliwal gaol under the authority of a letter from Major Crewe to the gaoler. He was kept in gaol at Aliwal and Queen's Town till the 15th May, when he was brought before the Resident Magistrate of Aliwal, who proceeded to institute a preliminary inquiry into his case, but not in the capacity of a magistrate holding a preliminary investigation, but as an agent of the military authorities. The investigation was continued from time to time, and the applicant is still detained in gaol in the custody of the gaoler, who is acting under the orders of the military authorities. Now seeing that the applicant is in the custody of the gaoler, and that the preliminary investigation into his case has been held by the Resident Magistrate of the district, one is constrained to inquire what reason or necessity was there that this man should

not have been handed over to the civil authorities in order that the ordinary procedure in the case of a man charged with a crime should be followed, and in order that the ordinary law should take its course. I pressed this matter upon the attention of counsel for the Crown more than once, but I cannot say that I received any satisfactory reply. If the Magistrate could hold this inquiry, why could he not in his capacity of Resident Magistrate have taken a preliminary examination, and why should not the gaoler have the applicant in his custody under the warrant of the Resident Magistrate instead of holding him as an agent of the military authorities? In other words, is there any reason or necessity for his detention by the military instead of by the civil authorities? Now I am bound to say that I should have found it very difficult to satisfy myself on this point, or to resist the application for the release of the applicant, leaving it to the civil authorities to arrest him again if they considered it desirable, had it not been for the existence of certain facts, which are matters of common knowledge, and which I think I am justified in taking notice of in a case of this nature, where it is of the utmost importance that all the circumstances which bear upon the application should be before the Court. For in the first place I cannot ignore the fact that the case of the applicant is not an isolated instance of detention under martial law; if it were I should have felt no difficulty in dealing with it. The applicant, as it well known, is one of several hundreds of persons charged with high treason, and detained in military custody pending their trial on that charge. Moreover it is matter of common knowledge that there are in addition to these persons in custody several thousands of others in the various districts of the Colony in which martial law is in force, who are under military supervision, but who have been allowed to return to their farms on condition that they should deliver themselves up if called upon to stand their trial on a similar charge. Now if an order were made in Bekker's case that he should be released on the ground that the ordinary course of law and justice should be followed, what would be the result? Bekker's case, as I have said, is only one of hundreds, and if the order was carried out in his case, there would be no justification for the military authorities detaining the many others who are in the same position. But this is not all, for if the ordinary law is to take its course, what

about the thousands of others over whose heads charges of high treason are hanging? If the ordinary procedure is to be followed in their cases, these men also would have to be arrested by the civil authorities and placed in gaol pending preliminary examinations into each of their cases. Is that a condition of things with which the civil authorities would be able to cope, or is it not better in the interests both of these persons and of the country generally that they should be left in charge of the military authorities for the time being. Individual cases of hardship no doubt may and will occur. I am not in a position to say whether or not Bekker's is such a case. He complains of his long detention in gaol, but of course one knows that in this country it is a matter of every-day experience that persons are detained in gaol for six months or more pending their trial before a Circuit Court; and it is impossible to say, without having all the facts before us, whether this is a case in which the Court would have admitted him to bail. But even though there might be individual cases of hardship, it is well to bear in mind also the very numerous cases of persons who are at large, and who but for the fact that martial law was in force might themselves now be languishing in gaol. Taking a broad and practical view of the whole situation, and not treating Bekker's case as an isolated occurrence, I hesitate to come to the conclusion that the emergencies of the situation do not justify the military in keeping all these persons under their charge pending their trial, and in suspending the ordinary course of law and justice for the present. And then there is in addition this other very important fact of which I feel bound to take notice, that there is at present before Parliament a Bill which amongst other things proposes to legalise the very proceedings which are now called in question, and to make special provision for the trial of persons charged with high treason. In these circumstances, is it not right and proper that the Court should stay its hand for the present pending the decision of Parliament upon this question? After all, in these applications for a Habeas Corpus a certain amount of discretion must be left to the Court. In the case of *Kek and Balie*, though the applicants had been illegally detained for twelve months, the Court would not have ordered their immediate release if the Crown had undertaken to take proceedings to place them on their trial; and it was only in default of such undertaking that the order

was made. To take another example, suppose that an action were brought this term by a resident in a district under martial law against a military officer for acts done in furtherance of military operations, would not the Court order the case to stand over until Parliament had come to a decision upon the Indemnity Bill which is now before the House? Taking then all these facts into consideration, I come to the conclusion that no order should be made in this case. There is only one other matter as to which I desire to say a word or two. The applicant complains of an interference not only with his person, but also with his property. The latter part of the case was, however, not argued before us by counsel for the applicant, and consequently I do not feel called upon or justified in expressing any opinion thereon.

Application refused accordingly.
[Applicants' Attorney, V. A. van der Byl.]

SUPREME COURT

[Before the Hon. Mr. Justice BUCHANAN (Acting Chief Justice) the Hon. Mr. Justice MAASDORP, and the Hon. Mr. Justice SOLOMON.]

REGINA V. SOEKENDER. { 1900.
{ Aug. 14th.

Liquor Licensing Act, No. 28, 1883, section 75.

The mere being in possession of liquor by an unlicensed person, without any evidence of selling, or offering or exposing for sale any such liquor, is not an offence under the 75th section of Act No. 28 of 1883.

Buchanan, A.C.J.: A case has come before me as judge of the week for review, in which two brothers named Soekender were charged with having contravened section 75 of the Liquor Act in that they did wrongfully and unlawfully, and contrary to the provisions of the Act, sell, deal in, or dispose of intoxicating liquor without a licence. They were found

guilty and sentenced to pay fines of £75 and £15, or six months' and two months' imprisonment respectively in default of payment. The evidence does not disclose any selling, dealing in, or disposing of intoxicating liquor. The men were hawkers, and had taken two rooms in a house in the country. In the front room they had their goods, and in the back room, which they used as a bedroom, a constable found some liquor, a portion of which was, he alleged, concealed under some merchandise in the room. There is not the slightest evidence that these men sold liquor to anyone. If they had exposed the liquor for sale they might have been convicted under another section of the Act, but in the absence of any evidence of selling, dealing in, or disposing of the liquor, or even attempting to do so, or even exposing it for sale, there is no ground for the conviction. Evidence is utterly wanting to show any contravention of the Act, and the conviction must be quashed. The chief constable seems to think that these parties had the liquor there for the purpose of sale, but having liquor in their possession is not *per se* a crime.

Conviction quashed accordingly.

PILLANS AND CO. V. ARISTON (1900).
MINERAL WATER COMPANY. { Aug. 14th.

This was an application for an interdict restraining respondent from using bottles and boxes bearing the trade-mark or name of the applicants and for delivery of all such bottles and boxes.

Sir Henry Juta, Q.C., appeared for the applicant. There was no appearance for the respondent.

L. Marnitz, of the Cape Bottle Exchange Agency, stated in an affidavit that he made periodical visits to all the soda-water makers in the Peninsula for the purpose of collecting bottles bearing the various names and returning them to their respective owners. Recently he was at the respondent's premises, St. Matthew's-road, Kenilworth, while some wagons were being loaded with boxes containing bottles. On looking at them he found bottles bearing the names of the applicants, Messrs. Wordon and Pegram, and Daly and Day.

Sir Henry Juta said that respondent had been before the Court before in a similar matter, on May 19, 1899, when he was interdicted from using bottles belonging to Messrs. Daly and Day.

It was also stated that the Bottle Exchange referred to collected bottles and returned them to their proper owners, no matter where they came from, and no manufacturer was supposed to use any bottles but his own.

The Court granted an interdict as prayed, with costs.

This matter was by consent of parties subsequently reopened.

GOLDSTONE AND ANOTHER V. } 1900.
THE SWISS WATCH COMPANY. } Aug. 14th.

Documentary evidence—Ground for reversing decision of an inferior Court on facts.

A. sued Max and David G. of Rietvlei in the, Magistrate's Court, Montagu, for £15 4s., being balance of an account for watches sold and delivered, and obtained judgment. Defendants appealed and the judgment of the Court below was reversed, it being clear from documentary evidence forming part of the record that one Daniel G. was the purchaser of the watches he having initialled an invoice "D.G.," paid £5 on account, and taken a receipt for the same.

This was an appeal from a decision of the Resident Magistrate at Montagu, in an action in which the Swiss Watch Company, of Cape Town, sued the appellants, Max and David Goldstone, for £15 4s., being balance of account for watches sold. The records of the Court below showed that for the plaintiffs it was alleged that David and Daniel Goldstone bought the watches, credit being given them on the strength of their statement that they were in partnership with their father at Rietvlei, Montagu district. For the defendants, Max Goldstone said that there was no such partnership, and he knew nothing about the purchase of the watches, while David Goldstone denied that he was present when the watches were purchased. It was also shown that the invoice was made out to "Mr. Goldstone," and that the receipt for the watches was initialled "D.G." Further that an account sent afterwards asking for immediate payment as the account was long overdue was addressed to "D. Goldstone, Boom-street," evidently meant for Daniel Goldstone, who was then in business

in Cape Town. Later on another account was sent, addressed to "D. Goldstone and father and brother." The Magistrate, after hearing the evidence, gave judgment for the plaintiffs for the amount claimed, with costs. Against this decision the defendants appealed.

Mr. Buchanan was heard in support of the appellants.

Sir Henry Juta, Q.C., appeared for the respondents.

Buchanan, A.C.J.: The plaintiffs sued in the Magistrate's Court Max Goldstone and David Goldstone, jointly and severally, the one paying the other to be absolved, for a sum of £15 4s., being balance of an account for goods sold and delivered. The plaintiffs did not themselves personally appear in the Magistrate's Court, but were examined by interrogatories, and in answer to these the plaintiff said that he had sold these goods to David and Daniel Goldstone, who said that they lived at Rietvlei, in the Montagu district, and carried on business in partnership with their father, Max Goldstone. The latter was called to show that no such partnership existed, and there is nothing in the evidence which can make Max Goldstone liable for the goods sold, and counsel on behalf of the respondents was obliged to say that the appeal should be allowed so far as Max Goldstone was concerned. As to David Goldstone, he denies that he was one of the persons present at and taking a part in the purchase, as stated by the plaintiff in the interrogatories. The question is, to whom was credit given at the time of the sale? If we look at the plaintiffs' own documents made at the time, and at others made subsequently, I think it is clear that credit was given, not to Max Goldstone and the others carrying on business together, not to David Goldstone as an individual, but solely to Daniel Goldstone, the person who purchased the goods. The invoice was at the time made out to "Mr. Goldstone," and on this invoice there is a receipt for the goods signed "D.G." Afterwards the plaintiffs sent an account to "D. Goldstone, Boom-street," and that was clearly Daniel Goldstone, who lived in Cape Town, asking for immediate payment, as the account was long overdue. On this account being sent, Daniel Goldstone goes and pays £5 on account, and the receipt is given to him. On these three documents I think it is impossible to come to any other conclusion than that credit was given to Daniel Goldstone, and that he was not included in the summons was extraordinary.

It is strange that the person who really bought the goods, and to whom credit was given, should be left out altogether and two others summoned, one of whom had nothing to do with the transaction, while the other was only alleged to have been present at the purchase. The judgment of the Court will be: Appeal allowed, with costs, and judgment in the Court below altered to judgment for the defendants, with costs.

Maaasdorp and Solomon, J.J., concurred.

[Appellants' Attorneys, Messrs. Dempers and Van Ryneveld; Respondents' Attorneys, Messrs. Silberbauer, Wahl and Fuller.]

BROWN V. DAVIDS. { 1900.
Aug. 14th.

Master and servant—Dismissal—Notice.

A monthly servant seriously misconducting himself by absenting himself without cause from his master's service may be summarily dismissed, on payment of his wages up to date of dismissal. The fact that such servant might be punished under the Master and Servants Act, does not render the master liable to pay, in addition to wages earned, a further month's wages in lieu of notice.

This was an appeal from a decision given by the Resident Magistrate at Worcester. The appellant was the defendant in the Court below in an action for wages due upon his alleged wrongful dismissal. The sum of £6 10s. was claimed, being balance of one month's wages from June 21 to July 2, and one month's wages in lieu of notice. The defendant (Brown) tendered £1 15s. 5d., wages up to the date of the dismissal. Appellant had been summarily dismissed on the ground that he absented himself from service without leave. After hearing evidence, the Magistrate gave judgment for the plaintiff (respondent in the appeal) with costs. In his reasons for his judgment the Magistrate said that he looked upon the plaintiff as a monthly servant, and he did not consider his conduct in absenting himself without leave such an offence as entitled the defendant to summarily dismiss him, as he could

have brought him up under the Master and Servants Act. Against this decision the defendant appealed.

Mr. McGregor appeared for the appellant; there was no appearance for the respondent.

Mr. McGregor: Here the servant complains that he has been illegally discharged and wants a month's wages in lieu of notice. See *Voltestein v. Liebermann* (2 Sheil, p. 116). The claim should be one for damages and not wages. The nature of the claim is wrong. To succeed, the plaintiff must show that he was ready and willing to continue service, and that he could not earn any wages elsewhere by reason of damage through wrongful dismissal. See *Chitty on Pleadings* (Vol. II., p. 291); *Turner v. Wells*, and *Bosher v. London County Printing Works* ("Law Times" Reports, p. 757).

Buchanan, A.C.J.: The plaintiff, who was a monthly servant in the employ of the defendant, absented himself on the night of the 14th July and returned to service on the morning of the 17th, but on his return to service he was at once dismissed by his master. The latter tendered him his wages up to the date for which he had served, but the servant refused to accept them and brought an action against his master for wages, together with the amount of a full month's wages in lieu of notice. The Magistrate gave judgment for the balance of wages due and for a month's wages in lieu of notice, holding that though the servant had absented himself, still his master might have punished him under the Master and Servants Act, and that that would have been sufficient remedy for the master, who was not justified in dismissing the servant. The sole question we have to decide is, was the master so justified? It appeared that the servant told someone the morning before he went to the Paarl that he intended to miss the train and that he would not be back until Tuesday. This was wilfully absenting himself from service, which the Magistrate finds might have been punished under the Master and Servants Act. But because the servant was punishable under the Master and Servants Act, that did not deprive the master of his right, on the serious misconduct of the servant, to dismiss him for such misconduct, of course paying the wages due up to the date of dismissal. The master tendered to pay these wages, viz., £1 15s. 5d., and that is really what the Magistrate ought to have awarded the plaintiff. The

appeal will be allowed with costs and judgment entered in the Magistrate's Court for the amount tendered, £1 15s. 5d., plaintiff to pay costs.

Maasdorp and Solomon, J.J., concurred.

[Appellant's Attorneys, Messrs. Walker and Jacobsohn.]

SUPREME COURT

[Before the Hon. Mr. Justice BUCHANAN (Acting Chief Justice), the Hon. Mr. Justice MAASDORP, and the Hon. Mr. Justice Solomon]

ALEXANDER V. JONES. { 1900.
{ Aug. 15th

This was an action in which the plaintiff, Leon Alexander, claimed from the defendant, Harry Jones, the payment of certain sums of money, amounting in all to £707, moneys lent by plaintiff to defendant on divers days between June 13 and 24, 1899. The plaintiff was a music-hall artist residing in Cape Town, and defendant was a speculator residing in Cape Town. Defendant filed a plea denying the debt and stated that he had never borrowed money from plaintiff.

Mr. Buchanan appeared for the plaintiff. The defendant appeared in person.

The first witness called was

Leon Alexander, who said that he was the plaintiff in the case, and was a musician at present carrying on business in Cape Town. He had known the defendant for about eighteen months, and in May last defendant said that he had a friend who was sick in Kimberley and could not raise a sufficient sum of money on some diamonds he had. He asked witness to lend £200, promising witness 8 per cent. He went to Kimberley, and afterwards telegraphed to witness to meet him. Witness went there, and defendant introduced his friend as Charles Rhodes. The latter said distinctly that he was doing business with Jones and not with witness. As he had only £25 with him, witness telegraphed for his balance in the bank, viz., £170. He could not draw it at Kimberley until Jones identified him at the bank there. Witness gave Jones the £170, and also a diamond stud valued at £20. Afterwards defendant told witness he had the diamonds all right and later on,

when they arrived in Cape Town, defendant said he wanted more money. Witness raised £500 on mortgage, Jones going with him and signing the power of attorney as a witness. Witness received a cheque for £480. Witness was a Russian, and the name on the cheque (a Russian one) was his real name, Leon Jones being his professional name, which he had gone under for twenty-six years. Witness drew the money and paid it, along with another £20, to make it up to £500, to defendant. He was about to take the number of the bank-notes when defendant took the paper, tore it up, and said "You have trusted me so much; now you are afraid to trust me." Charles Rhodes then went back to Kimberley to pay his debts and defendant—after borrowing another £10—also went to Kimberley. Then the siege came about, and witness did not see him again until the siege was over. He received two telegrams to the effect that it was all right, one also saying "Don't believe it." The first week after the siege witness saw defendant in Cape Town, and defendant said he would make it all right. Witness afterwards issued summons in this matter. Witness also lent defendant a further sum of £6, making the total amount he claimed £686.

Cross-examined: Witness lost money to certain people in gambling in Cape Town.

By Buchanan, A.C.J.: The witness received from defendant was in answer to the one he sent. The meaning of the wire was that defendant or someone connected with him had told his brother they had done witness out of a lot of money. Witness lent the additional £500 to pay his debts, because he had already lent so much, and never imagined that he would not pay.

By Solomon, J.: Witness lent the money to defendant to pay his friend's debt, because his friend had the diamonds as security, and defendant obtained those diamonds. Witness could not say whether Charlie Rhodes was licensed to deal in diamonds.

By Buchanan, A.C.J.: Witness saw the diamonds, but now did not think they were real, because if they had been real they would have been worth about £4,000.

Coenrad Cohen deposed that defendant owed him a large sum of money, and upon witness pressing him for it he said that his friend (pointing to the plaintiff) would lend him the money. Afterwards defendant paid £157 10s. of the amount owing, redeeming the jewellery which had been pledged. He left in pawn a bracelet pawned for £39.

Leon Morris Bernstein deposed to having seen defendant and plaintiff together, and heard some dispute about taking the numbers of the bank notes. Defendant then put the notes in his pocket.

Albert Gliddon said that in June, 1899, he was in the employ of Fairbridge, Arderne and Lawton, when the plaintiff and the defendant came in and spoke about raising a loan of £500. Both spoke about the matter, being apparently equally interested. Defendant signed the power of attorney as a witness. They received the cheque, and left together.

Julius Henry Barlow, a clerk in the Bank of Africa, stated that a man, named Leon Alexander, had had an amount of £171 4s. to his credit in the bank, which on June 13 last year was transmitted by wire to Kimberley.

This closed the case for the plaintiff.

The defendant then went into the box and denied all plaintiff's statements, stating he had never received a penny from him. Witness had lent plaintiff money to pay what he lost in gambling, which he had got back.

Buchanan, A.C.J.: The plaintiff claims £707 money lent to the defendant, but he has only proved in evidence money lent to the amount of £686. Defendant has gone into the box and said that he never borrowed any money from the plaintiff, but I am convinced on the evidence that a large sum of money was paid by the plaintiff to defendant. There are certain circumstances in this case which I do not believe have come out, and which I believe the defendant could have brought out, but he has not chosen to do so. Defendant simply says he did not get the money, but I believe he did get it, and in the absence of anything to show that it was not a loan, judgment will be given for the plaintiff as prayed for £686, with costs.

Maasdorp and Solomon, JJ., concurred.
[Plaintiff's Attorney, C. Brady.]

MCIPHERSON V. DOWTHWAITE. { 1900.
Aug. 15th.
" 16th.

Partnership—Action for an account.

This was an action brought by Peter McPherson against Thomas C. Dowthwaite, in connection with a disputed partnership account.

Mr. Buchanan appeared for the plaintiff. Mr. McGregor appeared for the defendant.

The plaintiff's declaration was as follows:

1. The plaintiff is a contractor, residing at Observatory-road; the defendant is also a contractor, residing in Cape Town.

2. In or about the month of May, 1899, the plaintiff and the defendant entered into a partnership for the purpose *inter alia* of carrying out certain contracts for executing certain additions, alterations, and repairs to (a) the house of Inspector Clark, in Wal-e-street, Cape Town; (b) the New Somerset Hospital; and (c) the house of Mr. Powell, at Claremont.

3. It was agreed *inter alia* by the parties that the plaintiff should see to the execution of these contracts, that he should receive all payments made therefor, and that, after deducting for himself the sum of £3 15s. per week from the net profits, he should divide the balance equally between the defendant and himself.

4. The work in connection with the said contracts was duly executed by plaintiff, but the defendant received all payments therefor, and kept all books, vouchers, and other documents relating thereto.

5. The said partnership was dissolved by mutual consent on or about the 7th September, 1899, at which time the above contracts had been executed, and it became and was the duty of defendant to render to plaintiff a full and true account, duly supported by vouchers, of all payments received and disbursements made in connection with the said contracts, to debate the same with plaintiff, and to pay over to him such sum of money as was found to be due to him in accordance with the agreement referred to in paragraph 3 hereof.

6. The defendant has failed and neglected to carry out his duty as above stated, notwithstanding that he has been called upon by plaintiff to perform his said duty.

7. Before and at the time of the dissolution of partnership before mentioned, the plaintiff and the defendant, as partners, had entered into a contract with the Divisional Council of the Cape, by virtue of which they had undertaken for certain payment to erect a bridge for the Council.

8. It was agreed upon by the parties, as one of the terms of the dissolution of partnership, that the plaintiff should carry out and execute this contract for his sole benefit and at his sole risk.

9. The plaintiff accordingly proceeded independently with the work in the said contract, and duly received such payments for such work as were from time to time made to him in accordance with the said contract,

until the defendant, on the 29th January, 1900, wrongfully and unlawfully, and in breach of his agreement as set out in paragraph 8 hereof, lodged a caveat with the Divisional Council, in consequence of which that body has refused and still refuses to pay any further sum of money due under the contract to plaintiff alone.

10. By reason of the premises the plaintiff has lost the use of money due to him under the contract with the Divisional Council, and has in this way, and otherwise by the lodging of the caveat, suffered damage to the extent of £300.

Wherefore the plaintiff claims: (a) That defendant be ordered to render him a full, true, and correct account, supported by vouchers, of the above partnership transactions as set forth in paragraphs 2 to 5 of the declaration; to debate the same with plaintiff before the Court, and to pay over to plaintiff whatever sum of money is after such debate found to be due to plaintiff in terms of the agreement aforementioned. (b) An order declaring that plaintiff is entitled to receive and have in his custody during such reasonable time as the Court shall fix all books, vouchers, and other documents connected with and showing the partnership transactions. (c) An order compelling the defendant to withdraw the caveat lodged with the Cape Divisional Council, or that it be declared of no force and effect. (d) Judgment for the sum of £300 as and for damages. (e) Alternative relief. (f) Costs of suit.

The defendant's plea was as follows:

1. He admits the allegations in paragraphs 1 and 2, save that he denies that the contract with reference to the house of Inspector Clark was a partnership contract, or that the work done thereto was done by or on behalf of the partnership. The said contract was entered into by the defendant personally, and the said work was executed by him and on his behalf. He says further that the allegations hereinafter made have reference only to the two remaining contracts.

2. He denies the allegations in paragraph 3, and says that it was agreed between the plaintiff and defendant that all moneys received in respect of the partnership transactions should be equally divided between himself and the plaintiff.

3. He admits paragraph 4, save that he says specially that the work therein referred to was done by himself and the plaintiff, and not by the plaintiff only.

4. He specially denies that the said partnership has been dissolved, and, subject to the matters hereinafter set out, he denies the remaining allegations in paragraph 5.

5. With reference to paragraph 6, the defendant says: (a) Since the filing of the declaration herein the defendant has rendered to the plaintiff a full and true account of all moneys received and disbursements made by him in respect of the work done on the Somerset Hospital, and the work done on the said Powell's aforesaid house at Claremont; (b) with reference to the said contracts, he says that the accounts rendered are full and true and duly vouched accounts, and show at the foot thereof the sums respectively of £22 4s. 6½d. and £3 1s. as being respectively due and owing to the plaintiff, but as to those amounts he craves leave here to refer to paragraph 14 of the claim in reconvention, and says that, by reason of the matters there set out, he is not liable to pay the amounts at the foot of such accounts to the plaintiff; (c) the defendant says further that he has tendered, and hereby again tenders, to pay to the plaintiff the taxed costs up to date of tender.

6. The seventh paragraph is admitted, save that the defendant does not admit any dissolution of the partnership.

7. The allegations in the eighth paragraph are denied. The said contract was entered into by, and the work thereunder done by, and on behalf of the partnership.

8. As to paragraph 9, the defendant says that the moneys therein referred to were received by the plaintiff for the use of the partnership and the partners therein, being for work done by the said partners as a partnership contract. He admits that he has lodged a caveat, but denies that he acted wrongfully in so doing. He says specially that the said moneys are partnership moneys as aforesaid, and that he is entitled to his moiety thereof, and that the plaintiff wrongfully and unlawfully denies his (the defendant's) right to any part thereof, and claims to deal with such moneys to the exclusion of the defendant.

9. Save as in the last paragraph set out, the defendant denies paragraph 10, and denies that the plaintiff has suffered any damage for which he is responsible.

Wherefore the defendant prays that the plaintiff's claim may, subject to his aforesaid tender, be dismissed with costs.

For a claim in reconvention the defendant (now plaintiff) said that on divers occasions between the 2nd May, 1899, and the 5th

September, 1899, he paid various sums of money and handed various articles over to the plaintiff (now defendant), amounting in all to the sum of £85 12s. 1d., and that after deducting therefrom various payments made by and moneys owing by way of credit balance, there remains due to the plaintiff the sum of £30 1s. 7d.

Wherefore the plaintiff in reconvention claimed : (a) A declaration that he is entitled as a partner along with the defendant to an interest in and to a moiety of moneys received under the said contract with the said Council; (b) that the defendant in reconvention be ordered to render him a full and true and duly vouched account of the moneys received and disbursements made by him in respect of the contract with the Council referred to in paragraphs 11 and 12, and to debate the same with the plaintiff, and pay over to him whatever shall be found due to him at the foot of such accounts; (c) payment to him of the sum of £30 1s. 7d.; (d) alternative relief; (e) costs of suit.

In his replication plaintiff admitted that since the filing of the declaration the defendant had rendered a statement of account as to the work done at Somerset Hospital and the house at Claremont, but denied that it was a full, true, and duly vouched account such as was required of the defendant in law, and said that even as it was it required debating. There was also no reference to the accounts in connection with Inspector Clark's house. Plaintiff admitted the tender of costs referred to, but said it was wholly insufficient.

For a plea to the claim in reconvention the plaintiff (now defendant) referred to his declaration, and denied the allegation in paragraphs 10, 11, 12, 13, and 14, save that with regard to the last-mentioned paragraph he admitted receipt of sums amounting to £68 2s., of which £67 10s. was due under the agreement with regard to his receiving £3 15s. a week, and he was willing that the balance of 12s. should be set off against money still due to him under the contract. He also admitted receiving several articles enumerated for use in carrying out the partnership contracts, and said that he was willing to account for these at their proper value or to allow defendant to take them over at such proper value.

The Acting Chief Justice pointed out that the Court could not go into the question of the account, which would be better to be referred to an accountant, unless an agreement was arrived at.

The questions before the Court were therefore: Whether or not the work on Inspector Clark's house was done under the partnership agreement; (2) whether or not the work on the bridge for the Divisional Council was done under the partnership agreement; (3) whether or not plaintiff was to get £3 15s. per week.

The first witness was

Peter McPherson, the plaintiff, who said he was a carpenter, and now resided at Observatory. About the beginning of May, 1899, defendant came to witness and said that he had the contract for Inspector Clark's house. He said he could not carry on the work himself, and witness agreed to go into partnership on terms previously agreed upon when they had tendered for certain public works. These terms were that witness was to receive £3 15s. per week for supervising and looking after the practical part of the work, and the profits were to be equally divided. This was agreed to, and witness started on the work about May 2, 1899. The contract was for general repairs to the house—carpenter work, plumber work, painting, paperhanging, etc. Witness worked on the house up to the end of May, and then went to the hospital job. The work on the house was then about finished, and until it was witness went there at times to direct the carpenter who was working there. While on the hospital job witness asked for a statement of account with regard to Clark's house. Defendant gave witness a statement, but witness was not satisfied with it, and defendant gave him another—that contained in the book produced. The book belonged to defendant, and the entries were in defendant's handwriting. Witness objected to the account, and defendant said they would go into it together, and come to some settlement, but they never did so. A statement of accounts on the hospital and the Claremont house had now been rendered, but witness disputed the items. With regard to the Divisional Council contract, defendant was always in doubt as to whether they could carry it out at the price, and he asked if witness would take it over. Witness said either the one or the other could take it over. Next day defendant said they had better go on with the contract together, but witness said there was nothing in the job, and either the one or the other must take it. Defendant then said, "Can I have the job?" Witness said he could, upon which defendant said: "Since you have offered it to me there is nothing in it; you had better take it." Afterwards they went to see the sureties—

defendant's brother and Mr. Powell. The matter was explained to the latter, and he said he had guaranteed Dowthwaite and they could make any private arrangement they liked. Afterwards when defendant, his brother, and witness were together it was agreed that witness should take over the work at his own risk. In accordance with the arrangement witness paid the accounts for certain goods ordered. (Certain correspondence was read, and in one letter, addressed to W. and G. Scott, defendant stated that he had turned over the bridge contract to McPherson.) Proceeding, witness said he completed the work, and received payments direct from the Divisional Council until about the end of January or beginning of February defendant lodged a caveat. Witness had asked the secretary of the Divisional Council for payment of the balance due, and he had refused to pay to witness alone. The contract price of the bridge was £400, and there were extras to the amount of £483. Witness had received £460 before the caveat was lodged, and the balance due to him was £423.

Joseph Green White, a joiner by trade, said he had done a staircase in Inspector Clark's house in Wale-street. He understood that he was doing the work for Dowthwaite and McPherson. One day defendant said to witness, "We are running this, but Mac is so slow." Witness asked if he meant they were working as partners, and defendant said, "Yes."

E. Tyzack said he was a clerk in Cape Town, and knew the parties to the suit, having known them in Johannesburg, where he had worked for Mr. Dowthwaite. He received a letter from defendant, in which he said that McPherson had taken on the bridge work himself. Afterwards witness went to Klipheuvell and got work on the bridge from Mr. McPherson. Witness was about three months on the work, and during that time witness never saw Dowthwaite there.

For the defence, the first witness called was

Thomas Clark Dowthwaite, the defendant, who said with regard to the first contract in dispute (Inspector's Clark's house), that he asked the plaintiff to tender but he refused. Witness got the tender and afterwards told plaintiff that he could stand in on the contract on condition that not more than £3 was drawn by him, as it was a painting job, and there was not likely to be more in it. This was agreed to, and a start on the job made on these

terms. Witness did a part of the work, painting the ceilings, etc., himself. Plaintiff was to receive the £3 per week on account of prospective profits. Plaintiff drew £22 on account of that job. The net profit was about £56. The Divisional Council contract witness admitted was given over to plaintiff on condition that witness drew all the moneys from the Divisional Council, seeing that witness could not be released from liability, and plaintiff could not find sureties.

Buchanan, A.C.J., said that the defendant's plea was not in accordance with his evidence, as there he claimed a moiety of the profits on that contract.

Witness said he did not claim half the profits, but the right to draw the moneys, as he was still liable. That was clearly agreed upon by the parties, and that was the reason witness lodged the caveat.

E. Powell gave evidence as to the agreement regarding the cost of repairs to the house at Claremont, and Charles William Dowthwaite corroborated the evidence of his brother, the defendant, as to the agreement to allow plaintiff to take over the Divisional Council contract, defendant to draw the moneys.

This was all the evidence, and counsel were heard in argument.

Buchanan, A.C.J.: The plaintiff and defendant in this case entered into partnership for the purpose of executing certain contracts. Disputes arose, the first being in regard to Inspector Clark's house, which defendant has pleaded was not a contract carried out under the partnership, but in the witness-box the defendant admitted that plaintiff had a half-share in this contract. As to the second and third contracts, it is common cause that they were carried out by the partnership. The only other contract in dispute is that with the Divisional Council. The plaintiff alleges that he took over the sole control and risk of this contract. The plea denied this, but it is clear from the evidence given in the box that both parties tendered; that their tender was accepted; that they found that the tender was too low, and did not expect the contract to be completed at the price; and that ultimately it was agreed that the plaintiff was to take over this contract and perform it himself at his own risk. Fortunately for plaintiff the original contract for £400 was not adhered to, or rather there were additions to the extent of over £450, and instead of a loss there would probably be a profit. The next

dispute was as to the alleged agreement to pay plaintiff £3 15s. per week as wages for himself before the profits were divided, and that they should share equally in the balance. The general rule between partners is that they were to share equally in such contracts. The plaintiff alleges that there was that stipulation for £3 15s. a week wages, but this the defendant denied, and it is remarkable that there is no writing embodying such a stipulation. In the absence of any such writing and in the direct conflict of evidence, we feel bound to decide for defendant on this point. As to the caveat, the defendant alleges that it was agreed that he should draw the moneys accruing from the Divisional Council job so as to protect himself. This is denied by plaintiff, and it is remarkable that if there was such a stipulation that defendant has never acted upon it, but has actually allowed plaintiff to draw all the moneys on the original contract, and the caveat was really lodged against the money due on the additional work. Defendant's conduct in lodging that caveat is altogether irregular, and improper. As to damages, £300 is altogether too much. Plaintiff has not had the use of the money, and in such cases the usual basis of damages was the estimated amount of interest lost, in this case about £10. Judgment will therefore be given for plaintiff in terms of prayer A, except as related to the £3 15s. per week, the defendant to give a full, true, and correct account, supported by vouchers, of the partnership transactions set forth in paragraph 2 (Inspector Clark's house, the work on Somerset Hospital, and the house at Claremont), the same to be debated with plaintiff, and plaintiff to be paid whatever sum of money the said debate might show to be due to him; the defendant ordered to withdraw the caveat, and to pay £10 damages. As to the debate the Court does not think it necessary to refer the case to an accountant, it being so simple that we think the attorneys between themselves might easily debate it. The counter claim consequently falls to the ground.

Maasdorp and Solomon, J.J., concurred.
[Plaintiff's Attorneys, Messrs. Van Zyl and Buissinne; Defendant's Attorney, J. F. E. Bernard.]

SUPREME COURT

[Before the Hon Mr. Justice BUCHANAN (Acting Chief Justice), the Hon. Mr. Justice MAASDORP, and the Hon. Mr. Justice SOLOMON.]

ADMISSION. { 1900.
{ Aug. 16th.

Mr. McGregor moved for the admission of Jean E. R. de Villiers as an advocate of the Supreme Court.

Order granted, and the oath administered

PROVISIONAL ROLL.

MORRIS V. MARAT.

Mr. P. S. Jones moved for a decree of civil imprisonment against defendant on an unsatisfied judgment of the Court for £64, less £1 18s. 7d. paid, and £6 15s. 9d. costs. A return of *nulla bona* had been made.

Order granted as prayed.

NEL V J. M. DE WAT

Mr. Buchanan moved for provisional sentence for £200 on a promissory note, with interest and costs.

Provisional sentence as prayed.

COLONIAL ASSURANCE COMPANY V. H. W. LATEGAN.

Mr. P. S. Jones moved for provisional sentence for £500 on two mortgage bonds, with interest and costs of suit; also that the property specially hypothecated be declared executable. The bond had become due by reason of the non-payment of interest.

Provisional sentence granted as prayed, and the property declared executable.

RATHFIELDER V. SARAH ELIZABETH HAMILTON.

Mr. Joubert moved for provisional sentence on four mortgage bonds, one for £250, with interest from June 13, 1899; one for £200, with interest from June 30, 1899; one for £500, with interest from December 31, 1838; and one for £150, with interest from February 21, 1899, all due by reason of non-payment of the interest. It was also asked that the properties specially hypothecated be declared executable.

Provisional sentence granted as prayed, and the properties declared executable.

MOUAT V. ELIZABETH CARNEY.

Mr. Buchanan moved for provisional sentence on a mortgage bond for the sum of £200, with interest at the rate of 12 per cent. per annum, and also that the property specially hypothecated be declared executable.

Provisional sentence granted as prayed, and the property declared executable.

SOUTH AFRICAN MILLING COMPANY V. JOHNSON.

Mr. P. S. Jones moved for provisional sentence on a promissory note for £20, with interest and costs. The defendant resides at Stellenbosch.

Provisional sentence granted as prayed.

WHITE V. ABRAHAM HARRIES. { 1900.
Aug. 16th.

Fine—Promissory note—Stamp.

The Court imposed a fine of £5 where provisional sentence had been claimed on an unstamped promissory note.

Mr. Buchanan moved for provisional sentence upon a promissory note for £300, for value received.

Buchanan, A.C.J.: The promissory note is unstamped.

Mr. Buchanan: The law requires that such documents should be stamped, but in the majority of cases that is not done.

Buchanan, A.C.J.: The Court has again and again pointed out that such a document should be stamped at the time it was signed. The Court must now begin to impose substantial fines in the cases of documents unstamped. In the present case a fine of £5 will be imposed, and in subsequent cases the fines will be increased.

Defendant appeared in court, and denied the debt, saying that he signed the note under compulsion. In an affidavit he put in he stated that it was an accommodation note, and there had been no consideration.

Mr. Buchanan: I intended to ask that the matter be allowed to stand over, and did not wish to put in the promissory note this week.

Buchanan, A.C.J.: So as to get it stamped.

The Court allowed the postponement of the case until next Thursday, the Acting Chief Justice advising defendant to go to an attorney.

Mr. Buchanan: Will the Court, in allowing the case to stand over, consider the promissory note as not having been put in?

Buchanan, A.C.J.: It is very fortunate that the promissory note has been put in, as it has been repeatedly laid down by the Court that promissory notes must be stamped when signed. The imposition of the fine will stand.

HUDSON V. SMYTHE. { 1900.
Aug. 16th.

Provisional sentence—Change of domicile—Jurisdiction.

Provisional sentence granted on a promissory note made in Johannesburg, and presumably payable there, there being prima facie evidence that the maker of the note had changed his domicile to Capetown.

Mr. Searle, Q.C., moved for provisional sentence on an acknowledgment of debt for £100.

Sir Henry Juta, Q.C., appeared for the defendant. The defence raised was that the Court had no jurisdiction, defendant being domiciled in Johannesburg. Defendant stated in his affidavit that he carried on business in Johannesburg as an auctioneer, but left there to take a trip Home. On his return in July, 1899, he did not go back to Johannesburg to resume his business there owing to the unsettled state of affairs, but intended to return after the war, so that his domicile was still there.

In reply the plaintiff alleged that defendant now resided at Clifton-on-Sea, and carried on business as a dealer in horses, having an office in Cape Town and stables in the suburbs.

Sir Henry Juta, Q.C.: Our defence is that the defendant is domiciled in Johannesburg, and consequently this Court has no jurisdiction. The note was made in Johannesburg, and was payable there, and so the proper *forum* is Johannesburg. The defendant is a refugee, and is only residing in Cape Town until an opportunity of returning to his domicile arises. His residence here is merely temporary, and is enforced by reason of circumstances beyond defendant's control. Mere temporary residence is not sufficient to constitute domicile. True defendant is carrying on business here, but he must necessarily do something until he can return to his usual avocation. There has been no change of domicile.

Mr. Searle, Q.C., was not called upon to reply.

Buchanan, A.C.J.: The plaintiff and the defendant were in Johannesburg in October, 1895, on which date the defendant wrote an unconditional promise to pay plaintiff on January 24, 1896, the sum of £100 sterling. There was no specific place of payment mentioned, but it may be inferred that the amount was to be paid in Johannesburg. The defendant did not pay this amount on January 24, 1896, and therefore after some time the plaintiff instituted legal proceedings against him, but these proceedings were stayed on the request of the defendant, who said he was terribly short of money, but was expecting some shortly. In 1898 defendant left Johannesburg, even closing his business and leaving no representative or place of business in Johannesburg. In July, 1899, defendant came to Cape Town, months before the outbreak of the war, and commenced a business in Cape Town, which he still carried on. This is an application for provisional sentence upon a written acknowledgment of debt. There is sufficient *prima facie* evidence of change of domicile, and therefore sufficient to justify the Court in assuming jurisdiction, provisional sentence will be granted as prayed, with costs. If the defendant should decide to go into the principal case, it is still open to him to take steps to do so.

Maasdorp and Solomon, JJ., concurred.

[Plaintiffs' Attorney, J. F. E. Bernard; Defendants' Attorneys, Van Zyl and Buisinne.]

BOSMAN V. FALCONER.

Mr. De Waal asked that this matter be postponed until the last day of term.

Postponement granted.

MILLS AND SON V. W. J. CLEAR AND CO.

Mr. P. S. Jones moved for provisional sentence on a promissory note for a sum of £250, and also judgment, under Rule 329d, on an illiquid claim for £793 13s. 3d., goods sold and delivered, with interest *a tempore morae*, and costs of suit.

Provisional sentence granted as prayed on the promissory note, and judgment as prayed on the illiquid claim.

ILLIQUID ROLL.

COLONIAL GOVERNMENT V. UILANDER.

Mr. Ward moved for judgment, under Rule 329d, for the sum of £107 12s. 6d., survey expenses of a farm in the division of Gordonia, with interest *a tempore morae*, and costs of suit.

Granted.

COLONIAL GOVERNMENT V. BARTLETT.

Mr. Ward moved for judgment, under Rule 329d, for the sum of £65 6s., survey expenses of a farm in the Gordonia division, with interest, etc.

Granted.

COLONIAL GOVERNMENT V. BEUKES.

Mr. Ward moved for judgment, under Rule 329d, for the sum of £110 18s. 3d., survey expenses, with interest, etc.

Granted.

GENERAL MOTIONS.

COLONIAL GOVERNMENT V. MILLER AND OTHERS.

Mr. Ward moved that the award of arbitrators in this matter be made a rule of Court. The matter is in connection with the expropriation of land at Simon's Town for the Imperial Government.

Mr. Molteno appeared on behalf of the respondents to consent.

Order granted as prayed.

IN THE ESTATE OF THE LATE JACOBUS GIDEON NEL.

Mr. Nathan moved that the rule be made absolute for an order authorising the Registrar of Deeds to issue a certified copy of a certain mortgage bond.

Rule made absolute as prayed.

BADENHORST V. BADENHORST. { 1901. Aug. 16th.

Mr. P. S. Jones moved for an order authorising the High Sheriff to transfer certain property. The property in question is situated in Colesberg, and about August 30, 1899, the respondent, R. J. Badenhorst, handed the deed of transfer to the applicant. Before the deed was passed the town was occupied by the Republican forces. When these forces left R. J. Badenhorst withdrew

also, and only recently they had received a letter from him stating that he was in France, and intended going to Holland.

In reply to the Court, counsel said that respondent had not received formal notice of this application, and unfortunately he had not got the letter referred to in the petition.

The matter was allowed to stand over for further information.

ISAACS AND OTHERS V. DE { 1900.
MARILLAC. { Aug. 16th.

Personal attachment—Contempt of Court.

Order for personal attachment granted against respondent for contempt of Court.

This was an application for an order attaching respondent's person for contempt of court, in that he had failed to produce and make over certain leases or titles held to belong to the Lillian Syndicate, in accordance with an Order of Court in a judgment given on May 31 last.

Mr. Gardiner appeared for the applicants.

Sir Henry Juta appeared for the respondent. The respondent in an affidavit set forth that he was at present in Namaqualand, and that he had written to the solicitors in London, with whom the leases were lodged, but had as yet received no reply. He stated that the applicants were well aware of the fact that the leases, etc., were in London.

For the applicants it was alleged that no reply had been received to repeated requests for information as to the leases, etc.

Buchanan, A.C.J.: The order of the Court dated May 31 last, for the delivery of the leases and titles, has not been complied with. Correspondence was entered into shortly after the judgment, but letters written to the defendant's attorneys, who subsequently withdrew from the record, received no attention, and letters were then written to the defendant himself, but no answer was received. Ultimately an intimation was given that an application would be made to the Court, but no explanation was given until they came into court, when defendant said that he had written to London on June 29, but did not annex the letter. Defendant must comply with the order of the Court, and he will be ordered to do so on or before September 12 next, which will give him ample time

to communicate with his representatives in London and obtain the leases and other documents. Defendant to pay the costs of this application.

[Applicants' Attorneys, Messrs. Fairbridge, Arderne and Lawton; Respondent's Attorneys, J. C. Berrange and Son.]

FOTHERGILL V. SOUTH AFRICAN
BREWRIES.

Sir Henry Juta, Q.C., moved that the Court fix a day for the trial of this action by a jury.

Mr. Searle, Q.C., for the respondents, appeared to consent.

The Court fixed September 6 as the day of trial.

PARKER V. THE EAST LONDON MUNICIPALITY.

Sir Henry Juta, Q.C., moved that the Court fix a day for the trial of this action by a jury.

Mr. Gardiner appeared to consent.

The Court fixed September 10 as the day of trial.

COOK V. GARDINER. { 1900.
{ Aug. 16th.

Sir Henry Juta, Q.C., moved the Court to fix a day for the trial of this action by a jury.

Mr. Searle, Q.C., appeared to oppose the fixing of a day except out of term, the respondent being at present in England, and although he had been written to, it was unlikely that he would return before a month or six weeks.

Sir Henry Juta said the action was to recover a sum of money amounting to several thousand pounds in connection with the sale of certain business at Observatory.

Mr. Searle said there were allegations of fraud against the plaintiff.

Sir Henry Juta said that was so, but the defendant seemed in no hurry to bring evidence in support of his case. He pointed out that it was at the defendant's instance that the case was to be tried by a jury, and submitted that in view of the delays it was time the defendant was put to terms.

Eventually the Court fixed October 2 as the day of trial.

BEYLEVELD AND OTHERS V. JORDAAN.

Mr. Buchanan moved for an order to declare executable certain moneys in the hands of the High Sheriff.

The Acting Chief Justice pointed out that there was a difficulty, as it seemed that the moneys in question had already been attached by another person to found jurisdiction.

Ultimately the Court decided that notice be given to the party who had already attached the moneys.

IN THE MATTER OF THE PETITION OF NICOLAAS ALBERTUS JANSE VAN RENSBURG.

Mr. De Waal moved for an order authorising the Registrar of Deeds to issue a certified copy of a certain mortgage bond.

A rule *nisi* was granted calling upon all concerned to show cause why an order should not be granted as prayed. Rule to be returnable on September 12, and to be published once in the "Government Gazette" and once in the "Colesberg Advertiser."

Ex parte BASSANO. { 1900.
Aug. 16th.

Bail—Magistrate—Mandamus.

An application for an order on a Magistrate to compel him to entertain an application for bail refused, the Magistrate not having received notice of the application.

Sir Henry Juta, Q.C., moved as a matter of urgency on the petition of one Bassano, who had been before the Magistrate that morning charged with the crime of indecent assault. An application had been made to the Magistrate for the accused's release on bail, and the Magistrate had referred them to the Assistant Resident Magistrate, Mr. Broers, who had absolutely refused to entertain any application for bail until the following morning (Friday).

Buchanan, A.C.J.: The Magistrate is not compelled to grant bail.

Sir Henry Juta: The Magistrate is bound to entertain the application.

Solomon, J.: We cannot take the matter out of the Magistrate's hands.

Sir Henry Juta: The result is that the man must in the meantime remain in gaol, although he was willing to give bail to the extent of £400 or £500 if desired.

Buchanan, A.C.J.: The Court cannot grant a mandamus when the Magistrate has had no notice of the application and is not here to give his reasons. The Court

knows absolutely nothing about the circumstances of the case, and cannot possibly at the present stage grant bail. No order will be made.

Maasdorp and Solomon, J.J., concurred.

WARD V. WARD'S TRUSTEES. { 1900.
Aug. 16th.

This was an application on notice to the respondent that application would be made to the Supreme Court for an order compelling the Resident Magistrate of Willowmore to admit and rank the proof of debt tendered by the applicant to the Resident Magistrate at the meeting of creditors in the insolvent estate of the said John Ward held before him on the 22nd May, 1900, and which said proof was refused by the said Resident Magistrate upon the respondent's application on the grounds:

(a) That three meetings were held in the estate previous to this one, and there was ample time to frame and prove this account at one of the previous meetings.

(b) That this item does not appear in the insolvent's schedules.

The applicant was the wife of the insolvent, to whom she was married out of community of property, and the amount of her claim against the insolvent estate was £1,105 1s. 7d., being the balance of account rendered. From the voluminous affidavits read it appeared that she did not at first press her claim against her husband's estate, because certain advantages were promised to the insolvent, such as leave to trade in his own name, to collect certain debts, and to proceed to Johannesburg in connection with the liquidation of assets there, but these promises were not fulfilled. A number of affidavits were also read to prove the giving of the moneys to the insolvent on behalf of his wife, who, in partnership with a Mrs. Nash, carried on the business of a stud sheep farm.

Sir Henry Juta, Q.C., for the applicant.

Mr. Schreiner, Q.C., for the respondent: The grounds appearing on the paper are, it is true, not sufficient for the rejection of the claim. The papers, however, show that there are other grounds which have not been clearly set forth. The Magistrate referred the matter to the Master of the Supreme Court, and had then carefully considered the account, with the result that he did not allow the claim. He complained that there was a want of detail in it. The grounds freely set out are not the only grounds for refusal; in fact, they are not the grounds at all.

Buchanan, A.C.J.: The two grounds then, so far as the merits of the case are concerned, cannot be held to be grounds for rejection, but, as pointed out in the affidavits, these were not the only grounds for the rejection of the claim, and the Magistrate, noting these objections, considered the matter carefully, and seeing the claim was so unsatisfactory, rejected it altogether. The creditor is not necessarily bound by the decision of the Magistrate, and can come to the Court to have judgment on the matter. At present the Court is not in a position to say that this is a good claim, or that the Magistrate was right in rejecting it. There seems to be a good deal of ground for saying that the sum must be proved. These are facts that must be tried by the examination of witnesses, and the Court will order that pleadings be filed in this case to determine the validity of the claim; costs of this action to be costs in the case. The motion will stand in lieu of summons, which will bring the matter within the rules of Court, so that the action will have to be brought within two terms.

No order made.

[Applicant's Attorneys, Messrs. Van Zyl and Buissinne; Respondents' Attorneys, Messrs. Scanlen and Syfret.]

SUPREME COURT

[Before the Hon. Mr. Justice BUCHANAN (Acting Chief Justice), the Hon. Mr. Justice MAASDORP, and the Hon. Mr. Justice SOLOMON.]

MICHAU V. THE ARGUS COMPANY. 1900. { Aug. 17th.

Pleadings — Exception — General denial.

In pleadings a general denial will not be accepted as good; each and every allegation of fact must be specifically dealt with.

This matter came up for argument on exceptions taken by the plaintiff to the defendants' plea.

The declaration alleged that the plaintiff, J. J. Michau, was an attorney, of Cape Town, and the defendants are the publishers of the "Cape Argus" newspaper. On the 3rd of January last they maliciously published the following false words in a letter describing the siege of Kimberley by the Republican forces: "All the news we have to-day is some meagre details of the fighting at Modder River twelve days previously, the main facts of which we knew some time ago; but still, satisfaction was expressed that the news was confirmed of those two Kimberley rebels, Messrs. J. J. Michau and D. J. Maritz, who had been fighting with the Boers." Also on the 1st of March they published the following: "Our correspondent writes: 'Last Wednesday, February 14, the notorious J. J. Michau was here at Cradock, and you should have seen the host of Boer friends and Bond members on the railway platform to see him off, and wish him good luck, and so forth.' We will not add our correspondent's remark, as to what in his opinion should have been the fate of such traitors and rebels who saw him off"; the innuendo being that the plaintiff had been guilty of treason. He claimed £500 damages. The plea was that the Argus Company admitted the publication on January 3, but denied the other allegations, and the same remark applied to the publication on March 1.

To this plea exception was taken on the ground that the plea did not clearly set forth the material facts on which the defendant relied, and was vague and embarrassing, and bad in law.

Mr. Burton appeared for the plaintiff (the exceptor).

Mr. Searle, Q.C., appeared for the defendants.

Mr. Burton: This plea cannot be allowed to stand, being bad in law. We must have something more definite. As the plea stands it is calculated to embarrass the plaintiff in the prosecution of the suit. It does not clearly set forth the material facts on which the defendant relies; not knowing them we are embarrassed. The object of the plea is to shift the *onus* on to us, with the result that we will have to prove malice. The defendants have two courses open to them, e.g., to prove justification or privilege. They merely deny the malice; this is not sufficient. Our allegation of malice in the declaration is purely formal, and it is bad to make in the plea a bald denial thereof. The plea does not assist us in preparing our case; we do

not know on what lines to proceed and what will be the general nature of the evidence we will be called upon to rebut.

Mr. Searle, Q.C.: Our plea amounts to a denial of malice, and also to a denial that any damages have been sustained. We need not go any further: the plaintiff must make out his case. With regard to the first count in the declaration, we say that the words are not libellous, and therefore cannot be the foundation of any claim for damages.

Buchanan, A.C.J.: There is now, according to the present rules of practice in pleading, no general denial such as is here pleaded. According to sub-section 3 of Rule of Court 330 each party must deal specifically with each, and every allegation of fact set out in the declaration. The exception will be allowed, and the defendants ordered to amend the plea within eight days, and to pay the costs of this application.

[Plaintiff's (exceptor) Attorney, J. G. van der Horst; Defendants' Attorneys, Messrs. Van Zyl and Buissinne.]

CLARKE V FRISBY. { 1900.
Aug. 17th.

Midwife—Contract—Breach—Question of fact—Magistrate's decision upheld.

This was an appeal from a decision of the Resident Magistrate of Wynberg in a case in which the respondent, Mrs. Frisby, sued the applicant, Mrs. Clarke, for the sum of £20 for damages for breach of contract. The case for the plaintiff was that defendant had arranged to be confined at plaintiff's house, and plaintiff was to provide certain baby linen, etc., and provide for the child until it was three months old. Plaintiff alleged that for this she was to receive £25. There was a letter from defendant, written, plaintiff alleged, three weeks after the arrangement had been come to, in which she said that she left everything to plaintiff, and telling her not to buy anything good, as she would not require them afterwards, and she could manage with what they had already. It was also stated in the letter that the amount plaintiff was to receive was £21, but plaintiff wrote back, and to show that her price was a fair and reasonable one, gave a list of the things she had had to buy, etc. Defendant's case was that no binding agreement had been entered into, and that afterwards she employed another woman. The Magistrate, after hearing the evidence, found that there

was a contract, and gave judgment for the plaintiff for £12 14s., being £5 12s. for the amount she had expended on clothes, etc., and for expenses, work refused, etc., £7 2s.

Mr. Buchanan for the appellant (defendant in the Court below); Mr. Searle, Q.C., for the respondent.

Mr. Buchanan: Plaintiff's own letters and her summons show that no real contract had been made: the Magistrate has gone out of his way to assume there was one. The one party offered to pay £21 for the use of the room and other articles, while the other asked £25. There was no consensus. The contract was never accepted. There must be mutual consent. A verbal agreement must be proved up to the hilt.

Mr. Searle, Q.C., was not called upon.

The Court upheld the Magistrate's decision, and dismissed the appeal with costs.

[Appellant's Attorneys, Messrs. Innes and Hutton; Respondent's Agent, James Brittain.]

SUPREME COURT

[Before the Hon. Mr. Justice BUCHANAN (Acting Chief Justice), the Hon. Mr. Justice MAASDORP, and the Hon. Mr. Justice SOLOMON.]

SMIT V. JOOSTE. { 1900.
Aug. 17th.

Marriage — Breach of promise — Justification.

This was an action brought by Albert Smit, sheepfarmer, of Kalk Kraal, against Mrs. Margareta Engela Jooste (born Cloete), to recover £600 damages for breach of promise of marriage.

The declaration stated that the defendant is the widow of the late Hendrik Jooste, of Donkergat, Beaufort West. It was alleged that on May 20, 1899, at Rooipoort, Carnarvon district, the parties entered into an agreement of marriage, but thereafter the defendant refused to fulfil her part of the contract. The engagement was afterwards renewed on July 2, and on the 4th of the same month the defendant, without cause, refused to marry plaintiff, and still

refused to do so. Plaintiff alleged that he had been put to great loss and inconvenience and expense in making journeys to defendant's farm, purchasing horses and carts, etc., and claimed £600 damages.

The plea admitted the agreement of May 20 and the refusal. The defendant alleged that she agreed to marry plaintiff believing that he was a man of sober habits, whereas he was not, but was intemperate, and this she only discovered after making the promise. She broke off her engagement on May 25th, as she was entitled to, and denied that there was a re-engagement in July, as stated. Plaintiff in his replication alleged that there was no cause for her conduct, and that though they were engaged on two occasions she still refused to marry him.

Mr. Searle, Q.C., and Mr. McGregor appeared for the plaintiff; Mr. Solomon, Q.C., and Mr. Buchanan for the defendant.

Albert Smit, the plaintiff, stated that he was a sheep-farmer living on his brother's farm, Kalk Kraal, in the district of Fraserburg, and was thirty-six years of age. He was a widower, his wife having died two or three years ago. He had no children. He first met Mrs. Jooste about the end of March or beginning of April last year. She was then living with her mother at the farm Rietfontein in the district of Carnarvon. He had first heard of Mrs. Jooste from his brother. The first occasion he met her he spoke to her, and was favourably impressed, and decided to come back. He paid a second visit at the beginning of April, and on that occasion stayed at the farm from April 4 to 6. He then asked defendant if she had sufficient regard for him to marry him. She said she had sufficient regard for him, but he must come again, and "take a little more trouble." They spoke about their prospects, witness having a little more than £400 in the bank, while defendant told him she had a little more than £300, and the life interest of a farm called Donkergat. Witness said he would return on May 28, but he returned on May 20. Defendant was not then at Rietfontein, but at her brother's farm Rooipoort, which was between three hours and three hours and a half from Rietfontein. Witness went to Rooipoort, where he remained from the Saturday to Monday. Defendant promised to marry him, and he gave her a ring. The marriage was fixed for September 1, as the lease of her farm Donkergat would then fall in, and they intended to take up their

residence there. He wished it fixed for an earlier date, as he feared that if he stayed away too long she would think he was not treating her with proper respect. On the Monday witness, defendant, and her mother went to another farm, where they remained for the day. On the Tuesday witness went to Carnarvon, where he ordered his wedding outfit and remained until May 25. He then went to Rietfontein, to which place defendant had returned. He arrived about two o'clock, and during the afternoon witness was with defendant in the sitting-room, when Mrs. Jooste took his hand and pulled the ring off, and taking the ring which he had given her, put it on his finger. Witness did not actually see her taking the ring off his finger, but felt her doing so. She said to him that she wanted to drop the matter, and on witness asking the reason, she said there was no reason, but she wanted to see if he loved her, and he had to come back in a fortnight. Defendant's mother had always treated witness kindly. About eighteen days afterwards, in June, witness came back to the farm, and then defendant's mother, Mrs. Cloete, seemed very unfriendly, while defendant was quiet and out of sorts. Witness remained at Rietfontein that evening, and next morning he saw defendant, who brought in a cup of coffee to him in the sitting-room. Witness got up, put the coffee down, and gave her a kiss. She was then friendly, and after breakfast he told defendant, "You have now tried me sufficiently; you can give me back the ring." She said she could not, and on being pressed for a reason, said that "Van der Westhuysen had said that you never had a sixpence but that you spent it in brandy, and that you never had a sheep or goat to your name." Van der Westhuysen was a sheep-farmer. Witness said to defendant that if that was the truth he would give her all credit for putting an end to the engagement, but he would prove that it was not true. That was on June 13. Witness saw the mother, who said in the presence of defendant, "You two have to marry each other, and stories like that won't separate you." Witness left and took proceedings against Van der Westhuysen for £20 damages. Afterwards he went with defendant's brother to Van der Westhuysen, after which they went to Rietfontein, where defendant's brother told defendant it was not true what Van der Westhuysen had said, and that he could not prove it. That was on July 2, and the following day (Sunday) witness and

defendant drove to a brother of the latter's on another farm, and when they returned witness received back the ring she had taken from him. Witness asked if she could fix an earlier date than the date she had originally fixed, but she said there was so much difficulty in getting a place that the marriage had better take place on the original date. The mother was also friendly, but the following morning Mrs. Cloete told defendant that she must make witness take the ring back, and that witness must not come back to the place. Defendant then took off the ring and gave it to witness. The Monday previous witness had been to Carnarvon, and returned with a letter of "apology" from Van der Westhuysen.

This letter simply denied that Van der Westhuysen had ever said that plaintiff was drunk, and that he could not prove it.

Buchanan, A.C.J., said that was not an apology.

Continuing, witness said that defendant told him he must not listen to her mother, as that was her mother's way, and that he must come back again in a month. He came back again in August, and saw both Mrs. Cloete and defendant, and he said to the latter that he had now come for the consent she had promised, but she said that her mother would not allow it. He said to her "Don't you do that; this thing will very easily cost you £500 or £600." She still refused to give her consent. Witness had expended in connection with his trips nearly £300, including the purchase of the cart and horses. Apart from the cart and horses, he had expended on hiring, expenses along the road, etc., about £60. There was no truth in the alleged statement that witness was of intemperate habits. Nor was there any truth in the reports that he had beaten his late wife, or that he was a spend-thrift.

Cross-examined: Witness had it in his mind to propose to defendant, but he wanted to see her first. His brother told him, but he did not say she had property. He said that she was an "ordentlyk vrouw." In the January before he was engaged witness was at a dance at the farm Bastardsfontein, at which one Broderick and one Van Wyk was present. The latter was not a friend of witness, and there was some feeling between them. Witness was merry at that dance, but he was perfectly sober, and did not insult the ladies. When defendant gave him back the ring in May she never said anything about Bastardsfontein, but de-

fendant had told witness at that place before May 20 that Van Wyk had told her that witness had taken too much drink there, and that he had not a cart and horses to his name, but she said she did not believe it. Witness had never all his life been the worse for liquor.

Mr. Solomon: Oh, come now, really very few men can say that.

Cross-examination continued: Witness frequently went to a hotel at Carnarvon when he was there, but he never drank too much. He was not drunk at Carnarvon on May 23 last year, although he had a few words, not a fight, with a man called Barnett. He did not know a Mrs. De Bruyns, although he might have seen her, and had never been to her house and made indecent overtures to her when he was drunk. He was really serious when he said that defendant re-engaged herself to him on July 2, and broke off the engagement again on July 4. Defendant's mother was at the bottom of it, but defendant herself told him to return in August, and he did so, whether she denied it or not. He did not send his attorney to defendant to say, "You must either marry me or pay £600 in the Supreme Court." It was later that he said that, and the engagement was therefore practically broken off in August, and not in July.

Mr. Solomon put in a letter which had been written by plaintiff to defendant, and which was translated by the interpreter (Mr. Watermeyer), all the endearing terms being, at the direction of the Acting Chief Justice, left out. The plaintiff in the letter advised the defendant to think well before she perpetrated such a shameful deed upon him, and he added, "The injustice is too great for me now. Unless you are prepared to give me your affection, you will have to pay me £600 for the shame you have done me. I greet you."

Peter Ludovicus van Rade, late Mayor of Frasersburg, said he had known the plaintiff for twenty years, and had constantly seen him, but had never known him to be the worse for liquor. He hired a cart from witness for one of his trips to the defendant, and paid £5 for it. Witness then sold him the horses and harness for £75.

Lucas Peter Steenkamp, farmer, Carnarvon district, corroborated the last witness as to plaintiff's sober habits, but knew nothing of an alleged quarrel between plaintiff and a Mr. Barnard or Barnett at the hotel at Carnarvon.

Johannes Adriaan Tromp, farmer, Frasersburg district, and Johannes Jacobus Stoffberg, late an articulated clerk, also gave evidence to the same effect.

This closed the case for the plaintiff.

For the defence,

Mrs. Margaretha Engela Jooste, the defendant, admitted the engagement on May 20, 1899, and the subsequent breaking off four days later, when she told him she had heard he was addicted to drink. Her informants were Van der Westhuysen and Van Wyk, who alleged that he was drunk at a dance party. Plaintiff denied it, but they exchanged rings, and she took hers away. The plaintiff then left without saying anything about returning for an answer in June, and she never saw him again that month, despite his assertion to the contrary. She saw him again early in July, when he asked her to renew the engagement, but she instantly refused. There was no truth in his statement about the second interchange of rings, or that she told him that her mother would not let her marry him. When she again saw him at the end of July she again refused to have anything to do with him, and never told him to come back for her consent. Then she got a letter from him, and afterwards saw his attorney, who asked her whether she was prepared to marry defendant or pay him £600, or go into the Supreme Court and pay it there.

Cross-examined: The date of their marriage was never fixed, and she never suggested that it should be September 1, because Brodrick was then giving up the lease of Donkergat. She never spoke about Donkergat or the man Brodrick, and they never spoke about business. He knew she had the farm Donkergat. The question of where they were to live never came up in their conversation at all. When witness spoke about what Van der Westhuysen had said plaintiff said it was a lie. He showed her the letter Van der Westhuysen had written, but that was about the end of July. Witness admitted that she could not remember the dates, and plaintiff might have been at the farm at the beginning of July. Plaintiff did come back with her brother on one occasion, but they never exchanged rings again. The man Van Wyk was a bywoner on Van der Westhuysen's farm, Bastardsfontein. Witness's mother was opposed to the match from the beginning. She never told plaintiff never to mind her mother, as it was only her way. Witness never was engaged to

plaintiff after May. Witness had not been engaged to a Mr. Viljoen or a Mr. Kempin since she broke off with the plaintiff.

Nicolaas Brodrick said that he lived in the district of Carnarvon, and was at a dance at the farm Bastardsfontein at the beginning of January last year. Plaintiff was at the dance and got drunk. He could not walk straight, and also used bad language towards the girls there. Witness had seen the defendant previously, but had never spoken to her. On May 23 last year witness was at the hotel at Carnarvon, and saw plaintiff there. The latter was drunk, and had a quarrel with one Barnett. Witness did not know plaintiff well, but had seen him several times.

Cross-examined: The Mr. Broderick who had the farm Donkergat was witness's uncle. The dance at Bastardsfontein was on January, 1899. Witness had never spoken about that to anyone. The first time witness had seen plaintiff was two days before that. He had only seen plaintiff six or seven times. At the dance plaintiff was staggering about. Witness could not say if plaintiff had been dancing a waltz, as witness was not a dancer himself. Witness had seen plaintiff drinking that night, but could not say what he was drinking. At the hotel at Carnarvon witness was in the hotel looking at a game of billiards, and saw plaintiff there. Plaintiff wanted to fight, and had a row with the man Barnett about a game of billiards.

Albertus van Wyk said in January, 1899, he was living at Bastardsfontein. Witness was friendly with Smit, and had never had a quarrel with him. At a dance in January, 1899, plaintiff was present, and was drunk, and used bad language to the girls. Plaintiff behaved very badly that night, and he went to bed in the morning with "one shoe off and one shoe on."

Cross-examined: They danced until dawn. They were tired when they finished, and witness also kept his boots on.

The Acting Chief Justice: Those who had experience of those country dances knew it was necessary to keep their boots on, as there was often no place to retire to.

Albert van Gossen said that until July, 1899, he was a hotelkeeper at Carnarvon, and knew the plaintiff, who had come to his hotel on two occasions, once in April, and once on May 23 last year. On the latter occasion plaintiff drank very freely, ordering liquors all round for everyone and drinking himself. Later on he was under the influence of liquor and quarrel-

some, witness being called into the billiard-room on account of a quarrel between plaintiff and Mr. Barnett, and witness requested plaintiff to leave the premises, which he did shortly afterwards.

Anna de Bruyn, a widow, stated that in 1899 she resided at Carnarvon. She knew plaintiff, who came to her house one night in April last year at midnight. Plaintiff was drunk, and began undressing himself in her presence. He then began vomiting and tumbled out of the house. In July last year witness was at a dance at the hotel at Carnarvon, and seeing her daughter dancing with plaintiff, told her to have nothing to do with him.

Cross-examined: She was certain plaintiff was the man who came to her house. It must have been either April 11 or 18.

This concluded the evidence.

After argument, the Court gave judgment for the defendant with costs.

Buchanan, A.C.J.: There is no doubt that when parties enter into contracts they must abide by them whether they are men or women. This action is for breach of contract brought by a man against a woman, and the contract alleged is a promise of marriage. It is common cause that the plaintiff, who is a widower, had never met the defendant, who is a widow, until shortly before the transaction which arose in this case; that the plaintiff's brother reported favourably apparently upon the defendant, and that his brother's report induced plaintiff to pay a visit to see her. He paid her one visit and repeated the visit next month. On the second visit the parties became engaged. This was on May 20, 1899, and the same or next day the defendant and the plaintiff drove over to a farm, where relatives were residing, and the defendant was left there. The plaintiff went on to Carnarvon and returned on May 25, four days afterwards, when the engagement was broken off. Defendant said that at this relative's farm she heard stories of the conduct of plaintiff, which were such as to induce her to say she could not marry him. This conduct consisted in plaintiff having got drunk at a dance and used insulting and bad language to the ladies who were present. I do not say that any serious charge against the character of the plaintiff has been proved in this case, but I must say that there has been sufficient proved to induce any woman who did not before know the character of the plaintiff to say that he was not a man

to whom she could entrust herself, whom she could marry and pass the rest of her life with. I think there was sufficient to justify her in refusing to carry out the contract. It is alleged that on July 2 the contract was renewed and broken off again on July 4, but this the defendant positively denies, and in the face of her denial I am not prepared to say that there was more than the one engagement, and the defendant himself said that he based his case solely upon the first engagement. Besides even if the defendant had not sufficient cause for breaking off the engagement the damages in a case like this would have been of a most trifling character. One could well understand that when an action was brought by a man against a woman, if there was something heartless in the conduct of the woman, if she had treated the man badly, and was a flirt, the Court might be induced to mark its sense of her conduct by giving damages, but in this case the parties were widower and widow, and they had only seen each other once before the engagement, which only lasted four days. It was not like a case where there had been any feelings greatly strained, no ruining of life, no loss of the chance of marrying which would apply more to a girl than a man, and in this case even if there was no justifiable cause for breaking the contract, it would only have been a matter for small damages. I think it has been proved that the plaintiff was actuated by a mercenary object. He heard that the defendant had money and a farm, and when the engagement was broken off he told her in effect, "You must marry me or else pay me £600. I want the money; I don't mind taking you with the money, but I will take the money without you." Under these circumstances, even if the defendant broke off the engagement without justification the damages would have been of a most trifling character. But as to justification, there is not only the conduct of the plaintiff at the dance, which has been brought against him, but also his conduct at the hotel, and it is very curious that immediately after his conduct at the latter place he went back to the farm, and that very day the engagement was broken off. It may be that the plaintiff, when he returned from the visit to Carnarvon, so acted that coming immediately after what the defendant had heard, she was satisfied in her mind that what she had heard about the

plaintiff was true. Under all the circumstances the defendant had good cause for breaking off the engagement, and consequently the defendant is entitled to judgment in this Court. Judgment will therefore be given for the defendant with costs.

Their lordships concurred.

Maasdorp and Solomon, J.J., concurred.

Plaintiff's Attorneys; Defendant's Attorneys.

SUPREME COURT

[Before the Hon. Mr. Justice BUCHANAN (Acting Chief Justice), the Hon. Mr. Justice MAASDORP, and the Hon. Mr. Justice SOLOMON.]

ADMISSION. { 1900,
{ Aug. 20th.

Mr. Buchanan moved for the admission of Willem Hendrik Marthinus Abraham Kempen as an attorney and notary.

Order granted, and the oaths administered.

HEANEY V. HEANEY. { 1900,
{ Aug. 20th.

This was an action for divorce brought by Matilda Ann Heaney (born Johnson) against her husband, Christian James Heaney, on the ground of his adultery with Eva Herman, Manie, and divers other women, whose names were unknown to the plaintiff.

Mr. McGregor appeared for the plaintiff; defendant was in default.

The first witness called was

R. D. H. Barry, a clerk in the Colonial Secretary's Office, who produced the marriage register containing the record of the marriage of plaintiff and defendant.

Matilda Ann Heaney, the plaintiff, said that she was married to the defendant at Mossel Bay on March 21, 1892. There were two children of the marriage, of whom only one survived, being now aged eight years. Her husband remained at Mossel Bay for two years afterwards, and then went to Cape Town to look for work, returning in December of the same year, 1894, bringing a woman named Eva Herman with him. Defendant and the woman went to reside at the house of the former's mother, and witness had seen them together. Defendant

did not come back to witness. He left Mossel Bay again in 1895, and witness took a situation as servant. Defendant returned to Mossel Bay in the same year, the woman being still with him, and afterwards the two left together for Cape Town. Witness went to East London, and when there received a letter from defendant asking her to return to him, and saying: "I have done you a great wrong; I was a senseless fool when I left you, and God has shown me I have done wrong." She refused to return, and in 1897 defendant came to East London, and told witness he had been living with the woman, but that he was trying to reform. He wanted witness to go back with him, but she refused. He then went to Natal, and wrote her a letter on July 23 asking her to return to him, but she again refused. Witness believed defendant was now living at Woodstock. Witness's mother looked after the child, witness supporting it out of her earnings. Her husband had no property when she lived with him, and since he left had given her nothing towards her support. Her husband was the only Christian James Heaney, a shoemaker, in Mossel Bay. He had a brother named William Heaney.

Jacobus Morro, a coloured man, gave evidence as to his having been employed by Heaney's father, and living in the same house as defendant and his brother William. Witness deposed as to defendant living with a woman named Manie.

This was all the evidence.

The Court granted a decree of divorce as prayed, plaintiff to have custody of the child, defendant to forfeit all benefits of the marriage in community of property, and to pay costs of suit.

[Before the Hon. Mr. Justice MAASDORP and the Hon. Mr. Justice SOLOMON.]

SALIE AND HADIEN V. { 1900,
ABRAHAMS. { Aug. 20th

Servitude — Registration mistake — Transfer.

Where at the time of a sale of certain property a stipulation was made that certain servitudes should exist in favour of the plaintiff which were however not registered through mistake, the Court allowed these servitudes to be subsequently registered,

This was an action brought by the plaintiff Salie, Hadien being only formally joined as co-plaintiff, against the defendant, Amina Abrahams, for an order for the registration of certain servitudes in connection with defendant's property in favour of plaintiff, who was the owner of an adjoining property.

The declaration set forth that the plaintiff was the owner of certain three houses in Clifton-street, Cape Town, and the defendant was the owner of an adjoining property, which she had purchased from the plaintiff. At the time of the sale there were certain two lanes or passages at the back of the houses, and it was alleged that a condition of the sale was that these passages should remain unobstructed, but by an oversight or error that condition was not inserted in defendant's title deed, and barriers had now been erected by defendant in these passages. It was also stated that subsequently underground drainage for plaintiff's and defendant's houses and for certain other houses had been laid down in the said lanes, and it was alleged that this was done with the full knowledge and consent of defendant, and a servitude had been created, which it was desired should be registered, so that drainage might not be interfered with in the future. It was alleged that defendant, in consideration of her allowing the pipes to be laid, had had her drain put in by plaintiff free of expense to her. The plaintiff Hadien came into the case through having now purchased the houses from Salie.

The plea denied the stipulation as to the right of way over the passages being reserved at the time of sale. The erection of the barriers was admitted, and it was contended she had a right to erect these. The construction of the drainage was admitted, but it was alleged that defendant had contributed her share, £15, towards the cost, and defendant did not admit that she agreed that the drains should be so laid as to extend down the passage leading into Clifton-street, and that she was not aware that the drain had been laid in passage B at all.

Mr. Searle, Q.C. (with whom was Mr. Buchanan), appeared for the plaintiffs.

Mr. McGregor (with whom was Mr. Gardiner) appeared for the defendant.

The facts are fully set forth in the judgment.

Mr. Justice Maasdorp, in giving judgment, said: In this case the plaintiff was at one time the owner of certain three houses abut-

ting on Clifton-street, and he now claims in respect of these houses a right of servitude over a portion of the property of the defendant, and he also claims the right of way for drainage of these properties over passages lying at the back and the side of defendant's house respectively, and communicating with Clifton-street. It appears that in January, 1898, the plaintiff was the owner of four of these houses abutting on Clifton-street, and at the back of the houses it seems that a certain strip of land was reserved for the use of these three houses in communicating with the passage B, which leads into the public street. At this time, and for some time before, the passage B and also the passage A seem to have been used by persons at different times, and at all times, who wished to communicate with the yards at the back of these houses, and it seems to me to be clearly proved that in respect of one use, only this passage could have been used for the purpose mentioned, and that was for the conveyance of the night-soil from the yards of these houses to the wagons waiting in Clifton-street to take it away. There was clearly no other way in which that service could have been performed. At that time the property lying on the other side of this strip of ground was open, that was there were no walls, and therefore no passage. This ground belonged to some other person, and the plaintiff, as the owner of these four houses, would have no right to use this ground for the purpose of communicating with any of the public roads. At that time, therefore, I think that the mode of communication from the back premises of these houses and the public street, was along this strip of ground and down the passage, and that it was continuously used for this purpose. In January, 1896, the plaintiff sold one of these houses to the defendant, and at the time of sale it must have been in contemplation that it was necessary for him to have communication from the back premises of the remaining houses to the public street. He himself said that he had it in contemplation, and made an express stipulation that the right of way along that passage should be reserved for the houses, which still remained his, and that this was agreed to expressly by the defendant. He must at the time have been aware that he required the use of that passage, and one could understand that he may have made an express condition of retaining that passage. On the other hand, we have the defendant, who says that she

never consented to the use of this passage, but it must be borne in mind that the defendant also says that when she bought the premises all she had in contemplation was that she was to buy the house. At that time she could not have had any intention of purchasing all rights to those two passages, and that being so, the matter would not have impressed her very much, and consequently she might very easily forget what the plaintiff would well remember. There is certainly a circumstance which is to some extent in favour of defendant's contention, and that is that the registration took place immediately after the transfer of the property, and it makes no mention of this servitude, but that may also be explained by the circumstances that the parties contemplated merely the sale of the house, and that the plaintiff was not aware that he was to lose the use of this passage when the transfer took place. In that way I am of opinion that a mistake was made in the failure to register this servitude in favour of the remaining properties. After some time the defendant obstructed the passages, and it is certainly curious that the plaintiff did not at once assert his right to have them cleared. His action may throw some doubts as to what were his views as to the rights in the passage, but it appeared that subsequently he acquired properties lying on the other side, and made use of the communication with Elsmere-street, which also communicated with the one passage, and consequently was not so much pressed about retaining his right to the other passage. Later on, however, he sold these properties to a man called Hadien, and it was then necessary that he should place Hadien in possession of all rights which appertained to the properties sold, and he then pointed out the right of communication with Clifton-street along this passage. That right was disputed by the defendant, and it became necessary for the purposes of the latter transfer that he should assert his right in a more forcible manner, and the matter was brought into court. On the whole evidence as to the right of way, I am clearly of opinion that at the time the sale was made by plaintiff to defendant a stipulation was made that there should be a servitude of a right of way over these passages for the benefit of the remaining properties. The next claim is for a right of servitude for certain pipes for drainage purposes in this passage. When it became necessary to construct drainage the parties had to con-

sider where they should lay the pipes, and it seems to me, from the circumstance that they immediately chose by mutual consent this passage for laying the pipes, that at that time it was fully understood that there was a joint or common interest in these two lanes for the benefit of all parties. However, it became necessary to make some agreement for joint action in the matter, and plaintiff after some negotiations with the defendant agreed with her that the pipes should be laid down along this passage. As some inducement the plaintiff said that he did not wish to make any profit out of the matter, and he offered to lay her portion without any charge. Here then, although he had no right by any previous servitude to lay the pipes in this passage, he gave her a certain consideration, in return for which she gave his consent to the laying of the pipes in the passage. It was argued for the defendant that if she did give any consent it merely meant such a leave or licence as could be withdrawn at any time by the defendant, but it seems to me under all the circumstances of the case that it was not merely leave or licence for a temporary purpose, but an agreement for a permanent one; that under all the circumstances the work must be a permanent one, and that the parties contemplated that it should be a permanent one, and therefore under the circumstances it must be held that a permanent servitude to lay the drainage pipes was constituted. I am quite satisfied that the agreement was entered into in the first place for the reservation of this servitude, and in the second place for the granting of leave to lay the drain pipes, and under these circumstances, there being clear proof that this first servitude, although not registered at the time of the transfer, was in the contemplation of the parties, the plaintiff is now entitled to have the matter rectified and the servitude registered. An order will therefore be given for the registration of this first servitude in favour of the remaining extent of lot 39 and lot 37, and for the registration of the subsequent servitude, as to the drainage pipes in favour of lot 37, lot 38, the remaining extent of lot 39 and lot 40, with costs, but the expenses of such registration are to be borne by plaintiff, for whose benefit the registration takes place.

Mr. Justice Solomon concurred.

[Plaintiff's Attorney, A. W. Steer; Respondent's Attorneys, Messrs. Walker and Jacobsohn.]

MARR V. MARR.

 1900.
 } Aug. 24th.
 " 21st.

This was an action for divorce brought by the plaintiff, Theresa Marr, against her husband, on the ground of his adultery with one Marie Zweltz, a servant in their employ, on March 2 last. She also claimed custody of the minor children of the marriage, that defendant contribute £10 per month towards their maintenance, and costs of suit. In his plea defendant denied the allegation of adultery, and claimed in reconvention a decree of divorce on the ground of plaintiff's adultery with one Arthur Kelly, a member of the police force. Plaintiff denied this allegation.

Mr. P. S. Jones appeared for the plaintiff.

Mr. Buchanan appeared for the defendant.

The first witness called was

Theresa Marr, the plaintiff, who said that her maiden name was Reynolds. She was married to the defendant at Liverpool on July 7, 1878. They went to Australia and then to Johannesburg. They quarrelled very much, and she in consequence left him and came to Cape Town in 1898, and entered into partnership with one Thomas Trill in the proprietorship of a hotel called the Portsmouth Arms. That partnership was dissolved long ago. About March 6, 1899, her husband came down and they made up their quarrel. She sold out of the Portsmouth Arms and her husband took out a licence for the Constitution Hotel, Constitution-street, the licence of which they lost on March 21 of this year. A month before that she refused to cohabit with him, and slept on a bed on the floor. Her reason for doing so was that he was always quarrelling with her and ill-treating her. On March 22 last, the day after they lost the licence, she went out with her daughter and returned about 10.30 p.m. Witness entered by a side door, and at her bedroom door met her husband and the girl Zweltz coming out of the room. Afterwards—in the presence of defendant—the girl admitted what had taken place between her and the master (defendant). Witness saw her attorney afterwards, and then with her daughter left the place and stayed first at Newlands, then at Observatory, and then at Woodstock. During the time witness resided at these places Kelly was never at her house. She knew Kelly well, as he often came to the hotel and was a friend of her husband's. One day in April witness received a letter from Kelly, and in consequence of that she went to the Paarl to see a

mutual acquaintance named Murphy, who was dangerously ill. Kelly met witness at Paarl Station and they went together to see Murphy. At the request of the old woman who was nursing Murphy, witness took a turn at nursing Murphy, but the old woman did not return. Witness decided to stay on and nurse Murphy for the night because he was too ill to be left, and permission was obtained from the Chief Constable. Witness left the following morning, Kelly seeing her to the station. Witness's visit to the Paarl was not kept secret, and in fact she went on her daughter's advice. Witness had not seen Kelly since, nor Murphy, who had been transferred to Port Elizabeth, and she denied absolutely that there was ever any impropriety between Kelly and herself. Last week defendant came to see witness, and they got angry and she asked him why he brought Kelly into this case, and he said it was because he wanted to get out of paying £10 a month maintenance. He asked her to make friends, but she refused. Witness, with her two boys, saw defendant to the train that evening. She did so to pacify the boys, who wanted to go with him. The eldest boy was fifteen years of age, and the youngest about fourteen years of age. Defendant had been extremely cruel to witness, and on two occasions she and her daughter had had to sleep outside owing to his cruelty.

Cross-examined: Witness had never lived with Trill as his wife while they were in partnership in two hotels. On March 5 witness was not suffering from the effects of drink. She could take a glass of anything, but knew how to take care of herself. Witness's daughter had not left her on account of the way in which witness treated her, but because her father had bribed her. It was all part of the conspiracy. She knew Murphy, who had been a customer at the hotel.

Arthur Kelly, a member of the Paarl police force, said he knew the plaintiff and the defendant in this case. He also knew the man Murphy, who had previously been with him at defendant's place, the Constitution Hotel. In April Murphy was lying dangerously ill with consumption of the lungs at Paarl Police Barracks, and he was being nursed by an old Malay woman, who was cook at the barracks. In consequence of a telegram witness met Mrs. Marr at Paarl Station, and took her to see Murphy. Witness went on duty at two o'clock, and when he returned at six o'clock he was astonished to find Mrs. Marr still there. It was an unusual thing for a lady to remain in the barracks, and witness saw the Chief

Constable and got permission for Mrs. Marr to remain all night and nurse the man Murphy, the old Malay woman having gone out and not returned. Witness remained in Murphy's room until nine o'clock, and then went to his own room. He never went into Murphy's room again that night, and no one ever came into his room. The only time he was alone with Mrs. Marr was in the public streets bringing her from the station and taking her back, and he denied that any impropriety had taken place between them. Her visit to the barracks was not kept secret. He had never been to Mrs. Marr's house while she was at Newlands and Observatory, and had never seen her while she was there. He denied ever having been unduly intimate with Mrs. Marr while she was in the Portsmouth Arms. On Sunday night, March 5, he was not on duty, and had to sleep in the barracks, being a member of the Garrison Police then. Consequently he could not have been at the Portsmouth Arms on that night.

Cross-examined: Witness did not ask Mrs. Marr to come to the Paarl. He simply wrote telling her that Murphy was sick. Witness did not get into trouble over having Mrs. Marr at the barracks.

Re-examined: Witness and Mr. Marr had always been good friends, and he had never had any bad word with him.

Maria Squalls, a coloured woman, said that in March last she was in the employ of the plaintiff and defendant at the Constitution Hotel, but now lived at Newlands with her sister. Her master and mistress used to call her Rosie. One Thursday evening towards the end of March last witness went out and returned about ten o'clock. When she returned the door was locked, and on her knocking it was opened by the master, who afterwards gave her a glass of stout. That was in the dining-room. Afterwards she went into her room, and the master followed her and put his hand round her neck. She went into her mistress's room to complain to her but defendant followed her, and said that her mistress had gone to the theatre. Proceeding, witness alleged that defendant committed adultery with her, and said that as she and the defendant came out of the room Mrs. Marr came in. The latter said nothing, and defendant went to lie on the couch in the dining-room, while witness went outside. Afterwards witness told Mrs. Marr in the presence of defendant what had happened. For the last two months that

witness was at the hotel Mrs. Marr used to sleep on the floor with her daughter May, and defendant slept on the bed in the room. Mrs. Marr slept on the floor because defendant got drunk every night, and abused and struck Mrs. Marr. The last Sunday evening they were at the hotel defendant locked witness, Mrs. Marr, and the daughter out, and they slept in the garden. The following day they left, and after staying a night at Salt River they went to a room at Newlands. All three (witness, plaintiff, and her daughter) slept in the one room. During the time they were there no one ever came to see them. Witness remembered Mrs. Marr receiving the letter from the Paarl saying that Murphy was ill, and the daughter suggested that her mother ought to go to the Paarl and see Murphy. Mrs. Marr did so the following morning, and they expected her back the same night, but she did not return until the next morning. From Newlands they went to Observatory, and while there Mrs. Marr was never absent for a night, and Kelly had never been there. Witness last saw Miss May (now Mrs. Webster) yesterday week, having met her in Caledon-street at the greengrocer's shop, between ten and eleven o'clock in the morning. She called witness, and the latter asked her for a tickey, and after changing a shilling she gave witness a tickey and some sweets, and then she told witness, "Rosie, don't you go and say anything about master."

Mr. Buchanan objected to this evidence.

Examination continued: Miss Mary spoke to witness about the case, and tried to frighten her.

Cross-examined: Two years previously witness had been an inmate of a brothel. Plaintiff had never offered her £5 to give evidence against her master. Plaintiff did not even have money to pay witness her wages, and she now owed witness two months' wages.

This closed the case for the plaintiff.

For the defence,

William Marr deposed as to his coming from Australia and his wife following him. Later on witness went to Johannesburg, and his wife went into partnership in a hotel with one Trill. Afterwards witness rejoined his wife, and they took the Constitution Hotel, and witness, who was a bricklayer by trade, but employed as a foreman of sewage works by the Town Council, used to attend in the bar after he

finished his work. On the night on which it was alleged witness had misconducted himself with the servant, plaintiff had asked him if she could go to the theatre with their daughter, and witness agreed. After he closed up the bar he went and laid down on the sofa and began to dose, the servant being outside with some fellow. About nine o'clock the servant came in and asked for a bottle of stout. Witness gave it to her and then lay down on the sofa again, and dosing off, knew nothing until his daughter came home and wakened him. He denied the servant's statements in the witness-box as to what took place that night. Witness was sorry to say that his wife was in the habit of taking a little drop too much to drink, and until she started drinking there was never a better woman living.

Cross-examined: Witness remembered the relief of Ladysmith well. His wife was drunk that night. He was not drunk, and although a little merry, he was able to serve in the bar. He did not strike plaintiff that night, and had never struck her in his life. He never locked his wife, daughter, and servant outside in the garden. She spent many a night in the garden, but through no action of witness's. The licence of the hotel was lost because of misconduct in the hotel during the daytime, not at night, when witness attended to the bar. Witness had tried to settle the case for the sake of his children.

May Webster, the daughter of the plaintiff and defendant, stated that she was married on June 5 last. After they came from Australia defendant was away from them for some time. She had often seen Kelly at the hotel. He was very friendly with her mother, and the Sunday night before her father came home (March 5) witness saw them under suspicious circumstances. That night Kelly had stayed at the house at witness's request, her mother being sick, having, in fact, taken too much drink, because she had lost the licence of the Portsmouth Arms. Her mother was not fit to do her work that day.

Buchanan, A.C.J.: But did you sell drink on Sunday?

Witness: We seldom used to sell on Sunday, but if we knew anybody we let them in.

Examination continued: On the Thursday evening in question at the end of March witness and her mother went out to visit a

friend and returned in a cab. Witness paid the cabman and afterwards got a bottle of beer for him from her mother and waited until he drank it. Her mother remained in the dining-room all the time, and her father was lying on the sofa asleep. The girl Rosie was not there, being outside with a man called Curlie. Witness's mother went to the Paarl on receiving the letter from Kelly saying that Murphy was sick. She said before she went that it depended upon how well Murphy was whether she remained two or three days there, but she came back the following morning. Witness had never seen Kelly at Newlands or Observatory.

Cross-examined: Witness's husband was a private in the Northumberland Fusiliers, and he supported her, but she was not on the strength of the regiment. Her father lived with them, but they paid half the rent. Her father did not support her.

Cross-examination continued: Witness met the girl Rosie in Caledon-street last week, but never tried to prevent her from coming to court by frightening her. Rosie said she was not coming to court, and witness said that if she did not after swearing an affidavit she might get five years. She did not tell her she might get five years if she did come to court.

This concluded the evidence.

Buchanan, A.C.J.: The impression upon our minds is that the evidence is unsatisfactory on both sides as to whether adultery has been committed. The parties possibly might agree to a judicial separation.

Mr. Buchanan: I cannot argue on the charge of adultery against Mrs. Marr, and so intend to confine my argument to rebutting evidence as to the charge against Mr. Marr.

Mr. Jones: The plaintiff will agree to a judicial separation if the husband will maintain her. She is absolutely penniless now, and the husband earns £4 4s. a week.

Mr. Buchanan: In an application formerly before the Court in connection with this case, it was shown that the plaintiff had jewellery to the value of £140. Defendant will offer 10s. a week towards plaintiff's maintenance.

Mr. Jones: The amount offered is too little.

Buchanan, A.C.J.: The Court is unanimously of opinion that adultery has not been proved on either side, and as things have gone so far that it is impossible for these people to live happily together again, I suggested a judicial separation, but of course that can only be done by mutual agree-

ment, as there is nothing on the pleadings to warrant the Court to come to that decision. Of course the defendant is bound to support his wife. The parties might consult with their counsel as to the terms of a judicial separation.

Postea (August 23, 1900.)

Mr. Jones: A consent paper has been signed by the parties by which the defendant was to have the custody of the two minor children of the marriage, the plaintiff to have access to them on Tuesday and Friday every week at such time and place as might be found convenient, and the defendant to pay the plaintiff 10s. per week towards her maintenance.

A decree of judicial separation in terms of the consent paper was granted.

[Plaintiff's Attorneys, Messrs. Fairbridge, Arderne and Lawton; Respondent's Attorneys, Messrs. Innes and Hutton.]

SUPREME COURT

[Before the Hon Mr. Justice BUCHANAN (Acting Chief Justice), the Hon. Mr. Justice MAASDORP, and the Hon. Mr. Justice SOLOMON.]

REGINA V. AFRICA. { 1900.
Aug. 21st.

Magistrate's ordinary jurisdiction—
Imprisonment.

A Magistrate's ordinary jurisdiction in criminal cases allows him to impose imprisonment to the extent of three months only, and such sentence cannot be increased because of a previous conviction.

Buchanan, A.C.J.: This case has come before me from Bredasdorp, in which the accused Africa was charged with stealing a jacket valued at 15s. He was tried by the Magistrate under his ordinary jurisdiction, pleaded guilty to the theft, and as he had apparently been previously convicted, the Magistrate sentenced him to six months' imprisonment. Under his ordinary jurisdiction the Magistrate could not sentence

the prisoner to more than three months' imprisonment, and the sentence will accordingly be reduced to three months.

ERRINGTON V. KATZEN. { 1900.
Aug. 21st.

This was an action in connection with a partnership in which the plaintiff, Edward Errington, claimed from the defendant, Morris Katzen, certain moneys, or in the alternative for an account and debate of the same.

The declaration alleged that in February, 1900, the parties entered into a partnership for the purpose of carrying on on Green Point Common what was known as the Royal Artillery Canteen, the object of which was to supply the troops in camp on the Common with liquor and other refreshments. The partnership was begun on February 18, and was dissolved on May 31, and it was alleged that the defendant had not rendered an account, though called upon to do so. On June 2 they agreed to submit all matters to Mr. J. E. P. Close, accountant, and to accept his award as final. Mr. Close awarded £333 9s. 6d. as due by defendant to plaintiff, for which judgment was now claimed, with costs. The plea was that the defendant kept care of the takings and the books with the consent of the plaintiff, and alleged that as the result of an account made up on May 22 plaintiff received £147 17s. 6d. It was denied that they had agreed to the arbitration of Mr. Close, defendant stating that Mr. Close only got the books to audit. It was alleged that the plaintiff always had free access to the books, and the partnership was dissolved by reason of the removal of most of the troops. The business was then finally realised, and it was alleged that there was now due to the plaintiff a sum of £119 13s. 9d., as his share, which had been tendered, with costs, up to July 10.

Mr. Gardiner appeared for the plaintiff, and Sir Henry Juta, Q.C. (with whom was Mr. Nathan), appeared for the defendant.

The first witness called was

Edward Errington, who said that about the beginning of this year he contemplated starting a canteen at Green Point Common, and had already obtained permission from the military authorities, when he met Katzen, who represented he was a man of means, and they started business together. The canteen consisted of two parts—a "wet" or beer canteen, and a dry goods canteen. They had two assistants, except for the first

few weeks, Katzen being always in the wet canteen, where most of the money was taken, and the money the assistants, who served in the dry goods canteen, took was put into a box in the wet canteen. Witness had no check on the gold taken, defendant taking all the gold, and then at the end of the day when the money was counted up just saying how much gold he had. Witness was away at Stellenbosch for two days, and when he returned he found that the barman, Katz, had been discharged by defendant. Later on witness asked defendant if it was true that he did not account for all the money, and defendant said that Katz would have to be careful, or he would be liable to an action for defamation of character. Later on witness instructed one of his employees to watch defendant, and found that all the money was not being accounted for, £1 in gold being kept back on two successive days. He taxed defendant with not accounting for all the money. Defendant at first denied it, but about half an hour later he accounted for £1, which he said had been mixed up with his own money, and as to the £1 which was missing the day before, he said he must have spent it in cheese. (Counsel here read the correspondence that took place between plaintiff's and defendant's attorneys, and that relating to the engagement of Mr. Close to go over the books.) Continuing, witness said that the price list produced contained the prices fixed by the military, at which they had to sell these goods.

Cross-examined: Witness and the assistants resided at the canteen for eight or ten weeks, and had their meals out of the stock, also what they drank and smoked. The books were kept by Katz, the assistant, up to the time of his discharge on April 20, and after that witness kept the books according to what defendant told him. The trade was very busy, and it was not necessary to stand treat to sergeants and orderlies. No credit was given at all, and there was no waste. The military people usually made a considerable sum out of shortage.

[Buchanan, A.C.J.: That means that in retailing the beer a pint pot would not be filled right up to the brim.]

Cross-examination continued: There was no loss on the exchange of dollars for the Canadian troops.

Witness was not about to be married, and had never contemplated getting married in his life.

J. E. P. Close, an accountant, deposed that he examined the books, and found that

according to them at the final liquidation there was £149 7s. 10d. due to plaintiff, and taking the amount of stock bought, he found that the profit that ought to have been made, but had not been accounted for, was £368 3s. 4d., and allowing plaintiff half of that, viz., £184 1s. 8d., there was due to him £333 9s. 6d. Leaving out of account the profits he found ought to have been made, there was a difference between the plaintiff and defendant of £30, defendant tendering £119 for the £149 due. Proceeding, witness gave evidence as to the items composing this £30 in dispute. In the books witness allowed, in addition to what was allowed for meals, 1s. 6d. a day for 100 days for what liquors, etc., were consumed in the store by the partners and assistants, so that the deficiency could not be accounted for by liquor, cigars, etc., consumed by them.

Max Katz stated he was in the employ of Katzen and Errington at the Green Point canteen. Defendant used to put the gold in his pocket, and then told Errington in the evening how much gold he had. Witness knew what the takings were, and knew that defendant always accounted in the evening for £5 or £6 less than he had actually taken. Witness knew at the time that it was not correct, and subsequently told plaintiff. No credit was ever given to the soldiers, but they used to give the canteen orderlies from three to five pints of beer a day.

Cross-examined: Witness left the service of Katzen and Errington of his own accord, and had never said to defendant: "Give me £25 or I will make it hot for you." He never even asked for a month's notice, as he would have done if he had been dismissed. He told Katzen that he could not stay with him any longer because he (Katzen) was not acting properly, taking the money, and by-and-bye he might say that his assistants were robbing him.

Esau Kirshin said he was in the employ of Katzen and Errington at Green Point Camp. Witness noticed on one occasion when Errington was away that Katzen, in stating to the former the amount of gold drawn, made it less by £3. That was the only occasion on which witness knew the total drawings. Afterwards in consequence of what Errington had told him, witness kept account of all the gold he changed. In the evening Katzen said to Errington he had only £6 in gold, whereas he received £7. On the following day he said he had received £14, while he had actually got £15. Wit-

ness said in the presence of Errington there should be a sovereign more, and Katzen then took the gold out of his pocket, and counting it, said that was right, and that he had made a mistake. Witness then said, "How about the sovereign you took yesterday?" and Katzen went away, but returning in a couple of hours, said, "I know where the other pound has gone; I bought cheese with it." They had never received that cheese to this day.

John Benjamin gave evidence on the same point.

This closed the case for the plaintiff.

For the defence,

Morris Katzen, the defendant, said he entered into partnership with plaintiff, witness doing the buying and getting the credit. The gold was counted every evening in the presence of plaintiff, and the silver in the morning. Witness had never taken any of the gold without accounting for it, except on the day referred to by the last witnesses when he made a mistake of a sovereign. Drinks were given free to a number of orderlies, and some credit was also given. Proceeding, witness gave evidence as to the disputed items in the £30. With regard to Katz, witness had dismissed him. After witness had given him his cheque for wages due Katz said, "Katzen, you give me £25, and if you don't it will cost you more." Witness asked him what he wanted £25 for, and went away, and never spoke to him again. There was a good turn over in this business, but there was a good deal of waste in it.

Cross-examined: Witness took the cash, but he never noticed that the takings were not by an average of £3 10s. a day what they ought to be. Witness reckoned about seven to eight gallons of beer were given to the seven orderly sergeants, two regimental sergeants, and sergeant-major.

W. Hancock gave evidence as to the waste in retailing beer.

Cross-examined: The waste would amount to two or three per cent., and not to an eighth of the takings.

Thomas Masterton, an accountant carrying on business in Cape Town, deposed as to examining the books of the parties and the amount due to the plaintiff being £119 13s. 9d. The only difference between witness and Mr. Close was the £17 and £27 10s.

Cross-examined: Witness went on the books, and did not attempt to calculate what amount the stock bought ought to have realised at the prices fixed by the military authorities.

After argument,

Q 4

Buchanan, A.C.J.: In February of this year the plaintiff and the defendant entered into partnership for the purpose of contracting with the military authorities to keep two canteens, one which is called a wet canteen, and the other a dry canteen. The defendant did the purchasing of the goods and took the money that was received, and he is therefore in the position of a person who has to render an account to the partnership of the dealings in the partnership. The business of the canteen was conducted on a cash basis, cash being handed over the counter. This cash was handed over to the defendant every night, and the amounts given up were entered in the account book put in. On May 22 the parties themselves came to a settlement of the profits accruing up to April 15, and the following receipt was given by the plaintiff to the defendant: "Received from Morris Katzen the sum of £147 17s. 6d., in full settlement of the profits, according to the books on April 15, 1900." But the books do not show a sum of £147 17s. 6d. They show the plaintiff's share of the profits to be greater, and this sum of £147 can only be arrived at by deducting two items, one of £17, which the parties are agreed was discussed at the time the settlement was arrived at, and also the sum of £27 10s., which the defendant says he paid into the business as capital, but the books do not show satisfactorily either of these items, although they do show that a sum of £9 was paid in by the defendant. However, it is clear that when the parties arrived at a settlement they took both these items into account, and the plaintiff agreed to accept £147 in full settlement of the profits accruing to that date. However, what the plaintiff really comes into court for now is this: that taking the amount at which the goods were purchased and the prices fixed by the military authorities at which they were sold, and calculating the amount which ought to have been realised, there ought to be a further sum of £184 due to the plaintiff. This is a very unusual way of arriving at the profits, but still if it had been shown that the money passed through defendant's hands alone there possibly might be some grounds for calling upon the defendant to account for this sum, but it has been shown that the plaintiff himself and the assistants in the canteens had to do with the money as well as defendant, and there is no evidence whatever to show that this additional amount was ever taken in the business at all. It has been shown that there is a certain amount of leakage in this

business, and a certain amount of treating, and also a certain amount of liquor and tobacco consumed by the assistants themselves, and there is no evidence to show that the goods realised more than the books show. The parties agreed to refer the books to Mr. Close, and the latter, as well as Mr. Masterton afterwards, went into the accounts, and the two agree as nearly as possible except with regard to that £27 10s. and the £17, which have to do with the profits before the settlement mentioned. According to Mr. Masterton, £119 13s. was due to the plaintiff, and the defendant tendered this amount with costs up to the date of the tender, viz., July 10, and I must say that on the evidence I do not think that the plaintiff has established his claim to anything further than that amount, although the business was certainly carried on in a loose way, and the plaintiff was at a disadvantage, there being no written agreement, so that he says he had to agree to the settlement to get evidence of his partnership. As to the costs of the interdict previously granted, there was here a partnership, the defendant receiving the money day by day and paying it into the bank in his own name, and then refused to render an account, so that plaintiff had to come to Court for an interdict on that money. Therefore I think that the costs of this interdict, which were incurred before July 10, must be taken as part of this tender. Judgment will therefore be for the plaintiff for the amount tendered with costs up to July 10, the date of tender, including the costs of the interdict, plaintiff to pay the costs incurred after that date.

Maasdorp and Solomon, J.J., concurred.

[Plaintiff's Attorneys, Messrs. Van Zyl and Buissinne; Respondents' Attorney, C. Friedlander.]

SUPREME COURT

[Before the Hon. Mr. Justice BUCHANAN (Acting Chief Justice), the Hon. Mr. Justice MAASDORP, and the Hon. Mr. Justice SOLOMON.]

LISTER V. MCKENZIE. { 1900.
Aug. 22nd.
" 23rd.

Landing agent—Loss of cargo—
Harbour Board.

The defendants, who had been appointed by the Table Bay Harbour Board to land cargo from a vessel and to give to the ship a discharge for the same on behalf of the consignees, on accepting such appointment,

Held, liable to an owner of cargo whose goods had been received and not delivered or accounted for by them.

This was an action for the delivery of certain goods, or in the alternative, the payment of the value of the same and for damages.

Mr. Gardiner appeared for the plaintiff.

Mr. Searle, Q.C. (with whom was Mr. Buchanan), appeared for the defendant.

The declaration set forth that the plaintiff was T. H. W. Lister, who carried on business as a seller of cigarettes, and the defendant was A. R. McKenzie, a forwarding agent, and more particularly a dock agent carrying on business at Cape Town under a licence as dock agent issued by the Table Bay Harbour Board. On or about January 15 the R.M.S. Tantallon Castle was discharging her cargo, and the said defendant had under the Dock Regulations been appointed the dock agent who alone could receive such cargo, and in fulfilment thereof the defendant did then and there as said agent receive a certain case consigned to the plaintiff, and containing 30,000 Egyptian cigarettes. It was alleged that the case was received by the defendant in good condition, and that the defendant by the several premises acting as dock agent aforesaid, it became his duty to give the case to the defendant, but that he had never done so, although a reasonable time had elapsed. The value of the case of cigarettes was £90, and

in addition the plaintiff had by not receiving the cigarettes been hindered in his business, and had suffered damages to the extent of £50. Wherefore the plaintiff prayed for the delivery of the said case and the contents thereof in the same good order and condition as defendant received them, or in the alternative for the payment of the sum of £90, the value thereof, and secondly, for the payment of the sum of £50, as and for damages sustained, with interest *a tempore morae* and costs of suit.

In his plea the defendant admitted the formal allegation as to the parties, admitted his appointment as dock agent and the discharging of the cargo of the Tantallon Castle here. He admitted receiving the said case, but denied that it was in good order and condition, saying that it was in a damaged condition, and that he informed the Castle Company, whose agent he was, of its being so. He said that he acted solely as agent for the said company, and in fulfilment of his duties as such handed the case over to the custody of the Harbour Board. He had no knowledge of the allegations as to damages sustained by the plaintiff, and denied that the plaintiff had suffered any damages for which he was liable.

The replication was general.

The facts appear from the judgment.

Mr. Gardiner, for the plaintiff: The first point in this case is to decide whose agent defendant was. Our contention is that he was the agent of the consignees, and this is borne out by the 31st Rule of the Dock Regulations. If the plaintiffs had not taken delivery of these goods the defendants would have been held liable. See *Juta and Co. v. Mackenzie* (8 Sheil, 394). The duty of the agents is to land cargo and to see that the goods landed are placed in a proper store. Further than this, they had no duty. But in this case the defendants were not merely landing agents; they were also agents to deliver, and so were responsible for the acts of their agents. The Harbour Board were their agents, and so they were responsible for the acts of the Harbour Board. Had they taken proper receipts from the Harbour Board, the plaintiffs might have been able to recover from the Harbour Board. Not doing so, they are guilty of gross negligence, having no one to look after the goods. On the evidence the Court will not be satisfied that these cases were placed in this storeroom.

The position taken up by the defendants on inquiry made about the goods, was not satisfactory. It is a well-known principle

of English law that railway companies who employ other companies as their agents are liable to the principals for the acts of the latter companies. Here the Harbour Board was the agent of the defendants, who were consequently liable for the omissions of the Harbour Board.

[Solomon, J.: Is defendant responsible without there being any proof of negligence?]

Hardly. If defendant did not place the goods in the shed he was guilty of negligence; but if he did place the goods in the shed he is still liable for the negligence of his agents. See *Story on Bailments*, section 539.

[Solomon, J.: When did defendant become plaintiffs' agent?]

He became our agent immediately he set the Harbour Board Regulations in motion, and when he had fulfilled his duties as such by landing the goods he became our agent under a special contract to deliver.

[Solemon, J.: Can you not sue the Harbour Board?]

We cannot do so on contract. There is no privity of contract between us and the Harbour Board.

Mr. Searle, Q.C. (with him Mr. Buchanan), for the defendants: We have acted in a statutory capacity as landing agents under the Regulations, and then when we had fulfilled our statutory duties we became engaged under a special contract. See section 30 of the Harbour Board Regulations. This gives the Board absolute control in the landing of the goods. See also sections 31, 32, and 79. The Board made all necessary arrangements with agents, who were to do the actual work carried out under the powers which were given in the Act. The only liability which can fall on us is a statutory one. Even then we are limited in our responsibilities. See p. 68 of the Regulations, which shows that the control of the Harbour Board is complete and absolute. See Regulation 36 on p. 36, which shows that goods should be warehoused.

Now have we acted with all reasonable care? We placed the goods in the store, and so cast all liability on to the Harbour Board. The Court will be satisfied that we have acted with all due care.

[Buchanan, A.C.J.: You must prove satisfactorily that the goods were placed in the store.]

The evidence of Sedgwick and the tally-clerk has proved that satisfactorily.

It is quite possible the goods went astray after being placed in the store; for

that the Harbour Board would be liable. But even if the Court holds that we have been guilty of negligence we will not be mulcted in damages. See the case of *Philips v. Metropolitan Railway Company* (10 Jut., 52).

Buchanan, A.C.J.: The plaintiff in this case shipped a case of cigarettes from Durban to Cape Town by the Tantalion Castle, receiving therefor the usual bill of lading. The ship arrived in Table Bay on a Sunday, and on the Monday morning following plaintiff went to the defendants, who are landing agents, handed the bills of lading over to them, and employed them as his agents to obtain this cargo and deliver it in a bonded warehouse. The defendants were also, as landing agents, appointed the persons to discharge the ship. It is clear, and the defendant himself admits, that he received this box of cigarettes, but it is in dispute what became of the case after it got into defendant's possession. He says it was handed over to the Harbour Board and placed in their warehouse. This is a question of fact the Court must decide one way or another. The main defence set up is that the Harbour Board and not the defendants should have been sued for the loss of these cigarettes. The Table Bay Docks are under the management of the Harbour Board, and by the Act under which it is constituted no goods brought here can be landed except by persons authorised by the Board. The Board can either land these goods themselves, or by their duly constituted agents. However, the Board do not land the goods themselves, or by persons who they consider their constituted agents, but they have framed regulations by which they make the person who lands the goods act as agent on behalf of the consignee, and authorise that person, on behalf of the consignee, to give a discharge to the master of a ship himself, and thus be able to acquit the ship of any responsibility after the goods are landed. It is quite possible that a very strong case might have been made against the Harbour Board, but unfortunately the Harbour Board is not before the Court, and we have no opportunity of hearing what defence they might have set up, and consequently we are not in a position to give a binding decision upon them. Somebody must be liable to the consignee. The defendants state that the goods were taken out of their hands by the Harbour Board, but the question is, have they proved this as a fact? And even if it had been proved, it would not neces-

sarily remove their liability, though probably they might in such a case have recourse against the Harbour Board. The defendants accepted the position of agents of the consignees, and they received the goods for consignees, they received the goods for the consignee in the present case, and are liable to account to the consignee by their constitution to appoint agents for the consignees or not, is a question still open to consideration. McKenzie and Co., however, accepted that position under the regulations. McKenzie and Co. say that they placed the goods in the Harbour Board's custody. Unfortunately there is no clear evidence that this was done. In the first place the defendants have not taken any receipt for the goods handed over. They said that it was not customary, but whether customary or not, it was a most reasonable precaution, and I do not see on what grounds the warehouse people could refuse. If, however, McKenzie and Co. did not take a receipt from the Harbour Board, they ought to have brought clear, emphatic evidence that would clearly show that the goods were placed in the warehouse. All we have in this case is the recollection of the tally clerk who checked the goods. The damage clerk, who was also said to have seen the case first in the warehouse, is said to be away. On the next day search was made in the warehouse for the goods, but they were not to be found there. It was said they might have been taken out during the night. Well, that is of course possible, but in my opinion there is strong presumptive evidence that the goods were never placed in the warehouse, which is supposed to be properly looked after. If on this action being brought after. If on this action being brought the defendants had said to the plaintiff that the Harbour Board was liable, and guaranteed them their expenses and assistance to prove that the goods had been duly handed over, so that an action might have been brought against the Harbour Board, then there might have been some ground for saying that the plaintiff should have proceeded against the Harbour Board. But nothing of the kind was done. McKenzie and Co. relied simply upon the recollection of the tally-clerk who checked the goods, and who said that according to custom the goods would be put in the store. The evidence is that when the goods are discharged some remain on the jetty and are never put into the

store at all, others are taken away by wagon and not put into the warehouses, while some are put into the warehouses. But no record seems to be kept as to how the cargo landed from any vessel is disposed of. One cannot help saying that the whole business is conducted in a very loose and unsatisfactory manner at the Docks. There ought to be clear, satisfactory evidence in every case as to what is done with the goods. The Harbour Board employed their own landing agent to land the goods, and if these goods are taken into the custody of the Harbour Board the latter should keep some entry to evidence the fact, and when the goods are taken out of the warehouse the person taking them out ought to give a receipt for them. There should be some record kept and not a mere trusting to the memory of a tally clerk, who was engaged in landing goods every day. It is too much to ask the Court to believe that the tally clerk, who checks perhaps a ship every day, could swear to any particular case out of a whole cargo, although he had never at any time had his attention particularly called to it. There is no evidence that this case was given into the store at all, and McKenzie and Co., having accepted the position of agent for the consignee, and having acknowledged receiving the case, must account for the property. They cannot show how it has gone astray, and they must be answerable for the value of the case, £90. The plaintiff also claims £50 as damages for being hindered in carrying on his business, but all the business he did here was simply to sell a few cigarettes and then he went away up-country, leaving directions that the case, if found, should be sent back to London. I do not think he has proved any damage beyond the value of the goods lost, and judgment will be entered for £83, being, with the £7 already advanced by defendants to plaintiff, the value of the cigarettes.

Maasdorp and Solomon, J.J., concurred.
[Plaintiff's Attorneys, Messrs. Fairbridge, Arderne and Lawton; Respondent's Attorneys, Messrs. Silberbauer, Wahl and Fuller.]

SUPREME COURT

[Before the Hon. Mr. Justice BUCHANAN (Acting Chief Justice), the Hon. Mr. Justice MAASDORP, and the Hon. Mr. Justice SOLOMON.]

ADMISSIONS. { 1899.
Aug. 23rd.

Mr. Buchanan moved in the applications of Hendrick Christoffel Wilcocks, Henry R. H. Buchanan, and Jacobus Johannes Stoffberg to be admitted as attorneys and notaries of the Court.

Orders were granted as prayed, the oaths being administered in the cases of Wilcocks and Buchanan, and leave granted for the oaths to be taken before the Resident Magistrate of Fraserburg in the case of Stoffberg.

Mr. Buchanan moved for the admission of Andrew Francois du Toit as a sworn translator.

Order granted, and the oath administered.

PROVISIONAL ROLL.

ELLIAS BROTHERS V. GREER.

Mr. P. S. Jones moved for provisional sentence on a promissory note for £228 1s. 2d., and also for judgment, under Rule 329d, for the sum of £433 19s. 3d., less £196 5s. 6d. paid on account, with interest *à tempore morae* and costs of suit.

Provisional sentence granted in the liquid claim, and judgment as prayed in the illiquid claim.

BROWN V. SHORT.

Mr. Buchanan moved for provisional sentence on a promissory note for £30, with interest and costs.

Provisional sentence granted as prayed.

BAM V. STEYN.

Mr. Heydenrych moved for provisional sentence for £24, interest on a certain mortgage bond, with costs of suit.

Provisional sentence granted as prayed.

LANG V. HAY.

Mr. Buchanan moved for provisional sentence on a mortgage bond for £150, with the interest thereon from September 23, 1899, and costs of suit. It was also asked

that the property specially hypothecated be declared executable. The bond had become due by reason of non-payment of the interest.

Provisional sentence as prayed, and the property declared executable.

SIRANGMAN V. MARTIN BEYERS.

Mr. Buchanan moved for the final sequestration of defendant's estate, the provisional order having been granted by Mr. Justice Solomon on August 15.

Granted.

WHITE V. HARRIS.

Mr. Buchanan asked that this matter be allowed to stand over until next Thursday, as he had not had time to go into defendant's answering affidavit.

Postponement granted.

BURTON V. SAMUELS.

Mr. Buchanan moved for provisional sentence on a mortgage bond for the sum of £125, and that the property specially hypothecated by declared executable. The bond had become due by reason of the non-payment of the interest.

Provisional sentence granted, and the property declared executable.

PURCELL, YALLOP AND VERRITT V. HARBSTALN.

Mr. Buchanan applied for a decree of civil imprisonment against the defendant on an unsatisfied judgment of the Court for £38 odd, with £10 costs thereon.

The defendant appeared in court, and said that he had found a purchaser for certain ground belonging to him, and that he would pay the debt due when it was sold.

The Court granted a decree as prayed, but under the circumstances execution was stayed pending payment of the amount due within a month.

ILLIQUID ROLL.

SHERWOOD V. CARTER. { 1900. Aug. 23rd.

Mr. Searle, Q.C., moved for judgment, under Rule 319, in default of plea for £296 6s. 3d.

It appeared from a letter put in from the attorneys who had previously acted for defendant that summons in this matter was

issued as far back as February, 1899, and defendant entered an appearance, but the declaration was not filed until July last, when defendant was in England, whither he had gone at the beginning of May this year, which it was alleged was known to plaintiff. On August 13, the attorneys wrote that they were surprised at receiving a notice to plead, and as it was impossible for them to act under the extraordinary circumstances of the case they withdrew.

In reply to the Court, Mr. Searle said they had served notice upon the attorneys.

Buchanan, A.C.J.: That is not sufficient, as they have withdrawn. You will have to serve it upon the defendant.

Mr. Searle: The summons has been served, and we could have claimed judgment on that. If we only knew that the defendant was coming back we would have stayed matters. We did not want the defendant to be barred, but we had no guarantee that he was going to return at all.

Buchanan, A.C.J.: There has been no proper service of this application, and no order can be made by the Court.

WIENER AND CO. (LIMITED) V. CLARKE.

Mr. Currey moved for judgment, under Rule 319, in default of plea, for the sum of £48 16s., being for goods sold and delivered, together with interest *a tempore morae* and costs of suit.

Judgment granted as prayed.

REHABILITATIONS.

Mr. Gardiner moved for the rehabilitation of Aaron Pieter Hendrickse.

Granted.

Mr. Buchanan moved for the rehabilitation of Gustav Adolph von Broembeen.

Granted.

GENERAL MOTIONS.

IN THE MATTER OF THE MINORS VAN HEERDEN.

Mr. Currey moved for the appointment of a *curator ad litem* in connection with the partition of certain property in which the minors have an interest.

The Court appointed the Resident Magistrate of Cradock to report to the Master on the matter.

WRIGHT V. WRIGHT. { 1900.
Aug. 23rd.

This was an application for an interdict restraining respondent from disposing of the joint estate, for an order to pay over the sum of £100 to enable applicant to institute proceedings against him, and the sum of £15 per month pending the result of such proceedings.

Mr. Howel Jones appeared for the applicant, from whose petition it appeared that she is about to bring an action against her husband for judicial separation on the ground of gross cruelty, a number of instances being given in support of the allegation. It appeared that the defendant has considerable property in King William's Town and a third share in a business carried on there and elsewhere, and also £2,000 on fixed deposit in the Standard and other banks in King William's Town.

The Court granted a rule *nisi*, operating as an interdict, and returnable on September 12, calling upon the defendant to show cause why he should not be restrained, pending the result of the action to be brought by plaintiff, from dealing with or disposing of the landed property, and the sum of £2,000 on fixed deposit, also why he should not pay plaintiff the sum of £50 to enable her to bring her action, and why he should not pay plaintiff the sum of £15 per month as alimony for her and the children of the marriage.

QUEEN V. WILDSCHUT.

Mr. Ward moved for the removal of this trial to the Circuit Court at Beaufort West. Wildschut is charged with the crime of house-breaking.

Granted.

QUEEN V. PICKENAR AND ANOTHER.

Mr. Ward moved for the removal of this trial to the Circuit Court at Beaufort West.

Granted.

IN THE ESTATE OF THE LATE PHILIPPUS JACOBUS FOURIE AND ANNA SUSANNA FOURIE.

Mr. Gardiner moved for an order authorising the transfer of certain property.

Granted.

IN THE MATTER OF THE CAPE COMMERCIAL BANK. IN LIQUIDATION. { 1900.
Aug. 23rd.

Mr. Schreiner, Q.C., moved for the confirmation of the liquidators' report. He briefly pointed out that for so protracted a liquidation, it had been going on since 1882, it appeared to have been very satisfactorily conducted indeed. Eighteen years was, he believed, a record in time. The total amount which passed through the hands of the liquidators was £546,338, including nearly £10,000 earnings in the liquidation and the expenses of the liquidation only amounted to about 2½ per cent. upon the gross amount passing through the hands of the liquidators, which was also a record, which was largely due to the liquidators having given the use of their own offices. There was now in hand a sum of 17s. per share by way of refund to those shareholders, numbering 5,063, who had paid in full the call of £36 per share, which would bring the amount refunded up to over £11. The order asked for in the report was: (1) To confirm this report and the final accounts annexed thereto; (2) in terms of section 40, Act 12, 1868, as to the disposal of the books, accounts, and documents of the liquidation; (3) to deposit with the Master of this Honourable Court one month after confirmation of this report all unclaimed dividends; (4) in terms of section 30 of Act 12 of 1868 to dissolve the bank.

The order was granted as prayed, except with regard to the books, accounts, and documents in the liquidation, which were ordered to be destroyed in three months from this date unless an objection was lodged.

IN THE ESTATE OF FRANCIS LODIEWYK LOCKE. { 1900.
Aug. 23rd.

Mr. Buchanan moved for an order directing the Master to take the necessary steps for the appointment of an executor dative.

It appeared that Francis Lodewyk Locke was a ship's captain who was here in 1837 and purchased a piece of ground situated at Diep River, which still remains registered in his name. He was last in this colony in 1862, and afterwards went to England. Subsequently, it was alleged, he left in a ship for South America, which had not been heard of since. The petitioners were believed to be his next-of-kin, but all that was at present asked for was the appointment of an executor dative, so that the piece of land, which was now valued at between £1,200 and

£1,500, should be sold, so as to avoid the possibility of its being sold in execution to pay rates.

Order granted.

IN THE MATTER OF THE PETITION OF JOHN GOTTFRIED GRUBER.

This was an application for an order to transfer certain property.

Granted.

BEYLEVELD AND OTHERS V. JORDAAN.

This matter was before the Court on August 16, when Mr. Buchanan moved for an order to declare executable certain moneys in the hands of the High Sheriff. The Acting Chief Justice then pointed out that there was a difficulty, as it seemed that the moneys in question had already been attached by another person to found jurisdiction, and ultimately the Court decided that notice be given to the party who had already attached the moneys.

Mr. Buchanan now moved in the matter, and said that notice had been given to the attorneys of the person who had previously attached the money, and they had replied that they did not intend to oppose the present application.

Order granted as prayed.

IN THE ESTATE OF THE LATE ANN JONES.

This was an application for leave to transfer certain property.

Order granted in terms of the Master's report.

TABLE BAY HARBOUR BOARD V. NEW ZEALAND STEAMSHIP COMPANY.

This was an application for a commission *de bene esse* to examine certain witnesses.

Sir Henry Juta, who appeared for the applicants, stated that the commission was intended to take the evidence in England of the captain and other officers of a steamship, but they had since learned that the captain would be out here by September 11, and they therefore asked for a commission in Cape Town as well as the one in London.

Mr. Searle, Q.C., appeared for the defendants, and said he did not oppose the application.

The Court granted the order as prayed, Mr. Charles Leonard being appointed the commissioner in London, and Mr. Howel Jones the commissioner in Cape Town.

BADENHORST V. BADENHORST. { 1900.
Aug. 23rd.

This matter was previously before the Court, when Mr. P. S. Jones moved for an order authorising the High Sheriff to transfer certain property. The property in question is situated in Colesberg, and about August 30, 1899, the respondent, R. J. Badenhorst, handed the deed of transfer to the applicant. Before the deed was passed the town was occupied by the Republican forces. When these forces left R. J. Badenhorst withdrew also, and only recently they had received a letter from him stating that he was in France, and intended going to Holland. After hearing counsel, the Court at the previous hearing ordered the matter to stand over for further information.

Mr. P. S. Jones now moved for a rule *nisi* calling upon the respondent to show cause why respondent's prayer should not be granted.

The Court granted a rule *nisi* returnable November 8, personal service to be effected.

PILLANS AND CO. V. ARISTON (MINERAL WATER COMPANY. { 1900.
Aug. 23rd.

This was an application for an interdict restraining respondent from using bottles and boxes bearing the trade-mark or names of the applicants and for delivery of all such bottles and boxes.

Sir Henry Juta, Q.C., appeared for the applicant.

Mr. Searle, Q.C., appeared for the respondent.

This matter was before the Court on August 14, when judgment was given for the applicant. As, however, respondent had been in default owing to a misunderstanding, leave was subsequently given to him to reopen the case, and the judgment cancelled.

The same affidavits as before were read on behalf of the plaintiff, and also an answering affidavit from the respondent, as well as further affidavits on behalf of the applicant.

After the affidavits had been read and counsel heard, the Court granted an interdict restraining respondent from using bottles and boxes bearing the trade-mark or name of the applicants, with costs.

REGINA V. SMITH. { 1900.
Aug. 23rd.

Murder—Bail.

Where the applicant was awaiting his trial on a charge of murder, and alleged that he shot the native,

whom he was charged with murdering, by order of his superior officer (applicant being then a member of a local police force) and applied to be admitted to bail, the Court refused the application.

This was an application for the release, on bail, of the applicant, Smith, who was charged with the crime of murder.

From the petition and the records of the preliminary examination attached it appeared that the applicant was charged with having on November 22 last year, at Jackalsfontein, in the district of Colesberg, murdered a native. The applicant alleged that he shot the native on the order of a superior officer, he being at the time a member of the local police force. War was then being conducted in the Colony between Her Majesty's Government and the Government of the Transvaal and Orange Free State, and General French, the commanding officer, confirmed the shooting, which was for disobedience of orders. Smith was not arrested until May this year, and he has been in prison since.

Sir Henry Juta, Q.C., for the applicant: The facts are all in prisoner's favour. The question which the Court will be required to consider is: "Will the accused appear to stand his trial?" It was not until six months after the commission of the alleged offence that he was arrested; if he had any fear of justice he would have fled before arrest. Everything points to his standing his trial. Large bail can be found, although accused has no property. The killing was perfectly justifiable; the accused had received orders to shoot the native if he proved to be stubborn. *Russell on Crimes*, p. 94: The killing of a man in obedience to the orders of a superior officer is justified if it is necessary. The necessity clearly did exist in this case.

Mr. Ward, for the Crown: The Attorney-General has thoroughly sifted this matter, and will not consent to bail. The prisoner was allowed to go unarrested for six months because martial law was in force, but as soon as he fell under the control of civil jurisdiction he was arrested. The Attorney-General is not justified in consenting to bail. The matter is in the hands of the Court.

* The applicant was subsequently tried for murder in the Supreme Court and acquitted.

REP.

Buchanan, A.C.J.: As has frequently been pointed out of late it was only recently that power was given to the Supreme Court to grant bail in capital charges, and in such applications the Court is very much influenced by the action taken by the Crown. Under all the circumstances of the present case, and considering the opposition offered by the Crown, the Court is not inclined to grant bail. The application will be refused.*

SUPREME COURT

[Before the Hon. Mr. Justice BUCHANAN (Acting Chief Justice), the Hon. Mr. Justice MAASDORP. and the Hon. Mr. Justice SOLOMON.]

CROWDER V. WHELAN. { 1900.
{ Aug. 24th.

This case, which is an action for an alleged breach of contract, was called.

Sir Henry Juta, Q.C. (with whom was Mr. Buchanan), appeared for the plaintiff.

Mr. Burton appeared for the defendant, and asked that the case be postponed as the defendant was ill in bed with fever. Counsel said he had a doctor's certificate to that effect, and also stated that owing to defendant's illness he had not been able to see him and have a consultation, and consequently could not now go on with the case.

Sir Henry Juta said that under the circumstances he could not oppose the postponement.

The case was accordingly postponed, the Acting Chief Justice saying that they would see on Monday when the time for setting down cases had expired what day they could fix for the hearing of the case.

KIDNEY AND PHILIP V. { 1900.
LEWIS. { Aug. 24th.

This was an action for the payment of the purchase price of certain ground, the plaintiffs tendering transfer of the property.

The plaintiffs were William Lambert Kidney and Edward Fairbairn Philip, and the defendant was Augustus Lewis, and the action was for the payment of a sum of £1,200 due in respect of the sale of certain property at Sea Point, which the plaintiffs alleged had

taken place, to the defendant, the plaintiffs tendering transfer and stating that everything necessary had been done, but the defendant refused and neglected to pay the said amount. The declaration set forth that the plaintiffs were jointly registered as owners of a property at Sea Point, and alleged that this was sold to defendant on July 17 last for the sum of £1,200, a broker's note being duly passed by Messrs. Gliddon and McIndoe, who acted as brokers for the plaintiffs.

The plea admitted the formal allegations as to the parties, etc., and said that the defendant was a partner in the firm of Lewis, Latimer and Co., builders and contractors, and went on to state that the firm obtained an option of purchase of the ground—£10 being given for the option, but this amount to be deducted from the purchase price in case the sale went through, the said option to expire on July 15. The option, it was alleged, was never exercised, but it was alleged that before and after July 15 the brokers, Messrs. Gliddon and McIndoe, attempted to induce defendant or his firm to buy, and did without authority, on July 18, deliver a broker's note in terms of the declaration, purporting to embody a contract of sale. The defendant further alleged that at that time he pointed out that he could do nothing definite until a loan for a certain building scheme had been concluded, which, he stated, was one of the conditions on which negotiations for the purchase of the property had been based.

Mr. Searle, Q.C. (with whom was Mr. De Villiers), for the plaintiffs.

Mr. Buchanan for the defendant.

The first witness called was

William Lambert Kidney, one of the plaintiffs, who said he was the joint owner with the other plaintiff of a piece of land at Sea Point. As to the sale of the land, it was left entirely to witness, and he put it in the hands of a firm of brokers in Cape Town, Messrs. Gliddon and McIndoe. After negotiations, Messrs. Lewis, Latimer and Co. secured, on payment of £10, an option until July 15 to purchase the piece of ground. That was on June 7, when witness met defendant and his partner, and defendant said he could have settled the matter right away if he was sure the Sea Point Municipal authorities would not throw out his plans. The option expired on July 15, and on the Tuesday following (July 17) witness met defendant and asked him if it was all right, and he said it was, and that Mr. Gliddon had sent

him the declaration. There had never been any repudiation. Witness signed his declaration on July 18.

Cross-examined: Witness knew they were going to build, but knew nothing about the loan. He knew nothing about the sale depending upon the building scheme going through. Witness was a broker himself, and there was an understanding to the effect that witness was to receive from Gliddon and McIndoe half the brokerage. The sellers (plaintiffs) were to pay the brokerage.

Albert Gliddon, of Gliddon and McIndoe, brokers, etc., said he believed the letters in the negotiations were written by Mr. Latimer, but he was not sure. Shortly before July 15 witness met Latimer, and he told witness it would be all right. On the afternoon of July 16 witness saw defendant, and asked him what he intended doing with regard to the option. He said he was quite prepared to take transfer. Witness, as conveyancer, asked the full names of the partners in the firm, but defendant said, "No, make it out in my name alone." Witness got defendant's Christian name, and sent him the broker's note next day. The whole thing was so clear that witness only made out the broker's note as a formal matter, and expected to get the declaration of purchase back in a very little time. Witness afterwards saw defendant, and he said he was so busy he could not get the declaration declared to, and witness said that could easily be done, as there were several Justices of the Peace in that building. Later he saw defendant, who said to witness, "Here, you have made a mistake; you charge brokerage against me." Witness showed him that it was transfer duty. A letter was sent to defendant from Messrs. Van Zyl and Buisinné, and after that witness met defendant in Adderley-street, and he seemed annoyed at receiving that letter, and said that he did not think the plaintiffs could force him to take transfer. He did not say why.

Cross-examined: Witness knew defendant was about to build half a dozen houses, and that he needed a loan for that. He said that if he could get his plans prepared and passed by the Sea Point Municipal authorities, which he had no doubt he would, he could raise the loan. Witness denied that on July 15 he saw defendant, when the latter said there was a difficulty about the loan, and the option could not be taken up.

For the defence,

Augustus Lewis, builder and contractor, said he was apparently the defendant. He

detailed the negotiations as to the option, and said that he told Mr. Kidney he would buy if he were certain he could get the loan for the building scheme he had in hand, and even then he must be certain that his plans would not be rejected by the Municipal Council. Witness was not in a position to buy the land without a loan. Witness had absolutely refused to sign the declaration or make himself responsible, either personally or on behalf of the firm. Witness had never signed the declaration, and did not return it because he had not arranged about the loan. He saw Mr. Gliddon again, and practically there was only one conversation between them, and that was to the effect that as they had not arranged the loan, they could not take up the option. Witness did not see Mr. Kidney on July 17, and consequently did not tell him that it was all right, as he had got the declaration. Practically everything was in the hands of Mr. Le Sueur, and if he could get the loan he would buy now. Witness considered it impertinent on Mr. Kidney's part to put the matter in the hands of Messrs. Van Zyl and Buissinné, and consequently he did not answer the letters of that firm.

Cross-examined: When witness saw Gliddon as to his name for the purpose of filling up the declaration of purchase. Mr. Gliddon thoroughly understood that there was no sale if the loan did not come off. On July 28 Mr. Gliddon came up to the office, and witness told him that he could not sign the declaration, but also said that even if they did take up the matter Gliddon's charges would have to come down. Witness thought there was a charge for commission, but Gliddon explained that that was not so. It might have been better if witness had returned the declaration, broker's note, etc., but it would have been much better if knowing the whole circumstances Mr. Gliddon had not had the impertinence to send these. Witness considered the property well worth the money, and his position now was the same as it always was, that if he could arrange the loan he would take the property.

George Latimer deposed that he was present during most of the negotiations for the option to his firm to purchase the ground. It was told to Mr. Gliddon and Mr. Kidney in witness's presence that the only thing that stood in the way of their purchasing the property was the getting of the loan. Witness did not remember seeing Mr. Gliddon on Monday, July 16. Witness never

consented, and would not have consented to defendant taking over the ground in his own name, as all the negotiations were in the name of the firm. Witness on July 17 saw the declaration made out in Lewis's name alone, and Gliddon told him that that was done because it would be much easier to get transfer owing to some technicality of the Dutch law. Later on they saw Gliddon and the plaintiff, and defendant said they could not force him to take up the sale. The loan was also spoken about, and Gliddon asked if he could arrange it for them. Mr. Lewis said that if Mr. Le Sueur could not do so Mr. Gliddon could.

Johannes Le Sueur deposed that he had endeavoured, but unsuccessfully, to raise for Lewis, Latimer and Co. a loan on this ground. Shortly after the option expired witness saw the defendant. On that day the loan had not been passed.

This concluded the evidence.

After hearing Mr. Buchanan, the Court gave judgment for plaintiff for £1,200, less £10 already paid in connection with the option, with costs, plaintiff to give transfer of the property.

Buchanan, A.C.J.: The plaintiffs in this case were the owners of certain property at Sea Point, and it is common cause that defendant and his partner Latimer obtained in May last an option of buying this property for the sum of £1,200. The option expired on Sunday, July 15, and on the following Monday the broker in whose hands the property had been placed saw the defendant Lewis, and according to his account concluded the purchase with him for the sum of £1,200, and the broker also says that the defendant Lewis said to him: "Do not put the property in the name of the partnership; put it in my own name." Defendant, however, said that what took place in this transaction was that he was quite willing to purchase, provided he could raise a loan. Counsel's contention now is that the parties never entered into an agreement, and therefore absolution from the instance should be given. The question we have to decide is, was the contract completed on that occasion or not? There is this conflict of testimony, but looking at the conduct of the parties and the correspondence that passed between them, I have no doubt in my own mind that the contract was completed on this day. Mr. Gliddon says that on the afternoon of July 16, when this concluded contract was made, he got the de-

defendant Lewis's full name, so as to put it in the papers to pass transfer, and on the 17th Mr. Gliddon, who was a conveyancer as well as broker, prepared a declaration of purchase, which he sent round to defendant, and the following day he wrote a letter saying: "Herewith I send you broker's note; kindly let bearer have the declaration of purchase duly completed, left with you yesterday." Both this declaration and the broker's note were kept by defendant, and have not been returned to this day. On the 19th Mr. Latimer wrote: "Owing to our Mr. Lewis being laid up with an attack of fever, he will be unable to fix up the matter of the Sea Point ground to-day. Kindly explain this to your client. Probably he will be able to attend to the matter to-morrow." It is said that Mr. Latimer was present at these negotiations, and that he was present when the sale was concluded. If so, I take it that this is not a letter which would be written by a party who was present at a contract not concluded. There is no repudiation of the concluded contract, no repudiation of the declaration of purchase, and no repudiation of the broker's note. Mr. Lewis says the purchase was put in the name of himself in consequence of some technicality in the Roman-Dutch law, which I cannot understand. At any rate, Mr. Lewis's name only is inserted in the declaration, and nothing whatever is said in this letter about the contract being for both, or that this contract is not completed. He says: "We have got your declaration and the broker's note, but Mr. Lewis is unwell, and cannot attend to the matter to-day, but will probably fix up the matter to-morrow." In addition to this, Mr. Gliddon prepared an account showing the charges for passing transfer, and this account was sent to defendant. Afterwards the defendant says: "This account is not correct; you have charged me with brokerage." He does not say "the transaction has not gone through; why do you send the account at all?" but he says the charge will have to be reduced. It would have been quite natural for him to say that the transaction had not been concluded, and asked why the account was sent. But, on the contrary, he speaks of the brokerage. We have it therefore that the declaration was made out and kept by defendant, that the broker's note was made out and kept by defendant, and that an account was sent, and there was no repudiation, and that there was no answer whatever to the letters repeatedly sent to defendant.

The defendant says that he saw Mr. Gliddon and told him, but it is curious that there was not a single reply to the letters, and nothing said as to the contract not being completed. I have come to the conclusion that the contract was completed, and that the plaintiffs are entitled to the £1,200. They have already received £10 for the option, and judgment will therefore be as prayed, less the £10 paid for the option, with costs.

Maasdorp and Solomon, J.J., concurred.

[Plaintiffs' Attorneys, Messrs. Van Zyl and Buissonne; Respondent's Attorneys, Messrs. Silberbauer, Wahl and Fuller.]

VAN WYK V. KOGELENBERG. { 1900.
Aug. 24th.

Witness expenses—Rule of Court
315—Unauthorised payment—
Ratification.

Plaintiff having a case in the Supreme Court asked defendant to give evidence and paid him his maintenance and travelling expenses.

Subsequently one Pocock, who had been, but was not at the time, plaintiff's agent, paid defendant a further sum of £10, as witness expenses, and this payment was ratified by plaintiff repaying Pocock the £10.

Plaintiff then sued defendant for the return of the £10 alleging that there had been an agreement that nothing beyond travelling and maintenance expenses should be paid.

The Magistrate however found that there had been no such agreement.

Plaintiff appealed, but the Court upheld the Magistrate's decision although they intimated that had the summons in the Court below contained an allegation that defendant had been overpaid and there had been evidence to substantiate that allegation the Court might have interfered. The appeal was dismissed with costs.

This was an appeal from a decision of the Resident Magistrate of Clanwilliam in a case in which Albert Erasmus Leopold van Wyk sued Jacobus Kogelenberg for the refund of £10, being an amount overpaid him by one Pocock, who had acted as agent for the plaintiff. Pocock paid the £10 to defendant on account of his expenses as a witness in a certain case which came before the Supreme Court on November 14 last year. This sum, it was alleged, had been paid by Pocock entirely by mistake, and the plaintiff now said the amount should never have been paid, inasmuch as by a certain verbal agreement existing between plaintiff and defendant the latter was to claim nothing more than the actual disbursements made and incurred by him or on his behalf for his necessary travelling and boarding expenses as a witness, which disbursements were in due course paid him by the plaintiff.

The Magistrate, after hearing the evidence, gave judgment for the defendant with costs, and against this judgment the plaintiff appealed.

The Magistrate gave his reasons for his judgment as follows: I was not satisfied that any agreement by which defendant was to forego his witness expenses was actually concluded. Pocock, however, states that he knew when paying defendant £10 that an agreement existed between plaintiff and defendant, by which defendant was to forego his witness expenses. Before paying this £10 to defendant Pocock ceased to be plaintiff's agent, plaintiff having withdrawn his authority. Notwithstanding this, Pocock, wholly unauthorised, pays an amount to defendant, and charges plaintiff with it; he says he was aware no witness expenses were to be claimed from plaintiff by defendant in this case in the Supreme Court. Plaintiff afterwards entirely removes his agency from Pocock. Pocock after the removal advances an amount of money to defendant, and makes plaintiff refund the same to him. In my opinion Pocock is the person who should have been sued. Plaintiff the moment he saw this amount on his account repudiated it.

Mr. Buchanan, for the appellant: Our ground of appeal is based on the *condictio indebiti*. Defendant received £10 too much, the agreement being that plaintiff should pay his travelling expenses and maintenance in Cape Town. These he got, and in addition to this he received from Pocock a sum of £10, to which he was not entitled, it

having been paid him by mistake. Rule of Court 315 fixes a witness's expenses. There seems to have been a misunderstanding between plaintiff and Pocock. Plaintiff paid the expenses of defendant according to the scale fixed by the Rule of Court. Pocock then, his authority as agent having been withdrawn, pays defendant an extra amount of £10 without consulting plaintiff. Defendant was, in fact, paid twice over.

See rule 315, section 2, in regard to the amount to which defendant is entitled.

[Buchanan, A.C.J.: He seems to have had more than he was entitled to.]

The Magistrate found there was no agreement, and yet he gives his judgment on the supposition that there was.

Mr. McGregor, for the respondent, was not called upon.

The Court dismissed the appeal.

Buchanan, A.C.J.: The plaintiff in this case having an action in the Supreme Court, required defendant as a witness, and he alleges that he made an agreement with defendant that he should attend the Supreme Court and give evidence in the case then pending without charging witness expenses, that he should claim nothing more than the actual disbursements necessary for travelling and for boarding expenses in Cape Town, and on this alleged agreement he sues defendant for the return of £10, which his agent Pocock paid defendant in spite of his agreement. That case came before the Magistrate's Court, and the only question before the Court was whether such agreement had been entered into or not. The Magistrate found, after hearing the parties, that there was no such agreement. The evidence supports that finding, and on that ground we cannot interfere with the Magistrate's judgment, the whole ground on which the summons was based being the existence of that agreement. But the Magistrate has gone into the merits of the case and questioned the conduct of Pocock, who was plaintiff's agent in the case pending in the Supreme Court. Pocock now appears in the Magistrate's Court on behalf of the defendant, and from the Magistrate's reasons it would appear that Pocock acted in a way altogether injudicious, having, after plaintiff had withdrawn his agency, and notwithstanding the agreement between plaintiff and defendant, paid the defendant the sum of £10 towards his witness expenses. Something was due to the defendant for witness expenses assuming there was no agreement, but £10 was considerably in excess of the sum due. It is admitted that

plaintiff not only paid defendant's railway fare coming to Cape Town, but paid for his maintenance here, and taking the highest charge that would have been allowed under section C of Rule 315, it would have been a sum not exceeding 7s. 6d. to 15s. a day, and this would have to cover maintenance. That Pocock overpaid defendant there is very little doubt, but unfortunately the plaintiff has ratified the contract so far as Pocock is concerned, and paid him the £10, and therefore it is very clear that by this ratification he cannot sue Pocock. Pocock's conduct is not excusable, but as he is not an attorney of the Supreme Court we cannot interfere. This is not an action in the Supreme Court, but comes now before us solely upon the question as to whether there was an agreement or not, which the Magistrate found did not exist, and as far as that is concerned I think the appeal must be dismissed. We can simply go now into the question as to whether or not there was an agreement. If there had been a clause in the summons alleging that defendant was overpaid, and there had been evidence to that effect, we might have done something but there is no such clause, and no such evidence, and no evidence as to the agreement. The Magistrate found on the conflicting evidence that no such agreement had been proved, and as he had the witnesses before him and could judge as to their credibility, the appeal must be dismissed, with costs.

Maasdorp and Solomon, J.J., concurred.
[Appellant's Attorney, P. M. Brink; Respondent's Attorneys, Messrs. Walker and Jacobsohn.]

SUPREME COURT

[Before the Hon. Mr. Justice BUCHANAN
(Acting Chief Justice), the Hon. Mr.
Justice MAASDORP, and the Hon. Mr.
Justice SOLOMON.]

AHLBOM V. LITHMAN AND CO. { 1900.
Aug. 27th.

This was an action brought by Carl Erik Ahlbom against Karl Lithman, trading as Lithman and Co., at Cape Town.

Sir Henry Juta, Q.C. (with whom was Mr. Buchanan), appeared for the plaintiff.

Mr. Searle, Q.C. (with whom was Mr. Gardiner), appeared for the defendant.

Sir Henry Juta, in opening the case, said that the plaintiff in 1890 entered defendant's service as his manager, and in October, 1892, an agreement was entered into between the parties and one Peters, by which the plaintiff was entitled to a salary and commission on the net profits of 25 per cent. In order to arrive at these profits certain items had to be deducted, including £30 a year and £100 a year, the latter having to be paid as rent for certain premises in Adderley-street, where business was being carried on by the firm; also £250 for the rent of a factory and the use of machinery in Prestwich-street. There were also deductions for interest, costs, charges, and expenses. The profits due to the plaintiff were to be placed to his credit on the capital account, and to remain as part of the working capital, and bear interest at 6 per cent. The agreement terminated on June 30, 1899, and according to it the plaintiff had to receive the moneys due to him. The defendant had drawn up a balance-sheet for 1898 (the balance for 1899 had not been prepared), and the plaintiff alleged that the accounts disclosed were wrong in certain particulars. The Court would be asked to say whether certain items could or could not be charged, and then the matter would have to be referred to some accountant to make the necessary calculations. The plaintiff objected to the first item of rent for the Adderley-street offices, which were given up shortly after the agreement, and the whole business transferred to Prestwich-street. The defendant owned the Adderley street premises, and he let them at a very good rental, all of which was credited to him. He afterwards sold the property at an enhanced value, and put £2,000 into the business and received 6 per cent. interest. But in his books he kept charging the £100 rental, though as a matter of fact the business was no longer carried on in Adderley-street. The defendant's plea was that the plaintiff agreed to this. Plaintiff next objected to this, that in 1893 the defendant borrowed £3,000 from the South African Association upon the Prestwich-street premises, and the plaintiff further alleged that the defendant took out of the stock of the business large amounts of goods for building these premises, and the business itself could not have paid for the premises and stock. He then raised the money on mortgage, and the plaintiff alleged that he used the

money in order to build the premises, the very one upon which he got rental. Plaintiff also alleged that the defendant had no right to deduct the interest on this money before he paid out any profits. The defendant alleged that the loan was raised and placed in the business, which required more capital for advantageous use, but plaintiff said that it went into the buildings. The third item the plaintiff objected to was that in June, 1893, there was a loss of £1,152 in the business, which should have been deducted from the defendant's capital account, because there was nothing in the agreement to say that the plaintiff had to pay losses, but the defendant did not deduct from his own account, and had continued to charge the 6 per cent., which was deducted from the profits before the plaintiff got anything. The defendant's explanation of this was to get rid of it by appreciating the value of the property by £652, and making himself and the architect certain allowances. Plaintiff denied that he agreed to this at all. In 1895 the defendant wrote off £190 as depreciation of the value of the premises, and deducted it from the value of the profits. Plaintiff contended that he was entitled to a fourth of that. Prior to 1895 the defendant's wife advanced him £2,000, upon which she received compound interest, and an account was opened in the books called the Rosebank property account, to which a large amount of stock was supplied, Mrs. Lithman having commenced to build houses. This was Mrs. Lithman's account, and in August, 1895, her indebtedness to it was £1,798, at which it remained until June, 1896, but she was not charged with any interest, though she got all the interest due by the partnership to her. That, the plaintiff said, was not a proper way of doing things. The last point was that the defendant had not credited the plaintiff with interest on what was called plaintiff's capital account, namely, the amount of profits which remained to his credit in the books except in the year ending June, 1898. The defendant, in his plea, alleged that plaintiff's debit was always greater than his credit, and that he never had anything to his credit. Defendant said that the plaintiff had full opportunity of inspecting the firm's books, and did so, but never raised any of the objections now brought forward. Plaintiff's case was that there was £1,047 5s. 5d. due to him, but defendant considered that only about £400 was due.

The first witness called was

Carl Erik Ahlbom, the plaintiff, who said he entered defendant's employ in 1890 as manager of the factory, and in October, 1892, an agreement, retrospective and dating from July 1, 1891, was entered into between witness and Peters and defendant. Under this agreement £250 was to be paid for the rent of the factory in Prestwich-street. This rental was calculated on the interest on the £3,000 required for the building, and the remainder was rent for the machinery. Witness drew up the plans for the new building, and was the only architect, but he did not receive the £150 shown in the books for architect's fees. For the offices in Adderley-street £100 rent was to be allowed, but in 1893 they removed their offices to the factory, as defendant was able to get a good price for the Adderley-street property. When the offices were removed there were no fresh buildings put up at the factory, but a staircase and some partitions were erected in a portion of the factory for which they were already paying rent. Witness never agreed to pay rent for these offices, and never knew it was being charged every year. Witness had nothing to do with the book-keeping, and knew nothing about book-keeping. Witness did not know that defendant was charging interest on the loan of £3,000, which he knew had been raised for the erection of the new building, and had never agreed to this charge being made before the profits were calculated. In June, 1893, as a result of a fire in March, 1892, there was a loss in the business. Witness did not know that that loss had been got rid of by writing up the buildings £620, allowing £350 for defendant's time, and £150 architect's fees. Witness knew nothing about the writing-off the value of the property in 1895, and had never agreed to that. Had he known at the time he would have objected. As a matter of fact the property had considerably increased in value at that time. Witness knew nothing about Mrs. Lithman's account, except that special prices were quoted, and there was to be no discount. Their ordinary custom was that if accounts were paid within thirty days 5 per cent. discount was allowed; if paid within three months 2½ per cent., and six months par. If not then paid bank-rate of interest was charged. The account in the name of witness's wife was really witness's. Peters left in May, 1899, and witness then began to make inquiries into the business, ultimately giving the notice required for termination of the agreement in June, 1899. Up to then witness believed that his account was being credited with interest according

to the agreement. Witness had never gone into the accounts and debated them, nor had a full account been furnished him.

Cross-examined: Peters was general manager of the office, but defendant had the supervision of the books. When the agreement started the books were taken away from Peters and given to Mr. Kirkman. Defendant was in England in 1897, and in that year £500 was written on the value of the property in the Dock-road, but witness said he would have nothing done without defendant's consent, although it would have been to his interest to have had it done. He did not know whether it was struck out after defendant came back. Witness did not know that when Peters, who was in the business under the same agreement, left the business he was settled with on the same basis as that which witness now objected to.

Re-examined: When the agreement was made it was put in the safe, and witness never saw it again until after he had severed his connection with the firm. That was because he thought everything was all right.

John Edward Paul Close deposed that he was engaged by defendant to examine the books. Witness detailed at length his examination into the books, which supported the claims made in the plaintiff's declaration.

Hy. Gibson gave evidence as to the loan from the South African Association.

This closed the case for the plaintiff.

For the defence,

Karl Wilhelm Lithman, the defendant, deposed that he carried on business in Cape Town as Karl Lithman and Co. Before the agreement, Peters had been in witness's employment from 1885, and the plaintiff from 1891. The agreement was made in 1892, but it was agreed that it should go back to 1891. The premises were burned down in March, 1892, and then the land on which the buildings had stood was exchanged for another piece on the Dock-road, and the factory erected on the latter. At the time of building there was no thought of offices, but the offices were afterwards removed there from Adderley-street, as it was more convenient for the business. When the offices were transferred from Adderley-street to the factory it was arranged, some time about the end of 1892, that the rent for the whole should be £350. The offices were transferred to the new building about the time these were erected. Before construction was finished they decided they should have offices in the new premises.

Some time after they left the Adderley-street offices witness sold the latter for £2,750. There was a bond of £675 on them, and £2,000 was put into the business. The money borrowed from the South African Association was put into the business as ordinary capital.

By the Court: The money for rebuilding the premises was taken out of the business.

Examination continued: Owing to the fire and bad debts there was a loss of over £1,100 on the year 1893, and this Peters and plaintiff agreed should be made up as stated, viz., by writing up the value of property, putting down architect's fee and allowance to witness for his time. As to Mrs. Lithman's account, it was arranged that instead of crediting her with discount on her goods she should get the 6 per cent. on the money she had in the business. Interest was allowed on plaintiff's profits in one year as a bonus, witness having been in England then, but otherwise it would be found that plaintiff's account was overdrawn. Plaintiff had had full access to the books, and was in the office off and on. In the year there was a loss of over £1,100. Witness did not charge the 6 per cent. on his capital. That was all under the same agreement. Witness settled with Peters on the same basis as he now proposed to settle with plaintiff. The latter knew of the settlement between witness and Peters.

Cross-examined: The year witness did not charge the 6 per cent. there was a loss, and if he had charged the 6 per cent. it would have increased the loss, and it was agreed that unless otherwise arranged the loss had to be deducted from witness's capital account. There was no generosity in his not charging the interest, and he did not say there was. The evidence of Peters was taken on commission on witness's behalf. Witness did not agree with Peters's statements as to the Adderley-street offices. Peters also said that the £3,000 raised on loan had gone into the building of the new premises, and witness admitted that part of it had done so. Peters looked after witness's books up to the time he left, and witness did not agree with Peters when he said otherwise. Witness disagreed with Peters on several points, such as the discussion of the yearly financial statement, etc.

Howard Kirkland said he was now general manager of defendant's business, having entered that business as bookkeeper and confidential clerk in 1890. Witness kept the books from that time up to 1896, and also from 1896 onwards. From time to time,

while witness was there, plaintiff had access to the books, and looked at them once a week or once a fortnight. The loss of £1,152 was written off in the manner it was in accordance with an arrangement between defendant, plaintiff, and Peters, the last-named two suggesting it. The year 1894-1895, when £190 was written off the property in Dock-road, was a good year. Witness knew that Peters and plaintiff knew of that amount being written off. Witness had always been on friendly terms with plaintiff until lately. The offices were removed from Adderley-street to the new building simply as a matter of convenience. Peters and plaintiff knew no reduction had been made in the sum total of the rent charged, £350. With regard to the Rosebank houses there was an amount of £2,500, goods supplied at ordinary prices, on which Mrs. Lithman would have been entitled to 5 per cent. discount, which would be more than the amount allowed for interest on the money she put in the business.

After the evidence of Axel Peters, taken on commission, had been put in, the case was closed.

Buchanan, A.C.J.: In 1892 the defendant was carrying on business in Cape Town as a merchant, and had in his employ the plaintiff and one Peters. He entered into an agreement with these parties which in its terms seems to be very generous towards them. He allowed himself £30 per month, and he allowed each of these two clerks £20 per month, and he agreed that the two latter should each have a commission of one-quarter of the profits, reserving half the profits to himself. In calculating these profits certain deductions were made before ascertaining what the profits were, viz: first, the repayment of the £20 per month paid to plaintiff and Peters; secondly, the sum of £30 per month paid to the defendant himself; thirdly, the deduction of £100 per annum for rent of the offices in Adderley-street, and a payment of £250 per annum as rent for the factory and machinery used in the business. Accounts were made up annually, and balance-sheets struck, but I do not think there has been such a debate of accounts between the parties as to prevent these accounts being reopened now. When we look at these accounts we find certain items objected to by plaintiff. The remuneration of the plaintiff and Peters is admitted, as is the payment of £30 per month to the defendant. With regard to the £100 per annum for the office in Adderley-street, although this office was

used when the agreement was entered into, shortly afterwards the office was removed from Adderley-street to the factory, for which a rent of £250 was required by the agreement. Notwithstanding this, rent continued to be charged for this office in Adderley-street, and I am clearly of opinion that the defendant is not entitled to have both the office in Adderley-street and the rent. When the office in Adderley-street was given up the £100 for rent was no longer payable. It is true that the office put in the factory was more commodious, but still no additional buildings were required, and it only amounts to this, that part of the premises, for which a rent of £250 was being paid, instead of being used for a factory was used as an office. Now the rent for the factory, £250, was reckoned at 5 per cent. on the value of the premises and land, and that certainly is a very liberal way of calculating, and as far as the plaintiff is concerned, not an excessive charge; on the contrary, ordinarily speaking, it would be a very moderate charge. The factory had been burned down, and rebuilt by the defendant, and to do so he borrowed the sum of £3,000. This amount he put in the books of the business, but he took out of the books of the business an amount calculated at £3,000 for the purpose of rebuilding, and now in the accounts he charges the business with interest on this £3,000 as well as rent. Now it is clear that the defendant cannot have both the interest on this £3,000 and the rental for the building erected with this £3,000, and therefore as regards these two items—the £100 per annum for the offices in Adderley-street and the interest on the £3,000—the plaintiff must succeed in his claim to have them struck off the accounts. There are several items which the plaintiff has raised. One is that a loss of £1,152 was made in the year 1893, which he says ought to have been deducted from the capital account of the defendant, that is, that his capital should have been reduced by that amount. Now this agreement made between plaintiff, Peters, and the defendant, although providing for the distribution of the profits in the proportion of a quarter each to the plaintiff and Peters, and one-half to the defendant, makes no provision whatever for the distribution of the losses. Defendant has taken the whole of this loss upon his own shoulders. Here again he has made a liberal and generous allowance to the plaintiff and Peters, and as in this year defendant suffered a severe loss of £1,152, it

is not at all surprising that the other persons agreed to have the amount adjusted in the way it has been done, as a very small compensation on their part, considering the large loss defendant suffered. The plaintiff said he never entered into such an agreement, but I think this is a mistake on his part. Kirkland tells us this was agreed to, defendant also said so, as did Peters. It is true that the relations between plaintiff and Peters were strained, but I remark that in his evidence taken on commission Peters's conduct towards plaintiff is rather favourable than otherwise. I think that the fact that this agreement was entered into has been clearly proved. It is probably a lapse of memory on plaintiff's part when he says it was not. It is not an unreasonable agreement, and this amount should not be reopened in the debate of accounts. Next, in the year 1895 a deduction of £190 was made, or rather written off the value of the premises. Defendant objects to this item, but here also Peters says it was agreed to, and when we see that the plaintiff and Peters, in the event of a certain occurrence happening, viz., defendant dying or retiring from business, would have the benefit of this, it is not surprising that in a good year they should agree to have the value of the property written down in the books, so that in the event of their taking it over they should have to pay less. Defendant said this was agreed to, Peters says the same, and the bookkeeper, Kirkland, says that he even discussed the matter with plaintiff. Therefore that item also is out of the question. Then plaintiff objects to interest not being paid on Mrs. Lithman's account. Mrs. Lithman was a customer of the firm, having bought certain things from them, and she was not charged interest on her account. This account must be treated like any other customer's account, and I do not see that plaintiff can call upon defendant to charge that amount of interest now upon an account of a customer which has been closed. Then there is a claim that plaintiff be allowed interest upon his capital account. Defendant says that he only allowed that one year as a bonus when he was away, but that for years plaintiff had overdrawn his capital account, and that therefore he had no capital. However, if in a debate of accounts it should be found that with the additional amount to be placed to plaintiff's account—his share of the rent of the Adderley-street office charged and the interest on the £3,000—his capital is not overdrawn then he is certainly entitled to

interest on the amount not drawn against. However, the matter must be referred to an accountant for debate, and report to the Court as to the amount actually due to plaintiff. In this debate it must be understood that the accountant must deduct the rent of £100 per annum for the Adderley-street office, deduct the interest on the loan of £3,000, and allow any interest that may have accrued on plaintiff's capital account.

Maasdorp and Solomon, J.J., concurred.

Mr. Nash was appointed accountant, to whom the accounts should be referred for debate.

[Plaintiff's Attorneys, Messrs. Silberbauer, Wahl and Fuller; Respondent's Attorneys, Messrs. Fairbridge, Arderne and Lawton.]

SUPREME COURT

[Before the Hon. Mr. Justice BUCHANAN (Acting Chief Justice), the Hon. Mr. Justice MAASDORP, and the Hon. Mr. Justice SOLOMON.]

SMIT V. SMIT. { 1900.
Aug. 28th.

This was an action brought by Helena Katherina Smit against her husband, Isaac Jacob Smit, for restitution of conjugal rights, failing which for divorce, with forfeiture of the benefits of the ante-nuptial contract entered into between the parties, and the custody of the minor child of the marriage.

Mr. Gardiner appeared for the plaintiff, and Sir Henry Juta, Q.C., watched the case on behalf of the defendant.

The declaration stated that the plaintiff lived at Worcester, and the defendant was a general dealer at Graaff-Reinet. They were married at Worcester on September 20, 1892, and there is one child of the marriage, a girl aged seven. About March, 1896, the plaintiff went to her mother's at Worcester, with defendant's consent, and subsequently the defendant refused to receive her or acknowledge her as his wife. It was alleged that she was entitled to certain furniture of the value of £112, the parties having been married by ante-nuptial contract. She now claimed restitution of conjugal rights, or in de-

fault a decree of divorce, the custody of the child, and £3 per month until the latter is sixteen years of age. The plea was that the defendant was willing to receive his wife, to give up the furniture, but denied the value placed upon it by the plaintiff, and claimed the custody of the child.

The first witness called was

Helena Katherina Smit (born De Villiers), who said that she was at present supporting herself by teaching. She was married to defendant on September 20, 1892, and previous to that they entered into an ante-nuptial contract, by which certain furniture and a harmonium were secured to her. She valued the property, including the harmonium, at £112 when she left. In 1893 witness's mother came to visit her, and at defendant's suggestion witness slept with her mother. After her mother left defendant refused to live again with her as his wife. In 1896 witness went, with her husband's full consent, to visit her mother at Worcester. When she went back her husband received her, but said he was sorry to tell her that he did not love her as he ought. In January, 1895, witness, with defendant's consent, again visited her mother, but when witness wanted to go back to her husband, and wrote to him for money to do so, he wrote to her mother saying that he did not want her back. He afterwards wrote emphasising the fact that they could never live together again, and saying witness's violent temper was the cause. He offered to support her. At the time he wrote witness was living in the house at Graaff-Reinet, but defendant had left, taking the child with him. He afterwards brought the child back to the house, and witness left with it for Worcester. She did so with defendant's consent. (Counsel here read correspondence between defendant and plaintiff's mother, in which defendant pressed for plaintiff's consent to a voluntary separation, defendant further saying the child could remain with plaintiff for the present, but stating at the same time he did not relinquish his rights to its custody.) Continuing, witness said that as a matter of fact the child had remained with her up to now. Her mother wrote the letters on witness's instructions, she being very ill at the time. From the time that they parted witness had received no support from defendant, but for the child he started sending 25s. a month, afterwards increasing this to £1 10s. a month, while for the last year he had regularly sent £3 per month. When witness was with him defendant had a good business, and also had some landed property.

Cross-examined: Witness would prefer the money to the furniture.

Alida Maria de Villiers said she was a widow, and the mother of the plaintiff in this suit. When witness first visited plaintiff and defendant after their marriage they appeared to be on friendly terms so far, but there appeared to be something not quite as it should be between a young married couple. Afterwards defendant asked witness to take her daughter back. Proceeding, witness corroborated plaintiff as to the latter since residing with her at Worcester, and defendant contributing from £1 5s. to £3 for the support of the child. Witness could not say what the value of the furniture at Graaff-Reinet was.

During the course of argument, Mr. Gardiner agreed to accept, in case defendant refused to restore plaintiff her conjugal rights, and a decree of divorce was granted, £50 instead of the furniture, the plaintiff to surrender to defendant a life policy of his she held.

Buchanan, A.C.J.: It is very unfortunate that these parties should have had serious differences, and there is evidently something in the background that has not come before the Court. I am glad, however, to find that the case is free from any charge or counter charge of misconduct. The order prayed for will be granted, the defendant to receive plaintiff on or before October 1, failing which to show cause on October 12 why a decree of divorce should not be granted, the plaintiff to have the custody of the child, to which the defendant may have access at reasonable times, with leave to move at some future time if desired for the custody of the child, defendant to pay £3 a month for the support of the child until she is 16 years of age, and also to pay the plaintiff £50 for the furniture mentioned in the ante-nuptial contract, plaintiff to surrender the life policy, and defendant to pay the costs.

[Plaintiff's Attorneys, Messrs. Walker and Jacobsohn; Defendant's Attorneys, Messrs. Van Zyl and Buissonne.]

TOWNSHEND, TAYLOR AND { 1900.
SNASHALL V. WILLIAMSON. { Aug. 28th

This was an action in which Messrs. Townshend, Taylor and Snashall, of Cape Town, sued Andrew Williamson, of East London, for the value of goods sold and delivered.

Sir Henry Juta, Q.C., appeared for the plaintiffs, and Mr. Currey appeared for the defendant.

From the declaration, it appeared that the action was to recover from the defendant, a butcher, of East London, the sum of £24 12s. 6d., the value of certain calendars supplied, as well as £1 8s. 4d., shipping expenses. The plea was that the goods were to be delivered early in December for distribution amongst customers, and that they were not delivered until January 8.

Buchanan, A.C.J., drew attention to the smallness of the claim, and asked why such a case had come before the Supreme Court.

Sir Henry Juta said that the point was that the defendant lived at East London while plaintiffs carried on business in Cape Town.

James B. Fish, the manager of James Coote and Co. at East London, said that he remembered on December 22 certain goods coming for the defendant with charges £1 8s. 4d. to pay thereon. Witness sent an account to the defendant the same day, and the same day in the afternoon witness sent his foreman, Wilde, over to defendant for the purpose of telling him that the case was at his disposal on payment of the charges. Wilde came back, and the money was not paid or tendered. On January 8 witness met defendant's bookkeeper in the street, and mentioned about the case and the charges, and in consequence of the conversation they had the goods sent to witness, and McDonald signed the receipt, which stated that it was for a case of almanacs. At the same time as witness received these calendars he received a number of small parcels of calendars for other people.

Edmund H. Wilde deposed that he was sent by the last witness to defendant's place of business to ask for the charges or a guarantee that they would be paid, so that the case might be delivered. Mr. McDonald said that defendant had gone up the line, and witness said they were not going to deliver the case unless the charges were paid or a promise given that they would be paid.

For the defence,

Andrew Williamson, the defendant, deposed as to the agreement being made in East London for the delivery of the calendars in the early part of December. He would have taken them on December 22, when they arrived, and he sent one of his assistants to Coote's to tell them to send up the calendars at once, but they did not do so. He sent again in the afternoon, but still they were not sent. Had the calendars

been delivered to him he would have paid the charges and deducted the amount off the price of the calendars. Witness suffered great loss through not having these calendars. His customers grumbled because they did not get them, and the other butchers in town had given their customers calendars, and consequently witness had to treat his customers to joints of meat and to other things. Witness was absent up the line on January 8, returning on the morning of the 12th, and when he heard the case of calendars had been delivered he immediately wrote repudiating the delivery.

John McDonald, bookkeeper to the defendant, said that in April, 1899, he was present when the calendars were ordered, and they were to be delivered not later than the early part of December, but delivery would be taken earlier if tendered. Witness did not remember seeing Wilde on December 22. Defendant was not up the line that day, and he sent the boy Jacobus to Coote and Co., but Jacobus returned without the calendars. He was again sent in the afternoon, but the calendars were not delivered. On January 8 defendant was absent from East London, and the case was brought to the shop, and witness gave the receipt. He was not asked to pay any charges, but on January 8 he met Mr. Fish in the street. Mr. Fish asked what about the calendars, and witness asked why he did not send them. There was nothing said about charges. Witness did not know the case contained calendars when he gave the receipt for the case.

Jacobus Rontganger, order boy to the defendant, said that on December 22 defendant sent him to Mr. Coote's office. Witness saw the clerk and said they must send up the calendars at once. The clerk went into the inner office, and on returning said that would be done. Later witness again went there, and saw the same clerk, and told him the calendars must be sent up at once, and the clerk said that would be done. Nothing was said on either occasion about the charges.

After argument,

Buchanan, A.C.J.: This is really a ridiculous dispute, and has evidently arisen out of temper. The defendant ordered from the plaintiffs some calendars which were to have been delivered early in December, but owing to special circumstances the plaintiffs were delayed in delivering the goods, and then arose a dispute about landing charges between the landing agent and the purchaser. There has been all this

worry and trouble and expense over a silly dispute. The parties ought never to have allowed the case to come into Court. The plaintiffs have been wrongfully forced into the Supreme Court by the action of the defendant. Judgment will be for the plaintiffs with costs.

Maasdorp and Solomon, J.J., concurred.
[Plaintiffs' Attorneys, Messrs. Silberbauer, Wahl and Fuller; Respondent's Attorneys, Messrs. Fairbridge, Arderne and Lawton.]

SUPREME COURT

[Before the Hon. Mr. Justice BUCHANAN (Acting Chief Justice), the Hon. Mr. Justice MAASDORP, and the Hon. Mr. Justice SOLOMON.]

DALE V. NORWICH UNION FIRE } 90).
INSURANCE COMPANY. } Aug. 28th.

This was an action brought by Henry Dale against the defendant company to recover the sum of £1,200 due on an insurance policy.

The plaintiff in his declaration stated that he was a general dealer carrying on business at Salt River, and the defendant was a fire insurance society duly incorporated in England, and carrying on business in this colony and elsewhere. On or about July 13, 1899, the plaintiff effected with the defendant a policy of insurance to the extent of £1,200, being (a) £1,000 on stock-in-trade; (b) £50 on fixtures; (c) £150 on household goods; all the property of the plaintiff, contained in a building built of brick and stone under iron roof, situate on Albert-road, Salt River, and occupied by the plaintiff. The said policy was of full effect on March 26, 1900, on which day a fire broke out in the aforesaid building and destroyed all the stock-in-trade, fixtures, and household goods insured by the plaintiff to the amount of £1,200. The declaration went on to say that at the time of the making of the said policy and thereon until and at the time of the damage and loss aforesaid, plaintiff was interested in the said property, insured to the amount of the insurance thereof, and that he had complied with all the conditions of the said policy to entitle him to demand from the defendant the aforesaid sum of £1,200, but the defendant re-

fuses to pay him the said sum or any part thereof. Wherefore the plaintiff prayed judgment for (1) the sum of £1,200, with interest thereon *a tempore morae*; (2) alternative relief; (3) costs of suit.

The defendant in his plea admitted the formal allegations as to the parties, and admitted the insurance, save that he denied that there was stock-in-trade, fixtures, and household goods to the value of £1,200 in the building as the date of the fire. He admitted that the policy was in full force and effect at the time of the fire, but denied that plaintiff had complied with the conditions of the policy, and said that by the eleventh condition of the policy it was provided, and they were conditions precedent, that the assured sustaining any loss or damage by the fire shall within fifteen days after such fire shall have happened deliver to the plaintiff as accurate and particular an account in detail of his loss or damage respectively as the nature and circumstances of the case will admit, stating separately the quantities and values of the various kinds of goods, and shall if required verify the same by solemn declaration or affirmation before a justice of the peace, and shall produce and submit his bills, invoices, vouchers, and such other evidence as the directors of the defendant company may reasonably require, and until such account, verified as aforesaid, and such other evidence have been produced, the amount of such loss or any part thereof shall not be payable or recoverable. Proceeding, the defendant alleged that the plaintiff had not delivered the account aforesaid within the said period, and had not delivered as accurate and particular an account as aforesaid, and verified as aforesaid, as the nature and circumstances of the case would admit, and the plaintiff had not delivered and had not produced such other evidence as the directors reasonably required of him. The policy was subject to the condition precedent that the plaintiff should after any loss or damage to the insured goods by fire deliver to the defendant an account of his loss or damage by such fire, and it was provided by the eleventh condition of the said policy that there should not be included in the claim made by the insured any amount in excess of the value of the goods insured immediately anterior to the fire, and that if there appeared to be any fraud or overcharge or imposition the insured should be excluded from all benefit of the policy, and the plaintiff did after the

alleged loss or damage make and deliver to the defendant as and for such account a fraudulent and false account of the alleged loss and damage with intent to induce the defendant to pay to the plaintiff a greater amount than the amount of his actual loss and damage by the fire, and the plaintiff made a false and fraudulent claim upon the defendant with a like intent. Wherefore the defendant prayed that the plaintiff's claim might be dismissed with costs.

In his replication the plaintiff said that the defendant had waived the condition as to filing an account of his loss within fifteen days, and that he did so before the defendant repudiated any liability in respect of the plaintiff's claim to comply with the requirements of the eleventh condition of the policy. He denied the allegations as to his having delivered a false and fraudulent account.

Mr. Solomon, Q.C. (with whom was Mr. Gardiner), appeared for the plaintiff, and Sir Henry Juta, Q.C. (with whom was Mr. Buchanan), appeared for the defendant.

The issues were (1) that the plaintiff did not comply with the conditions of the eleventh clause of the policy; (2) that the plaintiff made a fraudulent claim upon the defendant inasmuch as he over-estimated the value of the goods on his premises at the time of the fire, and (3) as to the value of the goods on the premises at that time.

Mr. Solomon, Q.C.: With regard to the plea of fraud, I think that there will be abundant evidence to satisfy the Court that at the time of the fire the plaintiff had goods upon his premises to the value of the amount at which he was insured. As to the non-compliance with the terms of the eleventh clause, the fire was a complete one, and all the goods, books, and documents were destroyed. The evidence will show that the plaintiff sent to the defendant as complete an account as he possibly could, but not within the fifteen days, because he alleges that that part of the condition was waived by the defendant company, for after the expiration of that term there were negotiations between these parties with regard to sending in the claim.

The first witness called was

Henry Dale, the plaintiff in the action, who said that at the time the fire took place he was carrying on business as a general dealer. He started business on October 15, 1898, and before that he had been twelve years in the employment of the Railway Department. He started at first on a small

scale as a barber and restaurant-keeper. He carried on business in this style until January, 1899, when he increased his business, taking over the whole building, and carried on the business of barber's shop, restaurant, newspaper agency, bicycle department, and also a boarding establishment. He insured on July 30, 1899, with the defendant company, as stated in the declaration. He had taken stock just one month before in June. His stock book had since been burned in the fire, but he could say from memory that his stock in June amounted to over £1,000, not quite £1,100. Proceeding, witness said he had further paid £36 for fittings—shelving, etc.—in addition to a lot of work done by himself and his servant. He would say that £56 would not have paid for it. As to his furniture at the time of the fire it was worth over £300. Before witness insured with this company one of defendant's clerks came out and went all over witness's premises, and saw the stock-in-trade, etc. After that inspection a policy was granted. On March 26 a fire broke out on the premises. The fire broke out between two and three o'clock in the morning. As far as witness could say, the fire broke out in the shop. When he was called smoke was coming out of the door of the shop. The whole place and its contents were burned down, except a small tin trunk containing receipts, which was got out. Witness in his business had a stock book, ledger, invoice book, bicycle book, etc. These books were all burned. While carrying on business witness's sales over the counter he estimated at £8 per month, and in addition groceries went into the boarding-house, which he estimated at £12 per month, making his total cash sales about £20 per month. Witness was injured at the fire, and when Mr. Dockrall came to see him the same day he was in bed. Witness gave him all the information he asked for, and he told witness to get all the invoices from merchants who had supplied him with goods, so as to show his transactions. He referred witness to Mr. Sichel, a fire assessor. He saw Mr. Sichel and the latter told him in the presence of Mr. Fuller that the best way to do would be to get all the invoices he could, and also said he thought it would be a fair case. Witness's only instructions were to get all the invoices from the merchants, and he was seventeen days in doing so, from the date of the fire. He handed these invoices to his attorneys. (Counsel here read the correspondence between the attorneys, which went on for

about two months, and in which the defendant pressed for full accounts of the goods alleged to be destroyed by the fire, and for the declaration. From plaintiff's side invoices were sent showing that plaintiff had bought during the eighteen months he was in business £2,259 of goods from merchants, and in addition it was stated that he had bought several hundred pounds worth of goods at Parade sales, for which there were no invoices).

Buchanan, A.C.J.: It appears that in the 18 months plaintiff had bought over £2,200 worth of goods, and he only sold £8 per month over the counter.

Witness said that in Salt River one wanted a large stock as they had to keep everything wanted. The amount of goods on those invoices, £2,200, witness had not paid in full. He estimate he owed about £400, but his ledger had been burned and at the present time he had nothing whatever with which to pay this amount. Witness had never made a declaration before a justice of the peace, but he had always been prepared to do so. After further correspondence witness sent in a list showing the total value of the furniture to be £388, and also list of shop fixtures, etc., showing the value of these to be £66. On June 8 a letter was received stating that as witness had not complied with the various clauses of the policy and for other good and sufficient reasons the defendants absolutely refused to recognise any further liability to witness, and declined to continue the correspondence. They never told him what the other good and sufficient reasons were, and he never heard of any fraudulent statement having been attributed to him until he saw the plea.

Sir Henry Juta (in cross-examination): What receipt for £51 is this, purporting to come from one Kavow for sign writing, shelving, and counter?

Witness admitted that he did not get that receipt from Kavow. He only got a receipt for £1 from Kavow.

Sir Henry Juta: And had the receipt a stamp on it at the time you got it?

Witness: As far as I can remember it had.

Sir Henry Juta pointed out that the stamp was cancelled with the date October 20, 1886, and said: You will be surprised to hear that this design of stamp was never issued until this year.

Witness: Well, I might have put the stamp on myself.

And for this very case?—Witness said that he was trying to arrive at the cost of the sign-

writing, shelving, etc., and wrote in the figures, but he had not intended to hand that account in.

Sir Henry Juta: And yet that was the only voucher which you sent in with your account.

In answer to the Court, witness said that he had only paid Kavow £1.

Sir Henry Juta pointed out that in his affidavit and declaration as well witness had stated Kavow's account to be £51.

Cross-examination continued: Witness did not remember Mr. Sichel when he met him saying that he appeared to have very little stock, and witness never said to him that he had not seen his large stock of boots and shoes in his other shop across the road. Witness never said he had between £200 and £300 worth of boots and shoes there. As a matter of fact, witness had about £300 worth of boots and shoes in the shop across the road. He did not tell the insurance company when he sent in the invoices that these included those boots and shoes. They did not ask him, and Mr. Dockrall knew all about them at the time he insured witness's stock. Mr. Sichel never mentioned witness's books, and did not tell him to get a certified certificate of accounts from the merchants, and deduct the approximate sales. Witness was simply told to get the invoices. Witness did not have any banking account at the time of the fire, but he had some money in the Savings Bank when he was in the Railway Department. Witness knew that certain goods included in the invoices put in were excluded by his policy. He had never gone through his policy. Witness had bought boots and shoes to the amount of £297 from Campbell and £69 from Cuthbert, but in addition he had bought boots on the Parade from time to time. He only sold one pair of boots or so a week at Salt River.

Cross-examination continued: The bicycles witness claimed for were not his own property, but were on the hire system. He did not remember going into a house next his shop, and on his speaking of the bicycles being destroyed the neighbour saying, "How can that be possible because the bicycles were next door and not in the fire." Nothing of the kind was said, and he did not wink at the people and say, "Do not say anything about that." Witness and his boy were not for several nights after the fire busy removing goods from the shoemaker's shop. There were no cases packed with goods under the counter in the shoemaker's shop. All that was there was a

small tub with some things in it. Witness had never told Mr. Dockrall that he had £300 outstanding debts. On the night of the fire he did not take a savings bank book out of his pocket and say, "Hurrah, I have saved this at any rate." Witness started business with £357, and in the eighteen months he bought over £2,400 worth of goods. He did bicycle repairs, etc., and made £30 per month on that, and his barber's shop averaged another £20 per month, while he made from £15 to £20 a month in selling papers, which he used to take round himself at five o'clock in the morning. Then he had the boarding-house, etc. He made about £150 a month clear profit, and this he put into stock.

Sir Henry Juta: You did do well, and so you devoted the proceeds of this extremely profitable business, which brought you in £1,800 a year, to purchasing stock which brought you in £8 per month?

Witness: Yes.

And still you have no banking account?—No, and anyone who knows my place can tell you how much I had in my shop when I started business, and it was crowded when the fire occurred. Proceeding, witness said he kept his books in the barber's shop, and the invoices, after they had been entered up, in his bedroom. He had not made an attempt to get from the auctioneers a certificate as to what they had sold him.

Re-examined: With regard to Kavov's receipt, witness had it before him when making up the total of the cost of the fittings, and he never intended that receipt to be handed in.

Buchanan, A.C.J.: I would like you to give some explanation as to how you came to alter this receipt from £1 to £51.

Witness said he was looking up the invoices, when he came on that receipt, and he began reckoning how much he had paid for the counter, shelving, etc., and he merely added that to Kavov's account for his own guidance, and did not intend to put the invoice in. He did not think the figures cancelling the stamp were his.

Frank Oscar Lynn said he boarded with plaintiff at the time of the fire. Witness was roused up between two and three by his room mate. They could smell smoke, and witness ran out. He saw Mr. Dale just coming out of his bedroom. Mr. Dale went to get the keys. When they opened the shop they saw they could do nothing, and witness

went to get what he could of his own out of his room. The house was ordinarily well furnished, but he could give no idea of the value of the furniture. He had not taken particular notice of the stock in the shop.

Louis Harris, a traveller for D. Isaacs and Co., deposed that he used to go once a week to plaintiff's shop for orders. He was last in the shop about the beginning of March. He did not pay any particular attention to the stock then, but on one occasion, in February, he had done so in consequence of a conversation, and he estimated the stock at £700 or £800. He did not look at what was under the counter, etc., but just looked round. Witness's firm had supplied plaintiff with crockery, hardware, brushware, etc., but no furniture.

Henry Dyson said he knew the plaintiff, and was in charge of his business for about eight days while plaintiff was away. The stock in the shop consisted principally of hardware, crockery, bicycles, sweets, tobacco, groceries, etc. Witness was not used to that class of stock, but he estimated its value at about £900. During the eight days witness drew about £25. That included money from boarders, sale of newspapers, bicycle hire, etc. About £2 10s. was taken for goods out of the shop. When witness said the stock was valued at £900, he took into consideration lampware and other goods under the counter. Witness estimated the fittings of the shop as worth about £40 or £45.

Cross-examined: Witness was a furniture salesman, and could not give an accurate valuation of groceries.

By the Court: He did not know how much of the fixtures belonged to Dale and how much to the landlord.

Postea (August 29, 1900).

When the Court adjourned on Tuesday evening, all the evidence for the plaintiff had not been led.

Mr. Solomon, Q.C.: The evidence given by the plaintiff has been considered, and I and my junior counsel have come to the conclusion that we are not justified in taking up the time of the Court in proceeding further. With the consent of the Court, we will withdraw and submit to judgment.

Buchanan, A.C.J.: No doubt in matters of this kind—a question of insurance—it is not to the advantage of insurance companies to dispute their policies as a matter of business, but I think it is a duty they owe to the public when it is a clear case of fraud, to bring the matter before the Court. In the present instance the

company has been justified in its action by the result. Judgment will be entered for the defendants with costs.

[Plaintiff's Attorneys, Messrs. Silberbauer, Wahl and Fuller; Defendant's Attorneys, Messrs. W. E. Moore and Son.]

BRADY V. KAMP.

{ 1900.
Aug. 29th.
" 30th.

This was an action in which Michael Brady sued Heinrich Kamp for the sum of £25, being the value of certain skates, furniture, and fittings alleged to have been bought by defendant from the plaintiff.

The defendant pleaded, *inter alia*, that the plaintiff represented that there were 750 pairs of skates, but on taking possession of the skates it was found that there were only 533 pairs, whereof 76 were of no value.

Mr. Schreiner, Q.C., and Sir H. Juta, Q.C., for the plaintiff.

Mr. Searle, Q.C. (with him Mr. Buchanan) appeared for the defendant.

Michael Brady, the plaintiff, said he had been in this colony for eight years, and for several years he had carried on business in Cape Town as a fruiterer and ice cream manufacturer. He knew defendant, and had business transactions with him. With regard to the skating rink, witness at first had the idea that he would get the lease of the rink, and bought some skates, viz., twenty-one new ones from Sassin for £21, and also a job lot of skates and fittings from Preuss, who had taken over a rink formerly run by Sassin. Witness gave £40 for this job lot of skates, etc. Witness, with the assistance of three boys, repaired a number of the skates, viz., fifty ladies' ball-bearing skates (second-hand), 122 gentlemen's ball-bearing skates (second-hand), and he also found 122 new ordinary skates. For the rest he did not know how many skates there were in the different cases. Witness knew Messrs. Tyler and Charlton. On July 2 defendant came to witness's place, and he told witness that he would not lease the rink to him as he intended to run the rink himself. Witness said, "Yes, but what will I do with the skates?" Defendant said, "I will buy them from you," and ultimately witness said he would sell them for £350. Defendant asked if what he saw in the place were all the skates he had, and witness said he had some more at his house. All that witness had repaired were in the shop, and there were some boxes also there. On the same day Tyler

also came to witness to try to buy the skates, but witness made no agreement with him, although he had offered him the skates for £350. On July 3 witness again saw defendant, and asked him if he was going to buy the skates, and he said he was, but that £350 was too much. He also told witness to bring the skates all down to the shop and he would come and look at them. Witness did so, but before that defendant's manager (Mr. Hilton) came and saw the skates. On Saturday, July 7, defendant came to witness's shop about a quarter to twelve in the morning. Witness had then all the skates in the shop, as well as the mirrors, tables, chairs, and other things. Defendant said, "Is this all you have got?" and witness said "Yes." After some bargaining, defendant agreed to give witness £325 cash down for the goods. This was in the shop, the lease of which had expired, but which witness had been allowed to keep on for a little. Witness gave the key to defendant, and the latter said he would come to the shop, at three o'clock, with the money. Witness had a receipt (produced) made out by Mr. Clew, and went to the shop, but defendant did not turn up. On the following morning witness was near the shop with a Mr. Clarke, when he saw defendant inside. Defendant said, pointing to the boxes, "This is all a lot of rubbish," and witness said, "Well, I have nothing to do with it; I sold you a job lot." There was a big Union Jack flag lying on the counter, and defendant was taking it away, when witness said "That does not belong to you," so defendant turned round and said: "I buy this lot of rubbish for £325, and you grumble about a flag." Witness said no more, and defendant took the flag. There were three tins of German sausages on a shelf. Defendant took down the tins and was putting them away, but witness took them back again. Defendant again took the tins and said, "I buy this rubbish for £325, and want these three tins, and they are my own country's stuff," so he took the three tins of German sausages also. Defendant then turned to a box and said: "See all this rubbish," and Clark said, "Perhaps you will find some gold there," whereupon defendant, referring to Brady, said, "He'll watch it." Defendant proceeded with the removal of the cases, three wagons being used. Two of the mirrors were also taken. The chairs, tables, counters, and some of the skates were left in the shop, but removed during the following week, defendant retaining the key until

the following Wednesday, when it was returned to him. Witness saw defendant repeatedly during the week, and pressed for payment, but was always put off by the defendant. He also at defendant's request got a boy, Simons, to repair the skates, Simons being engaged by plaintiff and paid 25s. per week. On Sunday, June 16, witness went to defendant's place and was present when the skates were counted, giving a hand in putting them back into the boxes. Defendant afterwards said to witness that he had said there were 750 pairs but witness told him he had never said that, and that he had only given him the numbers of those he had repaired. Defendant afterwards wanted to give the skates back, but witness would not agree to receive them, and witness also refused to have anything to do with a valuator. Witness interviewed defendant next day, and the same day received a letter telling him Mr. Jones was going out to value the skates next day. With regard to the hire of the skates by Tyler, witness had nothing to do with that. He had never agreed that the skates should be up to a certain sample.

Adam Clarke said that on Sunday, July 8, witness went with plaintiff to the latter's shop and saw a wagon at the door with a box on it. Defendant was there and said it was all rubbish. Proceeding, witness corroborated plaintiff as to the conversation, the flag, and the sausages. The same day witness had seen the flag on defendant's flag-staff at Woodstock. Witness had seen the skates in Brady's store, having seen Brady working at them night after night. Witness had sold roller skates in the store, and the prices on the list produced (Thurston's) were fair prices. This list put down Raymond Extension ball-bearing skates at £2 2s., and ordinary skates, not ball-bearing, at £1. In witness's opinion defendant had made a fair bargain, in view of the fact that defendant contemplated putting up a rink.

Cross-examined: Witness had not seen all the skates. He might have seen fifty skates. Witness valued the furniture, counters, etc., at £30 or £40. When he said it was a fair bargain, he reckoned upon there being 350 pairs of skates.

Re-examined: Witness knew that independently of the skates there was a large number of fittings, which were valuable.

Albert Thomas Bridge, superintendent of the British and Colonial Insurance Corporation, said he had no business connection with rink-skating, but he was very fond of the recreation, and had tried to get skates for

Messrs. Tyler and Charlton for the carnival. He saw plaintiff, and in consequence of what the latter said, he saw defendant on July 6, who in reply to questions said he had bought the skates from Brady, and arranged to meet Mr. Tyler as to hiring the skates to the latter. Defendant said nothing about having to consult plaintiff. Witness saw the skates at the Good Hope Hall. Some of them were in fair condition.

Alfred Cecil Clew deposed that he drew up the receipt produced.

William Ernest Tyler said he was interested with Mr. Charlton in getting up a rink carnival, and had first tried to purchase skates but afterwards did not do so. He then hired skates from defendant on July 9, and never heard anything about plaintiff having anything to do with the skates until July 16. He hired 100 pairs of skates at £12 10s., paying for them when he received them. Witness was not satisfied with Kamp not providing him with more skates when he wanted them, and sued him, but lost the case. On July 17 witness received a letter from defendant, in which the latter said that he had told witness that the sale was conditional, but that if it did not go through Brady would agree to any arrangement he (defendant) made. Defendant had never said anything of the sort, and had never said anything to witness to show that plaintiff's consent was necessary. On July 6, at the German Club, defendant had said to witness that he had bought the skates from plaintiff, and the arrangements were made to go to Woodstock to arrange for the hire of the skates.

Francis Simons deposed that during May last he assisted plaintiff in repairing skates and afterwards was engaged in July by defendant to repair and clean the skates, not merely to take them out of the boxes and put them on the counter. Witness worked half a week, and got 12s. 6d. Plaintiff came and looked how witness repaired the skates. That was all he did. A couple of weeks afterwards defendant again took witness into his employment at the cold storage works. On Sunday, July 15, witness was at the works assisting defendant, who, with his manager, was counting the skates. Plaintiff was there, and defendant afterwards said to him, "You said there were 750 pairs of skates," but plaintiff said "I never said there were 750 pairs of skates; I sold you a job lot." Defendant did not say any more.

Cross-examined: Plaintiff superintended while witness was repairing the skates.

Shikry Sassin said he used to run the rink, and disposed of it to Mr. Preuss. Plaintiff was the refreshment caterer. Witness gave over the rink in July, 1897. Preuss took over close on 800 or 900 skates. He took over the whole thing as a going concern. Plaintiff had bought some twenty-one skates from witness. He valued the articles now in dispute at £377 11s. 6d. He thought that a fair value.

Cross-examined: Witness sold the whole concern to Preuss as a going concern, including goodwill, and three months' rent paid in advance. He sold the whole thing for £300 because he was losing money.

Re-examined: Witness lost over £1,200 on the rink, which was situated at the end of Adderley-street in the old circus building.

This closed the case for the plaintiff.

Heinrich Kamp, the defendant, stated that he had carried on business in Cape Town for eighteen years. He had supplied plaintiff with ice for some time past. Plaintiff had come often to witness to see if he could hire the rink. Witness was making a rink. Up to July plaintiff came almost every day to Woodstock. Ultimately witness said he did not wish to hire out the rink, and plaintiff then said he had a lot of skates. Witness said he would come and look some day, and about the end of June or commencement of July did so, and discussed the matter in the presence of Mr. Hilton. In the latter's presence plaintiff said first that he had a great number of skates, far over 800 pairs, and then he said, "Call it 750 pairs." Witness told Hilton that plaintiff said there were 750 pairs of skates, and that he wanted £350 for them. Plaintiff further said that all the skates had been taken to pieces, and that the parts wanting renewal had been renewed, and that he considered them practically new. All the skates were not in the shop, plaintiff pointing to some other place where there were more. On July 7 witness again went to plaintiff's place, plaintiff having already been at Woodstock pressing witness to buy the skates. Witness went on July 7 with the intention of buying the skates, but said that he had no time then nor for several days to examine the skates, but offered to take them to Woodstock to examine them. Witness said he would not mind buying the skates at £300, but he must see the skates at Woodstock and examine them, as, he said—using a German expression—he did not care about "buying a hare in a bag." It was agreed that the key should be left at Adderley-street so that witness or his boys could

go and get the skates whenever they were required. Plaintiff also spoke about his having taken £150 the first night he and Sassin had the rink, and witness said that he would not mind giving plaintiff an additional £25 if he took that the first night. Witness made entries at the time of the furniture and fittings that were to go with the skates. Plaintiff was anxious that the things should be removed at once, and witness called one of his men, Fraser, who was passing at the time, and pointed out in plaintiff's presence that he had bought 750 skates in good order and condition, as well as the furniture, etc., and gave him instructions to begin removing the articles at once. Fraser misunderstood witness, and the removal of the goods was not begun until Sunday, and all with the exception of some articles still in the shop were removed by Wednesday or Thursday. Plaintiff came out to witness next day (Sunday), but did not ask for a cheque until Monday, when he asked for a cheque, as he was pressed for money, and said that if the condition of the goods was not as described he would give the money back. The boy Simon assisted plaintiff at Woodstock in putting the skates ready for examination, and finally it was agreed they should go through them on the Sunday following. Witness counted the skates then, and plaintiff put them in the box, Niay and the boy Simon being also present. They found there were 533 pairs of skates, classified according to the list produced, which was made at the time. Of these skates 76 were of no use at all, and the general condition of the skates was horrid, some not pairs and some called "new ordinary ones," mildewed and rusty. Afterwards witness said Brady must take the whole lot back owing to their condition, but Brady said: "Do make me any offer," and ultimately at Mr. Niay's suggestion it was decided to have a valuator to put a price on the skates, witness suggesting Mr. Thurston. This was agreed to, and next morning witness met plaintiff and said he had arranged for Mr. Jones to value the goods, and he would do so the following morning. Plaintiff then said he wanted the thing settled that day, and anyhow witness had already hired out some of the skates. He talked so loud that witness went out and wrote the letter put in, stating that Messrs. Jones and Co. would value the goods the following day, and the next thing witness got was the letter from plaintiff's attorney threatening an interdict. With regard to the hire of the skates to Charlton and Tyler, witness made

an arrangement with Tyler, plaintiff having asked witness to arrange the hire whether he bought the skates or not, and to do the best he could. On the Sunday the skates were examined, and sorted. Plaintiff and witness put aside 100 pairs for Charlton and Tyler at the Good Hope Hall, and witness said to plaintiff that it must be distinctly understood that whoever became the owner of the skates should have the money for the hire of these skates. All the skates were still locked up in the room at witness's premises at Woodstock, where they were brought to originally. Witness had not time after time promised plaintiff a cheque and put him off every time. As to the flag and sausage incident, that was more or less a bit of fun.

Alfred Edward Hilton deposed that in July last he met defendant and plaintiff at the corner of Shortmarket-street and St. George's-street. Witness had previously been in defendant's employ as manager, but had left on May 15. In plaintiff's presence defendant said plaintiff wanted either £325 or £350 for some skates, and plaintiff then said it was a jolly good bargain as defendant was to get 750 skates, tables, mirrors, fairy lamps, etc., Witness said, "Yes, but were the skates any good," and defendant said they were in splendid order, as he had been fitting them up himself. Defendant could not remain, but at his request witness went to see the boxes of skates in question. Witness made no close examination of the skates, and made no report to defendant.

Gustav Niay corroborated defendant as to the counting of the skates on Sunday, July 15, and the conversation between defendant and plaintiff, when it was agreed to have the goods valued. He was also present when the skates were removed from the shop on July 8, when it was distinctly understood by plaintiff and the defendant that the goods were being taken to Woodstock to be examined and counted.

Henry Preuss said that three years ago he took over a skating rink from Sassin, including goodwill, skates, and £180 rent paid in advance, for £325. He had the rink for three months, and then gave it up, storing the skates in his cellar. He afterwards sold the skates as a job lot to plaintiff for £40. He was glad to get rid of them at that.

Cross-examined: Witness lost by the skating rink.

Robert Fraser deposed to having heard plaintiff say to defendant that there were 750 skates. Witness was told by defendant

before plaintiff to take the things out to Woodstock to be examined there. Plaintiff also said they were in good condition. Witness heard that because defendant had told him to listen to what plaintiff said and what he said to plaintiff. That was on July 8.

Cross-examined: Witness had made a statement to Mr. McIntyre, and then said nothing about the 750 skates, but all the same he heard 750 skates mentioned.

Gordon Evans said he was a valuator, and had been employed by Messrs. Jones and Co. to make a valuation of these goods, which he did. He valued the 535 skates at between £80 and £90, and the furniture he valued between £20 and £30. The total valuation was £112 odd, which he thought was a fair valuation, and he did not believe the goods would realise as much as that by public auction.

Cross-examined: Witness had never before valued skates.

By leave of the Court Mr. Schreiner called

Robert Maxwell, who deposed that plaintiff had leased some premises from witness's firm, Maxwell and Earp. The lease expired on June 30, but they allowed plaintiff to remain until they needed the premises. Plaintiff did not owe them any money.

Cross-examined: It was understood plaintiff was to leave as soon as he could.

This concluded the evidence.

Postea (August 30).

After argument,

Fuchanan, A.C.J., in giving judgment, reviewed the evidence and said that unfortunately in this case there was no written agreement, and if there had been a conditional sale—that was the completion of the contract of sale being dependent upon there being 750 skates in good condition—one would have expected a written agreement. His lordship pointed out that defendant had employed a boy to repair the skates after he had removed them, and had also hired a number of the skates to Tyler. The defendant said that plaintiff had agreed to the hire of the skates on the understanding that if the sale was not completed plaintiff would have the money for the hire, but then plaintiff, if he had done so, would never have had such a letter written as that sent by his attorneys on July 16 demanding immediate payment of the amount due, and saying that unless that demand was complied with an interdict would be taken out against defendant using the goods. The conduct of defendant was greatly against him, he having removed the goods to Woodstock and not im-

mediately counted and examined them, and there was no repudiation at once of the sale. On the contrary, he got a boy to repair the skates. All this conduct is inconsistent with the statement that there was no complete sale, and it was the conduct of parties alone that must guide the Court, seeing there was such a direct conflict of oral evidence. In conclusion his lordship dealt with the correspondence, and then said in view of the direct conflict of testimony, the Court must be guided by the correspondence and the conduct of the parties, and both these showed the plaintiff's story was more probable than that of the defendant. Judgment was therefore given for the plaintiff for the amount claimed with costs.

[Plaintiff's Attorneys, Messrs. Tredgold, McIntyre, and Bisset; Defendant's Attorneys, Messrs. Findlay and Tait.]

SUPREME COURT

[Before the Hon. Mr. Justice BUCHANAN (Acting Chief Justice), the Hon. Mr. Justice MAASDORP and the Hon. Mr. Justice SOLOMON.]

ADMISSIONS. { 1900.
Aug. 30th.

Mr. Buchanan moved for the admission of Charles Heatherton Douglass as an attorney and notary.

Order granted, and the oaths administered.

Ex parte TEUBES. { 1900.
Aug. 30th.

Articled clerk—Continuous service.

This was the petition of Andrew George Henry Teubes. The petition set forth that on the 13th April, 1897, he entered into articles of clerkship with the late Mr. M. M. Tait, attorney-at-law and notary, for a period of three years; that on the 19th November, 1898, Mr. Tait died, and the petitioner thereupon, in terms of an order of the Hon. Mr. Justice Maasdorp (in Chambers), dated 8th December, 1898, entered into fresh articles with Mr. Findlay, to serve him until the expiry of the three years.

That in June, 1900, petitioner obtained a certificate of proficiency in law and jurisprudence of the University of the Cape of Good Hope, and is now in consequence eligible to be examined as to his qualifications for admission as an attorney and notary.

The prayer was for an order for his examination as an attorney and notary, and on the granting of the certificate by the examiners as to his proficiency, he might be approved, admitted, and enrolled as an attorney of the Court.

Mr. Buchanan moved.

Mr. Searle, Q.C. (on behalf of the Law Society): I do not oppose the admission, but wish to point out to the Court with regard to the order made in Chambers that it would be well that such an arrangement as that made in Mr. Teubes's case should not create a precedent. It appears that Mr. Teubes was articled to the late Mr. Tait on April 13, 1897. Mr. Tait died on November 19, 1898, and in Chambers an order was obtained on December 8, 1898, allowing Mr. Teubes to count as service the period of time elapsing between the date of his principal's death and the date he entered into fresh articles. In the case of Mr. Teubes, the latter was afterwards articled to Mr. Findlay, Mr. Tait's partner, and so remained in the same office, but there is another case pending on somewhat similar lines, and the Law Society merely wish to bring this matter forward so that the order now granted should not be held to be a precedent in all cases.

Buchanan, A.C.J.: I think the Court will require in every case full service of three years to be given.

The order for Mr. Teubes's admission as an attorney and notary was then made, and the oaths administered.

PROVISIONAL ROLL.

EATON, ROBINS AND CO. V. NASSAR.

Mr. Howel Jones moved for the final adjudication of defendant's estate as insolvent.

Order granted as prayed.

DIOCESE OF CAPE TOWN V. W. J. PEISER.

Mr. Maskew moved for provisional sentence for £270 and £9, being interest upon a mortgage bond for £4,000, and further asked that the property attached to found jurisdiction be declared executable.

Granted.

WRIGHT V. HART.

Mr. P. S. Jones asked for a postponement of this matter until September 12, as it was in course of settlement.

Postponement granted.

SMITH AND CO V. BHEKDA.

Mr. De Villiers moved for the final adjudication of defendant's estate as insolvent. Granted.

WHITE V. HARBIES.

Mr. Buchanan moved for provisional sentence on a promissory note for £300.

Mr. Nathan appeared for the defendant, whose defence was that the note was given merely as an accommodation note, and that there had been no consideration or value received.

For the plaintiff affidavits, etc., were filed, which tended to show that the note had been given in connection with a property transaction.

After argument,

Buchanan, A.C.J.: In this case the plaintiff sues on a promissory note for £300. The note was not actually signed by the defendant, and the signature of the person signing for the defendant is not denied, but the defendant says that this was an accommodation note given by the defendant to the plaintiff, and that there was no consideration. In reply to these affidavits an agreement has been put in showing ample consideration, and the only defence being want of consideration, provisional sentence must be given as prayed, but it will still be open to the defendant to go into the principal case if he wishes to do so.

[Plaintiff's Attorneys, Messrs. Fairbridge, Arderne, and Lawton; Defendant's Attorney, Mr. C. W. Herold.]

ILLIQUID ROLL.**AFRICAN LANDS AND HOTEL COMPANY V. W. BALLINGALL.**

Mr. Rubie moved for judgment under Rule 329d, for the sum of £95 18s. 3d., with interest and costs.

Judgment granted as prayed.

O'DOWD V. R. A FALCONER.

Mr. Maskew moved for judgment, under Rule 329d, for the sum of £60, with interest *a tempore morae* and costs of suit.

Judgment granted as prayed.

REHABILITATIONS.

Mr. De Waal moved for the rehabilitation of the insolvent estate of Pieter Johannes Coetzee. The estate was voluntarily surrendered on September 4, 1894. The debts proved amounted to £2,393 10s. 4d., and the assets realised £2,243 4s. 2d., leaving a deficiency of only £150 6s. 2d.

Order granted as prayed.

Mr. P. S. Jones mentioned the matter of the application, under the 117th section of the Insolvent Ordinance, of J. H. J. Visser for the rehabilitation of his estate. The certificate required was not available, and consequently the Registrar had refused to set the case down. He accordingly asked that the matter be postponed until September 12.

Postponement granted.

GENERAL MOTIONS.**IN THE MATTER OF THE PETITION OF LOUIS BOLTT.**

Mr. P. S. Jones moved that the rule nisi granted under the Derelict Lands Act be made absolute.

Rule made absolute as prayed.

IN THE MATTER OF THE PETITION OF ANNIE ELIZA MITCHELL. 1894, Aug. 30th.

Sir Henry Juta, Q.C., moved for an order authorising the payment to petitioner of certain money, the property of her minor daughter, in the hands of Messrs. W. E. Moore and Son. From the petition, it appeared that the petitioner was married to James Ross Mitchell in community of property, and in October last year they came to an agreement that all the assets of the community should be realised, and the proceeds equally divided. For this purpose a contract was drawn up, and by the petitioner's desire it was provided that her half share should be divided equally between herself and her minor daughter, Mona. After the execution of the contract the husband disappeared, taking his half share of the proceeds of the sale with him, and his present whereabouts were unknown. The petitioner's minor child died, and the attorneys who had charge of the money declined to pay the daughter's share to the petitioner unless they had counsel's opinion. This was accordingly obtained, and was to the effect that the petitioner could not claim the money as heir to the

child. Under these circumstances she applied to the Court, counsel stating that she had lost everything she had and was destitute.

The Court granted a rule *nisi*, returnable on September 12, to be published once in the "Cape Times."

On the return day, there being no opposition, the rule was made absolute.

BUYSKES V. DE MARILLAC. { 1900.
Aug. 30th.
" 31st.

Sir Henry Juta, Q.C., moved for leave to the defendant to plead. An affidavit by the applicant stated that he was in Namaqualand on July 20 last, and the letter of demand reached him fourteen days after summons had been served. He immediately set about making inquiries, and was informed that a German steamer was expected to arrive shortly at Port Nolloth, but she did not turn up, and it was only after waiting eleven days that the Nautilus arrived, and defendant was able to secure a passage to Cape Town, and in the meantime he had been barred in default of plea. Defendant stated that owing to his health he could not undertake the journey by cart, especially as the weather was rainy and the rivers swollen.

Mr. Schreiner, Q.C., appeared for the respondent and plaintiff.

Correspondence between the plaintiff's and defendant's attorneys was put in, in the course of which the plaintiff's attorneys stated that there was a post-cart twice a week from Namaqualand, and that instructions could have been sent down by post, and that failing the steamer, defendant could have come down by cart.

An affidavit by the plaintiff set forth that the case was one of libel founded upon two letters written by defendant to Mr. Cunningham and Mr. O'Dowd, containing allegations of a serious character against Mr. Buyskes.

Mr. Schreiner, Q.C.: It was said it would be the death of defendant to travel by cart to Cape Town, and yet he is travelling about from place to place in Namaqualand, not very easy travelling. There is no affidavit on the merits of the defence as required by the rules of Court (see rule of Court No. 26). Since I have practised the Court has always required either that there should be an affidavit on the merits or the word of the counsel that he is satisfied that there was a genuine defence to the action.

Buchanan, A.C.J.: If Mr. Schreiner presses application of the rule of Court, then the Court will have to refuse the application, but that will only mean that a fresh application will be made, and an affidavit on the merits put in.

Ultimately Mr. Schreiner agreed not to press the rule, and the case was postponed so that an affidavit on the merits might be filed.

Postea (August 31).

An affidavit by defendant on the merits was filed. The defence was that the statements alleged to be libellous in the letters were privileged.

After argument,

The Court granted an order removing the bar, defendant to plead by Monday, September 3, 1900.

[Applicant's Attorneys: Messrs. Van Zyl and Buissonne; Respondent's Attorney: Mr. D. Tennant, jun.]

TOOCH V. TOOCH.

Mr. Searle, Q.C., applied for the removal of this case, which arises out of a certain agreement of partnership between the parties, to the Circuit Court at Oudtshoorn, as all the witnesses for both the plaintiff and the defendant resided there.

Granted.

WENTZEL V. WENTZEL. { 1900.
Aug. 30th.

Sir Henry Juta, Q.C., moved on behalf of the applicant for an interdict restraining respondent from disposing of the landed property of the joint estate pending the result of an action for decree of divorce for desertion, or for judicial separation, for payment of £12 per month for maintenance, pending the decision of the said action, and for payment of £50 towards costs.

Mr. Searle, Q.C., appeared for the respondent.

An affidavit was filed, in which acts of cruelty were set out which necessitated a notarial separation. On a promise of reform by the husband, the parties were reunited. Unpleasantness, however, again arose, assaults by the husband on the wife occurred, and she and her daughters were ultimately ordered to leave the house. Respondent had a good business as a sanitary engineer, and had recently sold certain property which realised £600 clear profit.

An affidavit by respondent set forth that applicant's intolerable temper caused the

quarrels. Shortly after their marriage, on his refusing to support her family, she threatened to assault him with a razor. She always had some member of her family staying in the house.

After argument,

The Court granted an interdict as prayed, and ordered the payment by respondent to applicant of £8 per month for her maintenance, pending the decision of the action, and the payment of the sum of £25 towards the costs of the same.

IN THE ESTATE OF THE LATE CORNELIE UYS.

Mr. Nathan moved for an order allowing a minor interested in the above estate to join in raising money on mortgage. An order was granted, the amount of money raised to be such as the Master might deem necessary.

IN THE ESTATE OF THE LATE JOHANNES JACOBUS NEL.

Mr. Searle, Q.C., moved for leave to transfer certain property which had been bequeathed in a will to the children of the testator, and to the children of one daughter. The question raised was whether the term children used in the will included certain grandchildren whose parents had died before the testator.

Buchanan, A.C.J.: The question was discussed in a recent Privy Council case, and there it was laid down that the term children did not necessarily include grandchildren. It all depends upon the intention of the testator. In this case the Court is of the will. In this case the Court is of opinion that it does. An order will be granted as prayed.

HOLMES V. PREUSS. { 1900 Aug. 30th.

This was an action in which William John Holmes, residing at Upington, sued one Preuss, also of Upington, for the delivery of certain goods, or in the alternative for their value, £260 10s. 10d.

Mr. Burton (who appeared for the defendant) said: Before proceeding with the case I wish to inform the Court of the defendant's position in this matter. Both parties live at Upington, and the defendant has been detained at Upington by the military authorities, who will not allow him to be released. It is therefore impossible for him to be down for the trial. There are several witnesses present from Upington, and it is

desirable that these witnesses should not be detained here further, but I cannot undertake to go further than to cross-examine them. From the letters received from the military authorities, it appears that this man Preuss is detained by them on a charge of treason. The correspondence shows that an attempt has been made to have Preuss released on bail, but has failed.

Mr. Solomon, Q.C. (with him Mr. Buchanan): The declaration in this matter was filed on July 14, and on July 26 the defendant was called upon to plead, but as he had not done so by August 9 he was duly barred, the bar, however, being removed on August 11 at the request of defendant's attorney. Since then until to-day no intimation has been given that the defendant now wishes for a postponement of the case. The declaration states that the plaintiff is a general dealer, trading at Upington in co-partnership under the title of W. J. Holmes and Co., and the defendant was also a general dealer carrying on business at Upington. In March last, owing to the disturbances, the plaintiff was compelled to leave, and during his absence certain goods of the value of £260 10s. 10d. were forwarded from Victoria West Road, consigned to the plaintiff, and these on reaching Upington were taken possession of by the defendant, who has since refused to deliver up the said goods or to pay the value thereof.

The defendant set up a special plea to the effect that these goods became and were the property of the enemy invading the said district by reason of their capture by the enemy, and if the said plaintiff had any right or title to the said goods he after the said capture ceased to have any such right or title to the said goods.

Mr. Solomon, Q.C.: The plaintiff's case is very simple. He was compelled to leave Upington owing to it being practically occupied, not by the enemy, but by rebels, there being not more than half a dozen of the forces of the Free State and Transvaal there. The goods arrived for plaintiff, and were taken possession of by the defendant, under whose authority we do not know, and the defendant now sets up the plea that, these goods having been captured by the enemy plaintiff has no further right or title in them.

William John Holmes, a partner in the plaintiff firm, stated that they carried on business in Upington in March last, when the Republican flag was hoisted by the

rebels, there only being two members of the Republican forces present that witness knew of. In consequence of a notice given witness left Upington on March 13, leaving his storeman in charge of his goods. He returned at the end of March, when the British troops were in possession. He knew defendant, who was a registered voter and was at present in gaol at Upington on a charge of high treason. While witness was away certain goods consigned to him were delivered at Upington. These goods had been forwarded from Victoria West by witness's agent there, Mr. Legg, and were being taken to Upington by a carrier named Van der Westhuizen. The invoice was delivered to witness before he left. The document produced was a copy of the way-bill, and the goods mentioned therein were those now claimed. The value of the goods stated in the declaration was their market price at Upington. The way-bill was endorsed "Received by order of the Orange Free State Government, R. Preuss." He did not know Preuss's handwriting, but he knew there was no other man in Upington named R. Preuss. When witness got back to Upington at the end of March he heard something about his goods, and saw defendant in prison, and had a conversation with him. He said to defendant, "How about my goods?" and defendant replied that he had bought these goods from the Orange Free State Government. Van der Westhuizen the carrier's name was not mentioned at all. Witness had gone to try to get possession of the balance of the goods, as he understood a quantity of the goods was sold already. Defendant refused to give up the goods, saying he had bought them from the Orange Free State Government. Witness then put the matter in the hands of his attorney, and a letter of demand was sent.

Cross-examined: Advocate Cleaver came to Upington after witness had left, being then on his way from Kenhardt to Upington. Witness in his charge for the goods had made no allowance for the carriage, which would come to about £23. He did not know if the carrier got anything. Witness did not know before he left Upington that the wagon with these goods had been seized by the Republicans at Prieska. Witness left his storeman, Bergman, in charge of the store when he left Upington, but did not instruct him to refuse delivery of the goods when they came, as he intended to claim compensation for them from the Cape Government. Defendant acknowledged when witness interviewed him in prison that he

had possession of the balance of the goods. When witness got to Upington he spoke to Bergman about the matter, and the latter told him that he had refused to accept delivery of the goods because the carrier had demanded payment of the carriage before he would deliver them. The carrier had never said that the wagon had been looted, but he had said that one or two things had been taken off the wagon, but they were goods consigned to another merchant, Van der Westhuizen having two different consignments on his wagon. If anything at all was taken from witness's lot it was only a bag of coffee and a pocket of sugar.

Re-examined: If it was shown to witness that defendant had paid the carriage on the goods witness was prepared to allow him that. The carriage was payable at Victoria West when the carrier returned.

Jaspar van der Westhuizen deposed to having taken the load of goods in question from Victoria West, receiving £1 in advance for the carriage. He arrived at Upington towards the end of March, where, on the instructions of Commandant Borias, he delivered the goods at the pont. Preuss said to the Commandant that he would buy the goods at the invoice price. The following morning witness went with Cleaver, Borias, and Preuss to the last-named's house, and Borias took away the way bill. Witness received payment for the carriage. Preuss taking the money out of his pocket and passing it to Borias, who paid witness. He received £46 11s., but that included the carriage of the goods on one Bentheim also.

Cross-examined: At Prieska Commandant Steenekamp had detained witness, and the Boers took a case of saddles belonging to Bentheim's consignment from his wagon, but finding they were ladies' saddles, did not take them away. Witness afterwards put them back in the case, and nailing it up, took it on his wagon again. Holmes's goods were never interfered with at Prieska. At Upington witness had seen Bergman, plaintiff's assistant, and had asked him if he would receive the goods, but Bergman said, "The Free State Government has taken possession of these goods, and they must keep them." He would not take delivery. That was before the goods were off-loaded. Bergman did not say that plaintiff had told him that he must not accept delivery, and witness could not remember anything being said about compensation. Preuss took all the goods. Between

Raapenberg and Upington the goods got a little wet when the Boers took down the sail of his wagon.

Re-examined: When witness spoke about Boers he meant Colonial farmers, the rebels. The people who interfered with his wagon at Prieska, however, were 150 Free Staters and Transvaalers.

Dr. Simon John Fraser, practising at Upington, stated that he was there early in March, when the Free State flag was hoisted. There were only two Free Staters there then, all the others being rebels. The Free State flag was hoisted on March 10 and taken down on March 21, and during all that time there were not more than eight Republicans there altogether, and at no one time more than four. After the flag was taken down there was no attempt at government by the Republicans. On March 21, when the Free State flag was taken down, Commandant Steenekamp gave orders to the men who had taken up arms to go back to their farms with the exception of the ringleaders, whom he tried to induce to go back to the Transvaal with him. On March 21 the residents of Upington formed a Committee of Public Safety, all the Municipal Councillors being members. They met first on March 22, and they practically governed the place up to the time the military occupied it on March 30. One day subsequent to March 25, witness was bathing with a friend near the pont. He then saw plaintiff's goods on the pont, and defendant appeared to be in possession of them. Defendant was not one of the members of the Committee of Safety. Borias was a Transvaal under-commandant, and was at Upington on March 24. At the time witness saw the goods the only Republicans at Upington were men flying through from Kenhardt. Borias was in the vicinity of Upington from March 24 to 29. Cleaver was first at Upington about March 14 or 15, and when the rebellion broke down at Prieska he was sent there to try and keep things together.

Cross-examined: Cleaver was not in command at Upington. The Free State flag was never hoisted after March 21.

This closed the case for the plaintiff.

Mr. Burton now applied to have the case postponed so that he might get the evidence of the defendant.

In answer to the Court, he said he had no affidavit from defendant giving his reasons for not being present. He also admitted that although attempts had been made to get defendant released on bail no application had ever been made to the military authori-

ties to allow defendant to come down here to give evidence, nor had any attempt been made to take his evidence by a commission *de bene esse*.

Mr. Solomon opposed the postponement of the case.

In the absence of any affidavit from the defendant, and seeing that no attempt had been made to take his evidence *de bene esse*, or to apply to the military authorities for leave to defendant to come down and give his evidence, the Court refused the application for postponement.

Argument was then heard on the merits of the case, after which the Court gave judgment for the plaintiff with costs.

Buchanan, A.C.J.: This is an action to recover certain goods, the property of the plaintiff in the possession of the defendant. These goods were sent by the carrier on behalf of the plaintiff from Victoria West to Upington, where plaintiff was carrying on business. Before the goods arrived at Upington, owing to the advent of some Free State forces and the rebellion of the inhabitants, the Free State flag was hoisted, and the plaintiff had to leave the place. The goods arrived before the plaintiff got back, and are now in the possession of the defendant. The latter had no right to these goods. It is not alleged that he ever received or bought them from the plaintiff and his plea amounts to this, that somehow the goods referred to became the property of the enemy by reason of the latter capturing them during the operations of the war, and it is contended that after such capture the plaintiff has no right in the goods. Now the defendant himself has not been called to give evidence in this case, and the reason given for this is that he is a prisoner in in the gaol at Upington. But then there has been no application to the military authorities to allow the defendant to come down here to give evidence in this case, and no application for a commission to take his evidence *de bene esse*, nor has he filed any affidavit showing any ground why he should not be here to-day to give evidence. Then the plea which the defendant set up might have been established, if such a plea could be established at all, by the evidence of others than the defendant. The defendant himself could have given us some evidence. On the evidence before us, I must say I find great hesitation in saying there was anything like an effective occupation of Upington by proper Free State forces at any time. The evidence is that not more than four Republicans at a time, or eight

altogether, were in Upington, but that the district was disturbed by the rebellion of the inhabitants, which was quite a different thing. These are not belligerents in the sense of making any capture by them from a fellow-subject deprive such fellow subject of his right to the property. Then at the time these goods arrived the Free State flag was no longer flying, and has not been flying there since, and the town at that time appears to have been in the occupation, if of anybody, of the Municipal Councillors and inhabitants who formed themselves into a Committee of Safety. Now the plaintiff's goods being found in the hands of defendant it was for the latter to justify the possession of these goods independent of any question as to whether title would pass to any enemy who might properly capture any of these goods. But there is no satisfactory evidence to show that these goods were ever captured by a proper enemy for the interests of the enemy. Therefore this special defence utterly fails. If the defence proved had been the capture of these goods by the military forces of the enemy other questions might have arisen, such as the effect of the capture, the effect of leaving the goods in this country after the enemy had gone back, and whether the owner could not recover when he came back and found these goods in the possession of some other person, but under the circumstances of this case these questions did not arise, and in the absence of evidence the only judgment the Court can give here—as the plaintiff's goods are in the hands of the defendant who has no legal title whatever to them—is that the defendant must give up these goods or pay the value thereof. The value at the ordinary market price at Upington is stated in the declaration to be £260 10s. 10d. The defendant will therefore be ordered to deliver up these goods to the plaintiff forthwith, or unless he delivers them up forthwith to pay the value of them, £260 10s. 10d., and to pay the costs of this action. If the defendant can show that he paid a carrier for the conveyance of these goods the plaintiff is quite willing to allow him this. Judgment must be given for plaintiff with costs, plaintiff, as a necessary and material witness, being allowed his witness expenses.

Maasdorp and Solomon, J.J., concurred.
[Plaintiff's Attorneys, Messrs. Van Zyl and Buissinne; Defendant's Attorney, Mr. J. J. Michau.]

SUPREME COURT

[Before the Hon. Mr. Justice BUCHANAN (Acting Chief Justice), the Hon. Mr. Justice MAASDORP, and the Hon. Mr. Justice SOLOMON.]

ADMISSION. { 1900.
{ Aug. 31st.

Percival J. Griffiths was admitted as an attorney and notary, and the oaths administered.

PROVISIONAL ROLL.

MILLS AND SON V. CLEAR AND CO.

Mr. Close moved for the final adjudication of defendants' estate as insolvent.
Final sequestration adjudicated.

ESTATE OF SEEBURGER V. HEYER.

Mr. Buchanan moved for provisional sentence on a mortgage bond for £450, which had become payable by reason of the non-payment of the interest. It was also asked that the property specially hypothecated be declared executable.

Granted.

BARRY BROS. V. LOUW.

Mr. P. S. Jones moved for provisional sentence for two sums of £20 and £10 respectively, due on promissory notes, with interest and costs of suit.

Granted

SMIT V. MULL'GAN.

Mr. Gardiner moved for provisional sentence on three promissory notes for £314 18s., £113, and £95 respectively.

Granted.

FLETCHER AND ANOTHER V. ESTATE OF JOLIST.

Mr. Close moved for provisional sentence for £24, being interest on a certain mortgage bond for £170 and insurance paid under the bond.

Granted.

ESTATE OF THE LATE J. NICHOLLS V. SIMON HAVINGA.

Mr. Nathan moved for provisional sentence on a judgment of the Resident Magistrate's Court at Burghersdorp for £15 and £1 12s. 6d. costs, and also for the attachment of defendant's property.

Granted.

BOSMAN V. R. A. FALCONER.

Mr. De Waal moved for provisional sentence on a promissory note for £38, less £2 16s. paid on account.

Granted.

ILLIQUID ROLL.**SMITH AND CO. V. KOLLMAN.**

Mr. Close moved for judgment, under Rule 329d, for £88 12s. 4d., for goods sold and delivered, with interest and costs of suit.

Granted.

MAXWELL BROTHERS V. GREER.

Mr. P. S. Jones moved for judgment, under Rule 329d, for £111 5s. 6d., balance of account for goods sold and delivered, with interest *a tempore morae* and costs of suit.

Granted.

REHABILITATIONS.

Mr. Maskew moved for the rehabilitation of the insolvent estate of Christina Elizabeth Morton.

Granted.

Mr. Gardiner moved for the rehabilitation, under the 117th section of the Insolvent Ordinance, of the estate of George Lapperts, sen. The usual certificate was put in.

Granted.

GENERAL MOTIONS.**IN THE MATTER OF THE PETITION OF MUDIE AS THE GENERAL AGENT IN SOUTH AFRICA OF THE LONDON MISSIONARY SOCIETY.**

Mr. P. S. Jones moved that the rule *nisi* granted under the Derelict Lands Act be made absolute.

Rule made absolute as prayed.

JACKSON V. EAST LONDON MUNICIPALITY.

{ 1900.
{ Aug. 30th.

This was an application by the defendant for the removal of the trial to the ensuing Circuit Court at East London, it being stated that that would be more convenient as all the parties resided at East London.

Mr. Solomon, Q.C., appeared for the applicant.

Mr. Schreiner, Q.C., appeared for the respondent, and pointed out that the applica-

tion could not be acceded to, as the respondent (the plaintiff in the action) had applied for the trial of the case by a jury and a jury case could not be heard at the Circuit Court.

After hearing counsel,

Buchanan, A.C.J.: No doubt this case can be more conveniently heard at the Circuit Court, but under the Special Jury Act parties are entitled to claim a trial by jury, and as that has been done in this case an order for removal to the East London Circuit Court will be denying the law gave parties.

IN THE MATTER OF THE MINORS PHILLIPS

Mr. Buchanan moved for leave to vary the order of the 12th April, 1900, so that a certain sale could be made for £1,006 instead of £1,200.

Granted.

IN THE ESTATE OF THE LATE MARIA ALBERTINA MARINOWITZ.

Mr. H. Jones moved for leave to sell certain property in the estate.

Granted.

IN THE ESTATE OF THE LATE PETER ABRAHAM MYBURGH.

Mr. Rubie moved for leave to sell certain property.

Granted.

CARDWELL V. JORDAAN.

Mr. Searle, Q.C., moved for extension of return day and for substituted service in this matter.

The Court granted an extension of return day to October 12; the latter part of the motion, for substituted service, was not granted.

IN THE ESTATE OF THE LATE JAN FREDERIK DENNETT.

Mr. Gardiner moved for leave to transfer certain property.

Granted.

IN THE ESTATE OF THE LATE BESSIE COCKBURN.

Mr. P. S. Jones moved for leave to raise money on mortgage for the repair of a property, in the estate, in which the petitioners had a life interest. There was an alternative prayer that the money required, £250, come out of certain moneys, £3,000, in which the petitioner also had a life interest.

Order granted, the £250 to come out of the £3,000.

BENNETT V. BENNETT.

Sir Henry Juta, Q.C., moved for a commission *de bene esse* to take certain evidence in England.

Mr. Searle appeared for the respondent, and asked that the commission be made a joint one.

The Court granted a joint commission, Mr. G. W. Edmunds, solicitor, Southsea, being appointed commissioner.

DAVIES V. HAPALT AND ROOS. { 1900.
Aug. 31st.

In this matter there were two applications: (1) That a rule *nisi* to stay execution granted by the Supreme Court on the 28th August be made absolute; and (2) to set aside the writ under which the execution was about to proceed.

The applicant Davies obtained judgment in an action against Hapelt in the Magistrate's Court at St. Mark's for £60 4s. 1d. On a return of *nulla bona* a decree of civil imprisonment was granted, to be suspended pending the payment of £4 per month. The hearing of the application for the decree was at applicant's request postponed from the 24th February to the 26th February, in order to enable applicant to meet the evidence led by the respondent, applicant undertaking to pay the fees of respondents' attorney—10s. 6d. No order was made by the Assistant Magistrate as to costs when he granted the decree, but subsequently the Assistant Magistrate (Roos), acting as Taxing Officer, allowed respondent £1 14s. 6d. as costs. A writ was issued for the recovery of this amount against applicant, and a sale of goods was about to take place to recover the amount. Application was accordingly made to set aside the writ and stay execution, the granting of the writ being said to be illegal, and contrary to the Assistant Magistrate's decision.

In an affidavit by Roos, it was set forth that the intention of the Court at the time judgment was delivered was that applicant should pay these costs. Applicant was represented by attorney when the costs were taxed.

Mr. Molteno appeared for the applicant.

Mr. Searle appeared for the respondent Roos.

After argument, the Court granted an order making the rule absolute, with costs

against the respondent Hapelt. No order was made with regard to the setting aside of the writ.

[Applicant's Attorneys, Messrs. Walker and Jacobsohn; Respondents' Attorneys, Messrs. Fairbridge, Arderne, and Lawton.]

In re DE BEER. { 1900.
Aug. 31st.

Articled clerk—Continuous service.

Where a break in the service of an articled clerk had been occasioned by war and invasion, The Court dispensed with compliance with the rule requiring continuous service, but required the full period of three years to be made up afterwards.

This was an application for the admission of Reginald E. de Beer as an attorney and notary. The petitioner entered into articles of clerkship with Mr. Herman Rosenblatt, an attorney and notary practising at Vryburg, on July 6, 1897, for a term of three years. On October 12, 1899, owing to the outbreak of hostilities between Her Majesty's Government and the Governments of the late Orange Free State and the Transvaal, Mr. Rosenblatt went to Cape Town with his family, intending to leave his family there for safety, petitioner being left in charge of the business at Vryburg. Mr. Rosenblatt was unable to return, communication being interrupted between Vryburg and Cape Town shortly afterwards, and not restored until May 13 last. On January 4 last petitioner was arrested by the Republicans and lodged in gaol at Vryburg, the reason for his arrest being that he had previously been warned to leave the district, as he would not obey the Republicans' orders. He was kept in gaol until February 8 last, when he was sent to Pretoria, and eventually to Delagoa Bay, from whence he reached British territory. During a part of May he acted for the Crown at Kimberley in certain criminal trials, and on May 26 he returned to Vryburg, Mr. Rosenblatt returning on May 30, when petitioner resumed his ordinary duties. Petitioner also stated that prior to becoming articled he served eighteen months performing all the duties of an articled clerk. He had been examined for admission as an attorney and notary by the examiners appointed, and these gentlemen were satisfied as to his qualifications.

Mr. Nathan, for the applicant, referred to *ex parte Hoyle* (7 Juta, p. 97), in which an articled clerk had been allowed to count a break of six months, but the Acting Chief Justice pointed out that in that case the applicant had been studying law for these six months.

Mr. Searle, Q.C., who appeared for the Law Society, said the position was that the petitioner had not completed his three years as an articled clerk, and the society wished to point out that to grant this application might form an inconvenient precedent, although he admitted this was a hard case. It was not so much that the service was not continuous, the more important point being that petitioner had not completed the three years, there being about $7\frac{1}{2}$ months during which Mr. Rosenblatt was in Cape Town, and the time he was there one could not by any stretch say that petitioner was serving him as an articled clerk. He thought it would be better if petitioner served a few months more. One did feel that this was a hard case, and he was not instructed to oppose if under the circumstances the Court thought the petitioner should be admitted.

Buchanan, A.C.J.: To qualify for admission as an attorney, besides passing the necessary examinations, the law requires that every articled clerk shall be instructed during a continuous period of three years. The applicant in this case has not served during a continuous period of three years, though more than three years have elapsed since the date of the signing of his articles. In the special circumstances of this case the Court will make no objection on the ground of want of continuous service. The break in his service was due to no fault of the clerk; on the contrary, his conduct seems to have been most commendable, but still the rules as to the three years' service are clear, and here there has not been such service excluding the break caused by the invasion of the district by the enemy. After reviewing the circumstances of the case, his lordship continued: The applicant will be allowed to complete his three years, and no objection will be founded on the ground of want of continuous service, but he must make up the $7\frac{1}{2}$ months. Nearly two months have elapsed already, so that he will have only about $5\frac{1}{2}$ months more to serve. It is a hard case, but the law requires that full service of three years must be given by every articled clerk. No order can be made now for his admission, but when Mr. De Beer has completed his full service of three years he can apply again.

No order.

Maasdorp and Solomon, J.J., concurred.
[Applicant's Attorneys, Messrs. Fairbridge, Arderne and Lawton.]

MARKS V. THOMSON, WATSON
AND CO. 1900.
Aug. 31st.
Sept. 3rd.
" 4th.

Lease—Destruction of building—
Latent defect—Damages.

Premises which had been let as a store, and which had been properly shored by the tenant for the purpose of storing grain therein, collapsed through the supports giving way owing to a latent defect in the soil under the floor of the building.

Held, that in the absence of negligence on the part of the tenant, he was not liable to the landlord for the destruction of the building.

Held, further, that the landlord was not liable in damages to the tenant for loss sustained through damage done to the goods stored.

This was an action in which Samuel Marks, of Pretoria, sued Messrs. Thomson, Watson and Co. for damages, while there was a counter claim for damages brought by the latter against Mr. Marks. The case arose out of the collapse in March, 1900, of a building situated between the City Club and the Art School in Queen Victoria-street.

Mr. Searle, Q.C. (with him Mr. P. S. Jenes): Before going into the merits of the case I wish to bring to the notice of the Court that my client, Mr. Marks, is resident at Pretoria, and is a Transvaal burgher. No exception has been taken to this by the other side, and in fact both parties are anxious to have this suit tried, but there are authorities which set out that during the existence of a war the Court cannot proceed where the parties are in such a position.

Buchanan, A.C.J.: If no exception is taken the Court has nothing before it.

Mr. Schreiner, Q.C. (with him Mr. Gardiner): I have never before heard of a plaintiff coming in to sue, and saying that he has no *locus standi*. In any case this action is covered by the fact that the plaintiff has a duly appointed agent here who had been appointed long before the war.

The case was then proceeded with. The declaration alleged that on February 10 last Messrs. Thomson, Watson and Co. hired from Mr. Marks through his local agents, Messrs. Johan Jansen and Co., Mr. Marks's building in Queen Victoria-street for storage purposes, at a monthly rental of £50 for three months certain with the option of renewal for a further six months. Thereafter the defendants used the building for the purpose of storing flour therein, but they stacked in the said building a far greater amount of flour than the said building could reasonably have been expected to carry, and in order to strengthen the said building the defendants, without the knowledge and consent of the said plaintiff, put up additional supports therein, so as to shore up the walls of said building, but the said shoring up of the building was quite insufficient and inadequate for the great weight of flour placed upon the floors thereof by the defendants, and in consequence of the above on March 7 last the building fell down, and was completely destroyed. In its fall the building did considerable damage to the adjoining building, the Art School, belonging to the Colonial Government, viz., to the extent of £55, and the Government had claimed the said sum from the plaintiff, and the plaintiff was liable to pay the same. The cost of reinstating the building would be £2,100, and the plaintiff estimated that the building could not be rebuilt before the end of February, 1901. The plaintiff, therefore, alleged that he had sustained further damage to the extent of twelve months' rent, viz., £600. He therefore claimed: (a) That the defendants be ordered forthwith to reinstate the said building or to pay to the plaintiff the sum of £2,100, the cost thereof; (b) payment of the sums of £55 and £600 as damages; (c) alternative relief; (d) costs of suit.

The plea admitted the leasing of the premises, but said that it was upon the terms stated by the agent for the firm of Minville, Dupont and Co., of Buenos Ayres. The defendants denied that they stacked in the said building a far greater amount of flour than the building could reasonably have been expected to carry when the supports referred to were made, and denied that these supports were put up without the knowledge and consent of the plaintiff, and that they were quite insufficient and inadequate so far as could reasonably be foreseen. They stated that plaintiff's agent, Johan Jansen, was aware that the building was hired for the purpose

of storing a great quantity of flour, and that it was with the said agent's knowledge and approval that the building, and more particularly the floors thereof, were strengthened by strong supports erected under competent advice, which supports but for the unknown and unforeseen defects in the property let, and specially beneath the soil and in the foundation, would have been sufficient and adequate to enable the plaintiff's building, both as to its walls and floors, to contain and sustain the flour stored therein, for the storage whereof the plaintiff's said agent was fully aware that the said building was hired by the defendants. Owing to these unknown and unforeseen defects the floors and walls of the building gave way, and the building was destroyed, but the destruction of the said building was not due to any negligent or improper use by the defendants of the property let, and they were not in law responsible for any loss thereby sustained by the plaintiff. The defendants therefore refused to pay the sums demanded, and prayed that the plaintiff's claim might be dismissed with costs.

As a claim in reconvention, the defendants said that by reason of the fall of the said building they, on behalf of Minville, Dupont and Co., the owners of the flour stored in the property, had sustained damages in the sum of £1,039 16s. Defendants went on to say that the plaintiff (now defendant), by his agent, was aware of the purpose for which the building was hired, and as owner he was responsible for the loss occasioned by the unknown and unforeseen defects aforesaid, whereby the property was rendered unfit for the purpose for which it was hired, and was therefore indebted to the defendants (now plaintiffs) in the sum of £1,039 16s., for which sum the defendants (now plaintiffs) prayed for judgment, or for other relief and costs of suit.

In his plea in reconvention the plaintiff (now defendant) denied that defendants (now plaintiffs) had sustained any damage for which he was responsible.

The first witness called was

Johan Jansen, carrying on business as Johan Jansen and Co., brokers, etc., who said they had been the agents for Mr. Marks, of Pretoria, for more than twenty years. About March or April last year plaintiff bought the property in question in Queen Victoria-street. On February 10, Mr. Batezat, for the defendants, called and asked if the store was still to let. Witness said it was, and that the rent was £50 and immedi-

ate possession could be had. Witness asked him what he wanted it for, and he said for mules, horses, forage, etc. Batezat took away the key, and letters followed confirming the lease for three months at a rental of £50 a month for three months, with the option of renewal for six months. Some days after that Mr. Batezat called to see witness and said that as they were putting no animals in the building they wanted to remove the stalls and the mangers, and to this witness consented. There was stabling for about sixty horses.

Cross-examined: Witness knew nothing about Mr. Furber being concerned in the arrangement of the lease. He did not know that Mr. Furber was the agent for Messrs. Minville, Dupont and Co. Mr. Batezat never, to witness's knowledge, introduced Mr. Furber to him. Mr. Batezat never mentioned the stores being required for the storage of wheat. Witness did not remember him saying flour. He might have done so. He said forage, etc. Nothing was ever said, so far as witness remembered, about flour or meal being mentioned, nor was anything said about strengthening the floors. He remembered no conversation about anything except removing the stalls and the mangers. As to the storage of flour and wheat, witness had often seen wagons go in there, but took no particular notice. He first knew on March 5 that supports were being put in. The building was an old one, but he did not know that there was any defect in it except as to drainage. There were once negotiations about the premises being used as a Government store for stationery. He knew the Government did not take the store. The previous tenant was a Mr. Sym, who left at the end of November. He used the place as a stable and paid £45 per month. Witness knew of no scheme to pull the place down, even if it had not fallen, and put up some building more in keeping with the neighbourhood. The price paid for the site was £9,500. As a broker he considered it a very valuable site. Witness knew nothing as to what Mr. Marks intended to do with the building, as he had had no communication with him since the war. Witness did not know even now anything about the supports, except those in the stable.

Re-examined: Sym left because he became insolvent.

John Parker, architect, said that before the premises in question collapsed last month he prepared the plans for the drainage, which work was done in December and

January last. He detailed the drainage work done, which was completed about the end of January. The building was an old three-storied one. Witness visited the building a few days after it collapsed, and after obtaining particulars of the shoring witness, Mr. Tully, and Mr. Ransome sent in a joint report. Witness described his further investigations, which showed what the shoring had been. It was perfectly clear that the top floor of the coachhouse was filled completely full. The first floor had been about two-thirds or three-fourths full of flour. There might have been some on the ground floor. The system of shoring did not go far enough. It was easy to be wise after the event, but he thought in a building of this sort the whole weight should have been taken off the walls, and to do so each wall should have been supported. There were two walls quite unsupported, one of which, the middle wall, really had to take the most that the middle wall collapsed first. The foundations of the posts were not at all secure. The slabs of wood underneath the bottom of the posts were not sufficient. The walls were only really capable of keeping off the weather. They were incapable of keeping any weight there. Witness had made calculations, which showed that the weight on the top floor was about 2.13 cwt. per foot superficial, and on the middle floor about 3 cwt. per foot superficial. If loose forage had been stored there, the weight would have been about 50 lb. per foot superficial. Compressed forage would have given more than double that weight. It depended upon how the forage was compressed. Without shoring the walls would have begun to crack, the plaster to fall, etc., and given way after a few bags had been put in the building. The walls were not fit for storing any weight, but in his opinion they were quite fit for storing forage. Witness had called for tenders for the erection of a building similar to that which had collapsed, and the highest tender was £2,000, while the lowest was £1,888. The material—mortar, bricks, etc.—was taken as of a better quality than that in the old building for the purposes of the municipal regulations. The improved value of the material would be about £200, that was about 10 per cent. of the cost. He did not know that there was any serious intention of following out the old plan.

Buchanan, A.C.J.: The tenderers were not aware they were simply being made use of.

Cross-examined: In his measurements witness took the cubical contents of the top

floor packed, and the second floor two-thirds full. The walls were only 9 inches thick in the two upper floors. The state of the walls would not be perceptible to the casual observer, but the condition of the floors would. These walls were not strong enough to bear the weight.

Maasdorp, J.: You say a 9-inch wall would not have borne that weight. Would you have said that before the accident or not?

Witness: I think I should have said it before the accident.

John C. Tully, architect, also gave evidence. His opinion was that the collapse of the building was due to the want of proper supports for the uprights used for shoring. The centre wall must have been the one to give way first. Witness gave details of what he considered necessary in shoring a building of that kind.

Buchanan, A.C.J.: The effect of your evidence is that if you had had to shore up this building you would have put a longitudinal beam along the floor.

Witness: Yes, my lord.

David Arnot, a clerk of works, gave evidence as to the drainage and other work done on the building before it was leased by the defendants. The work done was good work, up to the requirements of the Town Council. As to the shoring put up by defendants, they did not shore up the weakest wall—the middle wall. He also contended that there should have been a longitudinal piece of wood on which the beams forming the shoring should have rested.

John Parker (recalled) said that according to his calculations there were 100 tons on the top floor of the coachhouse and 125 tons on the first floor.

This closed the plaintiff's case.

Postea, September 3.

Henry Batezat was the first witness called for the defence. He stated that he was a partner in the firm of Thomson, Watson and Co., the agents for Minville, Dupont and Co., the owners of the flour stored in the building that collapsed. In hiring that property they were acting on behalf of Minville, Dupont and Co. Mr. Forbes was the manager of the latter firm, and one of the partners arrived in this country shortly after the hiring of the premises. In consequence of an advertisement they saw in the "Times," witness and Mr. Forbes went to see Mr. Jansen, but he was not in. They met Mr. Jansen in St. George's-street, and witness introduced Mr. Forbes to him. Wit-

ness asked Mr. Jansen what was the rent of the property, and he said £50. That was on Saturday, February 10. Witness agreed to hire the store at £50 a month, stating distinctly that he required the building for storing wheat, flour, and other South American produce. Witness never said a word about requiring the building for mules and forage. Witness's firm was expecting a consignment of 30,000 bags of flour, etc., and it was to store that that they hired the building. They were to use the building as a bonded store, but witness was not sure whether or not he mentioned that to Mr. Jansen. The Tuesday or Wednesday following witness called in Mr. Ransome to examine the building, and in consequence of a report Mr. Ransome made, witness saw Mr. Jansen and told him that the architect recommended that some beams and supports should be put in to strengthen the store, and Mr. Jansen said he had no objection. Witness said he required more room, and Mr. Jansen agreed that witness should have the stalls removed, as the wood was rotten. Nothing was said about the cost of removing the stalls or putting in the supports. Mr. Hyland, a shipwright residing in Cape Town, did the work. Witness considered him a competent man, and had known him for the last twenty-five years. The strengthening of the building by supports was completed before any weight was put into the building. The ship with the produce arrived about the end of February, and the first lot was put on the ground floor of the coach-house. Mr. Moller was the clerk who supervised the storing of the flour and kept the tally. After the first floor of the coach-house had been partly filled, they began storing on the first floor of the stable. The bags were placed on an average two feet from the walls. On the first floor the flour was packed to about four or five feet from the beam. On the top floor the flour was packed up to the beams, leaving the space up to the roof vacant, there being no ceiling. The ground floor of the coach-house was filled to within eight or ten inches of the beams. On the stable ground floor there was only some hay. Above the stable 292 tons of flour were stacked, and above the coach-house 198 tons. There were altogether 11,606 bags of flour in the building. The store fell about 7.30 on the night of March 7. Witness was there about 4.30 the same afternoon, and there were no indications of anything wrong then. Proceeding, witness deposed as to the manner in which the counter-claim, £1,039 16s., was

made up. The item £249, wagon hire and Coolie labour, was approximated as near as possible. A special policeman £25, and £11 for Customs watchman, the store being a bonded store, were also paid. The accounts, amounting to about £160 for removing debris, etc., were for work absolutely necessary after the collapse of the building. The £83 6s. 8d., bags destroyed, entailing re-bagging, and £420 for bags entirely wasted and lost, etc., were fair and reasonable charges.

Cross-examined: Witness knew that previously the building had been used as a stable. At the time witness hired it he could not get store room anywhere in town. Minville, Dupont and Co. were also large importers of horses, mules, forage, etc. On same vessel as the flour there were 265 horses, which had already been sold, subject to being passed, to the Government. On the same vessel there were 4,000 to 5,000 bales of compressed forage. Altogether there were 14,000 to 15,000 bags of other produce than flour. The remainder of the 30,000 bags was stored in the Docks' store, as they could not get a store in town. They paid £3,000 to £4,000 rent to the Harbour Board about this time for rent of stores. Witness had a special staircase made to get the flour in from the front, where a space of eight or nine feet was left. Mr. Knight, another partner of the firm, had suggested to witness that it would be desirable to have the store examined. Flour was one of the heaviest articles of merchandise, and required a very strong store. The reason all the flour was stored in the coach-house and the top stories was that the stables could not, without large alterations, be made into a bonded store, there being openings at the back. If a judgment was given against witness's firm, they would recover from Minville, Dupont and Co.

By the Court: There was no suspension, on behalf of Mr. Jansen, of the alteration to strengthen the building, but witness had heard that he was there two or three times. It was after contract was made that Mr. Knight suggested employing an architect to examine the building.

Frank Forbes, manager here for Minville, Dupont and Co., said his firm was interested in several contracts for the supply of South American produce. They did not want the stabling for horses which were to arrive on the same ship as the flour, as all horses on arrival were either taken to the Government Remount Camp at Green Point or to

Wrensch's Farm, Observatory. Witness corroborated as to the hiring of the premises. He was with Mr. Batezat when they examined the building, and afterwards met Mr. Jansen in St. George's-street, when the store was hired. Flour was mentioned, but horses or mules were never mentioned. Minville, Dupont and Co. were the substantial parties in this suit, that was if damages were given against the defendants, Minville, Dupont and Co. would have to pay, and if anything was recovered on the counter-claim, they would receive it.

Cross-examined: There would not be so much difference between the weight of a bale of compressed forage and a bag of flour, but the bale of forage would be about a third larger than a bag of flour. Witness was introduced by Mr. Batezat to Mr. Jansen as the representative of Minville, Dupont and Co., and absolutely took part in the conversation.

William Cornelis Arels Moller, shipping clerk in the employ of defendants, said he was in charge of the stores in question on February 19, when Hyland was putting in the supports. Witness had frequently seen Mr. Jansen at the stores, and it was not true that Mr. Jansen had only seen the lower part of the stable on the one occasion. Witness gave details as to the manner in which the bags were stored, generally corroborating Mr. Batezat. The day previous to the collapse of the building, there was no indication that the building was yielding.

Cross-examined: Witness had only recently entered defendant's service and had never packed flour before this lot.

Henry C. Hyland said he had carried on business as a shipwright here for twenty-four years. On instructions from Mr. Batezat, witness put in the supports, etc., in this building. If the floor on the foundation had not given, the supports put in were sufficient to carry three times the weight. The pieces on which the uprights rested were put across a cement gutter running right along the building. If the ground below the gutter was all right, that cement was strong enough to put the weight on.

Cross-examined: Witness put in supports of a less thickness in the upper portion than provided in the architect's plan. Witness did that on Mr. Batezat's orders after he (witness) had pointed out that to put in the posts provided for would take up half the room. If the foundations had been good, the supports he put in were sufficient to lift a ship. The middle wall was not shored up

at all, that not being provided for in the plan. There was not a post in the whole place broken.

Morris Charles Fanwood, a contractor, deposed that he was called in by defendants, after the collapse of the building, and removed the debris. He then found that the first three supports in the coachhouse had sunk right through the floor, the one nearest the street two feet, the second two feet six inches, and the third three feet. That was as far back as they had cleaned, the debris still being there. The supports had carried the cement guttering right down. Witness had dug at one place shortly after the collapse (about a week afterwards), and found the ground very sloppy underneath.

Cross-examined: Witness commenced work removing the debris on March 10.

Henry Rudolph Stephan, the remaining partner in the firm of Stephan Bros., said he had had great experience in the storage of grain and flour. He did not consider the building a proper one for the storage of flour or grain, but when supported as had been stated, it ought to have taken 400 or 500 tons on the upper floors.

George Ransome said he had practised in Cape Town as an architect for twenty years. He had drawn up a plan showing how this building should be supported for the purpose of stacking grain. The supports he provided for were 12 by 12 on the stable ground floor, with the exception of one 12 by 9 along the wall, and 12 by 9 all upstairs. The supports of lesser thickness put in would weaken the support, but witness was of opinion that that had nothing to do with the collapse of the building. Witness, after that event, had seen the place, and seen that all the supports in the coachhouse had been driven through the floor into the ground, the cement on which the soles rested being driven through also. The stable side had not been cleared, and witness only spoke of the coachhouse. This sinking of the beams would lead to the collapse of the building. The beams themselves were perfectly intact, and, so far as witness could see, there was no defect in the work. Witness did not attribute the accident to the thickness of the wall, but to the supports going in, principally the third support, which went three feet into the ground. Under the third upright there was a cavity of $2\frac{1}{2}$ to 3 inches, and that extended three feet under the brickwork, caused by a contraction of the earth under the brickwork, the bricks being closely packed, holding up together. This

would lead to a sinking of that third post, and that would draw the others down with it. Witness did not think a beam run right along would be so good as the system of toe-caps he recommended. But for the sinkage the store would have been standing now. Witness saw the soil after the collapse, and it was damp.

Cross-examined: The middle wall was not shored up, although it had the greatest strain on it, but that had nothing to do with the collapse of the building. The middle wall did not collapse first. Witness did not inspect the work of storing after it was finished, and he did not know who was going to do the work. He supplied a working plan, and that had nothing to do with the supervision, although he had unofficially seen the work after it was completed. Witness was not consulted as to the alterations made in his plan. If a longitudinal beam had been used the three posts would not have gone one after another. He would have got by that a greater longitudinal strength, but not so great a transverse strength, and it was a transverse strength he wanted. There were only two inches of cement plaster on the floor, not concrete, which would be a mixture of cement and stone. There were seven inches of solid material. The work was well done, but there should have been a better base. The building fell towards the club, which showed that the walls which were not shored fell. The reason of the cavity would be, according to witness's theory, that the flooring had been laid down when the sub-soil water was very high, and upon that decreasing the ground would shrink.

Buchanan, A.C.J.: As I understand your evidence, you admit that smaller beams were used than you ordered, but you say they were sufficient to carry the weight, notwithstanding the reduction in size; that is, they would have carried the weight if it had not been for the sinking of the foot of the support in the ground?

Witness: Yes, my lord. In answer to further questions by the Court, witness said he knew the beams did not give way because none of them were fractured or bent. The weight per superficial foot on the first floor of the coachhouse was 1 cwt. 38 lb., and on the upper floor 1 cwt. 72 lb. Compared with other stores, that would not be an excessive weight. The safety weight for an ordinary warehouse would be $1\frac{1}{4}$ cwt. per superficial foot on each floor; that would be one-tenth of the breaking load. That was without

shoring. If these beams had not sunk this shoring would have carried any weight put on it.

William Black said he had practised as an architect here for eight years, and previous to that in Australia. Four days ago he had inspected the site of this building. In the sub-strata two feet deep he found some brick-bats. This showed it had been a builder's rubbish depot at one time. He also had a hole opened on the site adjoining, and two feet down he found evidences of recent filling which showed that it was not virgin soil. He found an amount of water in the third hole. He also found a cavity two feet away from the posts. After giving evidence as to the thickness of the walls, witness said that he considered the supports put in were more than ample to carry the weight in the building. Witness considered the bad soil the cause of the collapse. Had the sole-plates (or toe-caps, as they had been called), been on an ordinary floor, they would not have sunk.

Postea (September 4).

Mr. Searle, Q.C., in argument, cited *Bensley v. Clear* (Buch., 1878, p. 89), *Alexander v. Armstrong* (Buch., 1879, p. 233), *Nannucci v. Wilson and Co.* (11 S.C.R., p. 240).

Mr. Schreiner, Q.C., relied on *Voet* (19, 2, 20), *Wheeler v. Van Reenen* (2 Juta, 269).

The Court gave judgment for the defendants on the claim in convention, with costs, and for the defendant on the claim in reconvention (plaintiff in the claim in convention), with costs in reconvention.

Buchanan, A.C.J.: This action has been brought for the recovery of damages which have resulted through a store belonging to the plaintiff, which was let to the defendants, having fallen down. The declaration alleges that the plaintiff, having let the store to defendants, the latter stacked too much flour therein, that the shoring to support the floors was insufficient and inadequate, and in consequence of this and of the defendants' negligence the store collapsed. The plea is that this shoring and the storage of flour was with the consent of the plaintiff's agent, that the shoring was adequate as far as could be foreseen, and that the immediate cause of the collapse was a defect in the soil under the floor of the store. In reconvention on these grounds the defendants claim damages which they say they have suffered in consequence of injury to the flour stored in the store. The case depends mainly on the view taken of the evidence, for there is not much dispute as to the law ap-

plicable. Counsel on both sides have based their claims upon the negligence of the parties on the other side. Now, though the store in question had formerly been used only for livery stables, the agent for the plaintiff advertised it to be let, stating that the property could be let as a warehouse or store. The defendants required a store—a bonded warehouse—in which they wished to put flour, and they went to plaintiff's agent and hired these premises, not for stables but for stores or warehouses, and they were let as such. Before putting in the flour defendants made certain additions to the stores for the purpose of strengthening them, and making them capable of bearing the weight of the flour intended to be put therein. The defendants say they told the plaintiff's agent of these additions, and got his consent, but the plaintiff's agent said they only spoke to him about removing the stalls. I think, however, it is more probable they informed the agent they were going to use the store for flour, and put supports in, and that he gave his consent. Before the flour was put in defendants employed an architect in connection with what is called the shoring or supports for the purpose of strengthening the building. This shoring was a very necessary precaution, and the only expert witness on this point who has been called, Mr. Stephan, a large dealer in grain, says that even when stores are well built it is desirable before putting in such a heavy weight as grain or flour to put in shoring. The plans for the shoring were prepared by a highly competent architect, and were only altered in minor points. This shoring was not put up under the supervision of the architect, and if through want of this it had been negligently or badly done there would have been some force in the contention that want of supervision was negligence on the part of the defendants, but the person who put up the shoring was a highly competent man of great experience. The shoring was put up in accordance with the architect's plan except that the size of some of the beams was less, but the beams put in were of sufficient size to maintain the building. The accident which followed did not result from the reduction of the size of these particular beams. It is curious to notice that it was from the giving way of one row of beams put in as designed by the architect that the accident resulted. Unfortunately this row of beams which was in the coachhouse was placed along the floor in the front part of the building, where there was soft sub-soil. This sub-soil gave way,

and this brought the building down. We think this really caused the accident, and that if the ground had been ordinary virgin soil, and had given a fair support to the beams, the beams would not have sunk through the floor. We are also of opinion that the store was not overloaded, and that if the soil had been solid the beams would have stood, and there would have been no accident. Mr. Stephan said that in these stores there could easily have been placed 500 tons of flour, while, as a fact, only 410 tons of flour were placed in the building, viz., fifty-seven tons on the top floor of the coachhouse, and seventy-one tons on the first floor, and 282 tons on the other side (the stable). Therefore, as far as the overloading is concerned, I think that the plaintiff has failed. The fault in the shoring was said to be that a longitudinal beam ought to have been placed along the whole length of the store. No doubt, looking at the case now, it would seem that a longitudinal beam would have given more support than the transverse section used according to Mr. Ransome's plan, but Mr. Ransome and another architect, Mr. Black, say that under the circumstances it was a fair and reasonable way of putting up the beams. Then it is said there was negligence on the part of the defendants in not testing the floors. I could understand this argument if the architect had attempted to put heavy beams to support heavy weights on an ordinary plank floor, but in this case there was a new and solid concrete floor throughout the coachhouse. It was evident that it was a new floor, and looked to all appearance thoroughly sound. It had been recently restored, and there was nothing to lead anyone to think that there was any latent defect underneath which could be reasonably required to be allowed for. Under all the circumstances, we find a very great difficulty in fixing upon anything in which we can say that the defendants have been negligent in what they did in regard to the store. The shoring up of the floor was reasonable, and was done in a proper manner—and the defect in the sub-soil was one which they could not reasonably anticipate, and for which they could not be blamed. I think, therefore, that from the circumstances disclosed in the evidence, the plaintiff cannot recover against the defendants on the claim in convention. As to the claim in reconvention, because the plaintiff has failed in the claim in convention, it is not a necessary sequence that the defendants must succeed in their claim in reconvention. A fundamental

principle of the law of hiring and selling is that the party selling or letting a thing gives an implied warranty that the article is reasonably fit for the purposes let or sold. In this case the premises were let as warehouses, and were reasonably fit for the purpose, but where there is a latent defect, the principle of law is different from where there is a defect which the lessee ought to have known or did know. In this case it was altogether a latent defect. The floor was properly laid, and there was no negligence in not having it more strongly built. Under these circumstances the principle applicable to defendants' case is different from that applicable to the plaintiff's case, and the defendants must establish clear neglect before they can recover. Each party must be held to have failed in their actions, and judgment will be for the defendants in convention with costs, and for the defendant in reconvention with costs.

Maasdorp and Solomon, J.J., concurred.

[Plaintiff's Attorneys, Messrs. Fairbridge, Arderne, and Lawton; Defendants' Attorneys, Messrs. J. and H. Reid, and Nephew.]

TUROC V. WOODSTOCK MUNICIPALITY. 1900.
Sept. 4th.
" 5th.

This was an action in which Hyman Turok sued the Municipality of Woodstock for £500 for damages sustained to property situated at Woodstock, and belonging to him, by a flood on February 25 last.

The declaration set forth that the plaintiff resides and carries on business at Woodstock, where, besides other property, he owns a piece of land situated at the corner of Railway-street and Albert-road, which are Municipal streets in the Municipality of Woodstock, in which the plaintiff is a ratpayer. Near the said corner and in Albert-road, and in the immediate neighbourhood of the said land, the defendant Municipality had before the month of February last constructed as a Municipal work a certain storm-water grating for the reception of water, and more especially rain-water, into an underground drain (also a Municipal work), by which such water flowing in that neighbourhood, and especially in Albert-road, should be drained off without damage to or flooding of the property of plaintiff or other ratepayers. It became the duty of the defendant Municipality to construct, keep, and maintain both the said storm-water grating, including its connection with the said underground drain, and the said underground drain so that no

damage might be caused to the plaintiff or other ratepayers in consequence thereof, and more especially by any flooding of water for the reception of which the said grating and drain were constructed, and it was further the duty of the defendant Municipality in no way to cause the plaintiff's property to be flooded by collecting and diverting water so as to discharge the same thereon. The natural flow of the water coming to the corner aforesaid would be down Railway-street and past the plaintiff's property, but besides constructing the works aforesaid the defendant Municipality also caused the ground to be so raised at the junction of Railway-street and Albert-road as to prevent water from taking the said natural flow and to collect and divert it so as to flow to the said grating, and in case the said grating or drain or either of them were insufficient, or not in order to receive such water and drain it off, then to cause it to be discharged upon the plaintiff's land. The defendant Municipality failed or neglected to perform its duties aforesaid, and either failed properly to construct the aforesaid Municipal works so as to be sufficient for the purposes for which they were intended, or in the alternative failed duly so to keep and maintain the said works that they should be sufficient, and in order to receive and drain off the water coming to the said grating, and in February last, by reason of and in consequence of such failure or neglect on the part of the defendant Municipality, large quantities of rainwater were collected near, diverted to, and discharged upon the plaintiff's said land. At that time the plaintiff had partly constructed and nearly completed upon the said land a large building, the foundations and portions of the walls whereof were soaked by the water so discharged, and by such soaking the foundations were damaged and portions of the wall were caused to sink and crack to such an extent that the plaintiff was obliged to cause such portions to be pulled down and rebuilt at great cost. The plaintiff further sustained special damages by reason of the delay in completing his building in consequence of the matters aforesaid. He therefore claimed the sum of £500 as damages and costs of suit.

In their plea the defendants admitted the first paragraph of the declaration save that the said Albert-road was a Divisional Council road not under their control. Prior to certain work mentioned a large quantity of water flowed down Greatmore-street to the south of Albert-road into Albert-road, and

thence flowed partly along Albert-road, partly across the road into a gully at a certain spot there, and thence over plaintiff's property into Railway-street, that being the natural flow of the water. Proceeding, the plea detailed the works done prior to February last, according to the plan put in, and said that these works were duly and properly constructed, kept, and maintained, and the effect thereof was to drain away from the plaintiff's land, a large quantity of water which would otherwise naturally have flowed thereover. In the month of February last an abnormal, violent, and exceptional fall of rain, in the nature of a waterspout, took place, which overflowed Albert-road and flowed down towards a gully constructed near plaintiff's property. The plaintiff, in the carrying on of the building operations on the said land, had by himself, his servants, or agents, wrongfully, unlawfully, and negligently blocked and obstructed the said gullies, and thereby prevented the said water from flowing therein, and in consequence of the above the said water overflowed on to the plaintiff's land, which had been excavated by the plaintiff to a considerable depth below the level of the adjoining land and streets. The defendants contended that they had performed their duty, and had not collected near, diverted to, or discharged rainwater upon the plaintiff's land, and they denied that the plaintiff had suffered any damage. If the plaintiff had suffered any damage the defendants said it was through no act or default of theirs but was through the act of God, and the aforesaid wrongful and negligent conduct of the plaintiff, his servants, or agents. Wherefore they prayed that the plaintiff's claim might be dismissed with costs.

In his replication the plaintiff admitted that Albert-road was a Divisional Council road, but said that the portion within the Municipal limits and referred to in the declaration had been with the consent of the Divisional Council dealt with for the purposes of the works referred to in the declaration, and the plea as a municipal street. The plaintiff specially denied that before the construction by the defendant Council of the works mentioned, and before the raising of the ground referred to in the declaration any considerable quantity of water flowed across his property in its natural flow. He also specially denied that the fall of rain in the month of February mentioned was abnormal, violent, or exceptional in the nature of a waterspout, but admitted that it was very heavy.

Mr. Schreiner, Q.C. (with whom was Mr. Close), appeared for the plaintiff, and Sir Henry Juta, Q.C. (with whom was Mr. McGregor), appeared for the defendant Municipality.

Thomas W. Cairncross, a member of the Institute of Civil Engineers, and formerly engineer to the Town Council of Cape Town, deposed as to the correctness of the plans put in. At the place in question if Albert-road was not there the water would flow right down towards the shore. The level of Railway-street had to be raised above the ordinary surface of the ground when the street was being made. The centre of Albert-road was rather higher than the level of Railway-street. There was an overlap which prevented water which found its way over the crown of Albert-road going down that road, forming a sort of a dam. Stormwater which failed to find its way into the 12-inch pipe at the junction of Dublin-street and Albert-road would find its way over the crown of Albert-road into the gutter alongside Turok's property. That gutter was only intended to drain a half of Albert-road for about 300 yards, and was quite sufficient for that purpose. Briefly, the gully at Turok's corner had to carry off the water for a very large area, and it is was not sufficient, as all gullies should be provided with a storm-water overflow such as witness had introduced in Cape Town ten or eleven years ago.

Cross-examined: Witness ceased to be town engineer in 1898, having then held the post for eighteen years. The storm-water overflows were not all in yet. They were being gradually introduced. The system was begun by witness ten years ago, and it was at work still.

W. Herman, the architect of plaintiff's building, deposed that part of the sluic which formerly ran down Railway-street was on plaintiff's ground and part outside, the corner beacon being in the sluic, but after building the foundations there was still a broad sluic of 2 feet 6 inches left. The building was carried on in accordance with the Municipal requirements, and the building inspector was there off and on. When witness spoke to the inspector about the building he appeared satisfied, and there was no complaint about the height of the walls. Witness believed the sluic was filled up when the second story of the building was begun, and the street was then made up to the level of Albert-road. The morning after the flood witness visited the building. He could see that the water was going right into the building and the foundations had been badly

washed out, and the sleeper walls were topsyturvy. The cross-walls were made mostly of clay, and the outside walls of concrete. One of the upper walls was cracked badly. Proceeding, witness gave evidence as to the cost of repairing the damage done by the flood, and said that the items in the statement submitted to the Municipality were fair. Nothing unnecessary was done in reflood. He could not say anything about the carpentry repairs.

Cross-examined: The raising of the floor after the flood entailed extra carpentry work.

Fred Cherry, an architect practising in Cape Town, deposed to having on Monday, February 26, gone out with Mr. Fuller to plaintiff's building at Woodstock, and examining the storm-water grating outside the building. The grating was then fairly clear, but witness could see that it had been choked up. He saw that Railway-street, being raised, the water could not get over it and went over the property. At the corner Railway-street was higher than Albert-road.

Hyman Turok, the plaintiff, deposed that at the end of 1898 he purchased this piece of ground at the corner of Albert-road and Railway-street, and plans for a building were passed about the end of August, 1899. Railway-street was not made when witness commenced to build, and there was a large sluic along the edge of witness's property from Albert-road down Railway-street. The sluic was between two or three feet wide and three feet deep. The grating in front of witness's property was made by the Municipality after witness had begun to build. After the foundations were in they filled up the sluic and made up Railway-street; they made it higher than the top of Albert-road, but afterwards lowered it to the present height. Witness went to the house on Sunday, February 25 last, and saw that there was a big flood just at that place. The building was flooded, the water in it being three courses of bricks high. That was between seven and eight o'clock in the morning. It had been raining through the night. Witness was his own contractor, and getting his men together, began to put things right. Proceeding, witness corroborated the architect as to the damage done. The charges witness had made in connection with the repairs were correct. He also suffered through depreciation in the value of the building, and also through the delay, as he could have had the premises let as soon as they were finished. He was

now getting £54 10s. a month rent, and the repairs required owing to the damage by the flood took over a month.

Cross-examined: Witness had had no complaints since February, the small grating in front of his property having been enlarged, and he thought that had put everything right. He was certain the gratings were altered after the flood.

Evidence was given by plaintiff's mason as to the condition of Railway-street before the building, and the alterations that had since been made by the Municipality. He also deposed as to the damage done by the flood, and the cost of the extra work he had to do in repairing the damage. In cross-examination he said there had been bigger rains since February 25, but after that flood he took precautions by building dwarf wells in the doors until he was finished. He admitted, however, that he could not say how heavy the rain was through the night of the flood. He had always kept the place clear of rubbish while building was going on.

Nathan Levy, who did the carpentry work on the building, said he charged £20 for the extra carpenter's work necessitated by the flood. In cross-examination, witness admitted that the floors, etc., had been raised after the flood, and that the direct work necessitated by the flood was the removing of six rafters, which took a day, and also repairs to the sleeper plates, etc. The raising of the floors was included in the £20.

Postea, September 5.

Frederick Luyt said he lived 800 or 900 yards from plaintiff's property. On the morning of February 25 he noticed that there had been rain through the night, but he could not say whether or not it had been heavy.

This closed the case for the plaintiff.

Henry Bancroft deposed that he lived in Albert-road, on the mountain side, just opposite Turok's place, and had lived there about eighteen years. He remembered the morning of Sunday, February 25. The biggest rush of water witness had ever seen was then coming down from the direction of the mountain. The water came into witness's back kitchen, a thing that had never happened before. On the ground owned by Turok there used to be seven or eight feet of clay, which had been removed. Before the building was put up witness had several times seen the water flowing right over the land.

The gully and other Municipal work at the spot had been a great improvement, as formerly the rains used to wash Railway-street away.

James O'Mara said he had the hotel at the corner of Dublin-street and Albert-road, where he had lived a little over five years. Witness remembered the heavy storm in February which flooded Turok's property. It was a heavier storm than those of the previous year. Previously a regular sheet of water used to run over the ground now owned by Turok every time there was a storm of water, even although it was not a very severe storm. Before the Municipality made this sewer in heavy rains the water used to come right up to witness's stoep, but the sewer was a great improvement, carrying off twice as much water as used to be carried off. After heavy rains there was always a big rush of water down Dublin-street.

Joseph Smuts said he lived in Albert-road, next to Turok's premises. He had been there about fifteen years, and knew the ground well. Before the Municipality made the sewer in question witness had often during rains seen the water go on to Turok's land. Witness remembered the morning of Sunday, February 25. From the marks witness saw he judged there must have been a very heavy storm during the night. Witness had seen the new sewer at work. It took off more water than used to be carried off, and was an improvement. Turok's property also benefited in more water being carried off. When witness went out the grating was cleared, but there were already some people there, among them Mr. Gray. There was a quantity of builders' debris lying at the side of the grating, having apparently been cleared out from the grating.

Henry Ryder, an architect, said he resided 500 or 600 yards from Turok's place. Witness had lived in Woodstock about 2½ years, and in Salt River about 5½ years. Witness remembered that on February 25 there was a very heavy storm, one of the heaviest he had seen.

Robert Carslaw, a builder, said he had lived 21 years at Woodstock. Early on the morning of February 25 there was a heavy storm and a big rush of water, and the destruction caused in the street he lived in (Plein-street, Woodstock) he had never seen the like of. Crossing Albert-road, at the foot of Plein-street, the water was up to witness's knees.

Cross-examined: Plein-street was about 200 yards from Turok's place, and the water there did not flow towards Turok's property.

Thomas Adam Clark, a house and estate agent, said he had been in Woodstock for over twelve years. He knew Turok's property, and had often in heavy rain seen water flowing over it. There was an abnormally heavy storm on the morning of February 25. It was heavier than the storms in August, but of shorter duration. It looked like as if a storm-cloud had broken against the mountain.

Cross-examined: The storm began about four o'clock in the morning, and the back of the storm was broken about seven o'clock.

Donald Ackhurst said he was in the employ of the Town Council of Woodstock, and part of his duties was to go round and see that the Municipal boys did their duty in cleaning the gratings. Witness remembered a heavy storm on the morning of February 25. He went to Turok's place and found there one of his boys, David Isaacs, whose duty was to keep the gullies clear. He was taking bricks, boards, and other builder's debris from the grating. Witness knew of no other building going on near that grating from which the debris could have come.

David Isaacs said he was employed by the Town Council of Woodstock as a gully cleaner. There was a heavy storm on the morning of February 25, and witness on going to the gully at Turok's place found the gratings covered with stones, planks, half bricks, and sand. It looked like builders' material. While witness was at work Ackhurst came there.

Cross-examined: Witness had only cleared the top, but had not taken up the grating when Mr. Ackhurst came there. Afterwards witness went into the gully, and found that clear. The planks had formed a dam, and the stones were the principal cause of obstruction. There were stones and bricks on the sidewalk when witness came there which were lying just as the workmen had left them. The stones were those used for concrete.

Re-examined: Witness had to clean that grating every morning, and all that time building was going on there, there were always bricks and rubbish on the grating.

William Thomas Olive, a civil engineer, and previously for nearly two years town engineer of Cape Town, said that he had first suggested an improved stormwater overflow in connection with the stormwater drainage of Cape Town about the beginning

of 1897. Where they had drains to carry sewage as well as stormwater it would be inadvisable to have this system of stormwater overflow, as where they had sewage the gullies would have to be trapped. Witness would not recommend the stormwater overflow recommended for Woodstock by Mr. Cairncross unless they had a separate system of stormwater drainage.

William Harrison Gray said he was a member of the Incorporated Association of Municipal and County Engineers, and had had thirty years' experience of municipal work. He had been engineer to the Town Council of Woodstock since January last year. The storm on the morning of February 25 last was the He had traced the course of the storm, and found that its centre was as near as possible the Municipal Building, about 200 yards from Turok's place. On the Wynberg side the storm extended to Station-road, Observatory—the boundary between Woodstock and Mowbray. On the Cape Town side it gradually decreased until there was very little rain falling in Cape Town. Witness considered that the storm was entirely local. It did a good deal of damage where it fell. Proceeding, witness detailed the municipal improvements effected in the neighbourhood of Railway-street, the construction of the sewer in question being begun about September last. Before the works were commenced witness had often seen water flowing over Turok's property. As to the allegation that Railway-street had been raised before the storm, witness had never done any work in the way of raising or lowering it until May last. Turok while building took clay out from between his walls to make his clay mortar. Witness saw the building after the flood. There was very little damage done; in fact, not £20 worth. On the Monday when Turok was complaining of the damage witness said, "Give me £20 and I will put it straight for you." Witness spoke of the £20 as a sort of estimate of the damage done. Witness had since put down a small gutter of three inches, but even if he had wanted to make that gutter before the storm in February he could not have done so, as there was a scaffold pole of plaintiff's in the way. As to the suggestion for stormwater overflows, witness considered that it was impracticable where they had a combined stormwater and sewage scheme, as in that case they had to trap the drains.

Cross-examined: He was not advised to adopt Mr. Cairncross's system at Turok's place. Railway-street at that time was

worn down until it was really a drain in itself. But for the violence of the storm the water would have run down Railway-street when the grating was choked. Witness never offered Mr. Turok a certain sum but when Mr. Turok was grumbling about the cost witness said that he could get the work done for him for £20. Witness told Mr. Turok at the time that the Municipality was not liable in any way whatever.

J. Gall gave evidence as to the grating on the morning of the storm being choked up with builder's debris. There was no other building than Turok's going on in the neighbourhood at the time. He also deposed as to the Municipal works put in at that corner, which enabled much more water to be carried off than before. Witness attributed the flooding of Turok's property to the debris, planks, bricks, etc., on the sidewalk preventing the water flowing in its natural course.

Cross-examined: Witness did the work on the gutters and gully, but he had no plans. There might have been plans, but witness did not see them. Stormwater overflows had been suggested to witness, and he had suggested them to Mr. Gray, as he thought they might come in handy some time.

Re-examined: Witness was not an engineer, and he carried on the works under the supervision of the person responsible, and the work was well constructed. When the storm took place the corner in question was just the same as it had always been.

John Hyde Beresford said he had been Town Clerk of Woodstock for twelve years. Before the storm in question witness had on several occasions seen the stormwater running over plaintiff's land. The storm on February 25 was the heaviest witness had ever seen since he had been in Woodstock.

Thomas Bennett, member of the Institute of Civil Engineers, said he had examined the Municipal works in question, and in his opinion they were sufficient for the carrying off of the water and the purpose they were built for. Witness had calculated all the capacities, and had also done that in comparison with what existed before, and the present arrangement was very much more commodious. Generally speaking, there was more provision for the carrying off of the water by the present arrangement than by the former arrangement. Witness was not prepared to recommend stormwater

overflows in mixed drainage, because where they had sewage they must have some means of trapping the gullies.

This concluded the evidence.

After argument, the Court gave judgment for the defendants with costs.

Buchanan, A.C.J.: The plaintiff in this action sues for the recovery of £500 damages from the Municipality of Woodstock for injuries suffered through, as alleged in the declaration, certain municipal works constructed by the Municipality having the effect of throwing and discharging upon the plaintiff's land stormwater, which caused injury to a building which plaintiff was erecting. The acts which are complained of in the declaration are: Firstly, the placing of certain stormwater grating, or gully as it has been called technically, on the north side of Albert-road, and constructing an underground sewer to carry off the stormwater; and the second ground is that the Municipality raised the level of the street known as Railway-street to such a height as to dam back the water and throw it on to plaintiff's property. The plea is that the works done by the Municipality were properly done, and that it was through no fault of the defendants that the plaintiff's property was injured. The land on which plaintiff has built his house is situated on the lower side of Albert-road. Clay had been excavated from this land, and in consequence the land itself was at a lower level than the adjoining street, Railway-street, and the surrounding land, and before the plaintiff began building whenever there was stormwater or an extra flow of water its natural flow was over this property. The plaintiff constructed his house in this low-lying spot, and put his floors at such a level that when stormwater came it flooded the place, and caused injury, but the plaintiff has had these floors raised 10 inches, and since then he has suffered no damage. It has been clearly laid down in many cases that where a municipality undertakes works it must carry out these works in such a way that no injury shall result to the inhabitants of neighbouring property. The case of Searight has been mentioned, but there the Municipality had dammed up a street, and by this damming up had caused the water to flow into a store which was in existence before the street was raised, but here in this case we have the water flowing over the land before the house was built, and the water flowing as it was accustomed after the house was built, and so into the house. As to the

underground sewer, it has been candidly admitted that it is of sufficient capacity to carry off the stormwater carried down to it. If it had not been of sufficient capacity and had become choked by the flood, and thus caused injury to the plaintiff, a great deal might have been said on behalf of the contention of counsel. The ground slopes from south to north, and Albert-road, which is under the control of the Divisional Council, runs from east to west. The natural flow therefore of the water is from south to north, but Albert-road intercepts a quantity of this water, and what the Council has done is to collect on the south side of Albert-road a quantity of that water which would otherwise have gone over the road on to plaintiff's property. It is alleged that the Municipality dammed up the water at the corner by raising Railway-street, but it is clearly proved that Railway-street was never touched, beyond laying down the drain pipes, which did not raise the street, until long after the occurrence complained of, and on that ground the placing of gullies or gratings on the north side of Albert-road to carry off water. Before the plaintiff began his building there was one gully. The Municipality placed three there, thus increasing instead of decreasing the capacity of the gully to carry off the water. It is therefore very difficult to find anything the Council did, or any improper conduct on their part from which damage resulted to the plaintiff. At the time this heavy rain fell the plaintiff was building his house. He had built to the limits of his land, and had platforms and scaffolding overhanging on which he had also deposited building material. When the heavy rain came this gully became choked. There is no plea of contributory negligence on the part of the plaintiff, but I think the evidence shows that the choking of this gully was due a great deal to the building material accumulated at that spot. Then it is said that there was negligence on the part of the Municipality in not providing stormwater over-flows, which might have been done, and on this point I must say that I fail to see why stormwater over-flows should not have been provided so as to run the water into the same chamber as the gullies ran into. However, Mr. Cairncross's plan does not show how this is to be done. He has prepared his plan on the supposition that there was a drain for stormwater only, and not one for both stormwater and sewage. Other engineers have been called, and say that for a drain to carry both stormwater

and sewage it would have been an improper thing to put these stormwater over-flows in. With that before us, I cannot say that the Municipality are wrong in not having those stormwater over-flows. Since the action there is no doubt that Railway-street has been raised and kerbing put round it, and consequently there is a continuation of the gully round the corner, which carries off the over-flow. It is somewhat higher still, but if there is any accumulation of water, it would now flow round past the plaintiff's property. This is the only thing done since then, and it is said that it could not be done before, as the ground was occupied by the plaintiff in his building operations, and that at that date the ground was not in such order as to permit the Municipality adopting the best means of carrying off the water. Therefore there is no act of the Council upon which we can fix and say that this act of the Council has resulted in the injury to the plaintiff. The only other alternative in the declaration is, that there was a neglect of duty on the part of the Council in failing to keep this gully clean. We find as far as that point is concerned that the Council seem to have been very rigorous and had servants constantly employed on this work. On the very Sunday morning on which this storm fell, the servants of the Municipality went out at once to see that the works were right. It is impossible for the Council or any other body to prevent these gratings becoming choked, but they must take due precaution to see that they are kept clean, and when choked to have them cleared as soon as possible. Here on the evidence there was no negligence on their part, and they acted with promptitude in remedying anything they found going wrong. On the whole the plaintiff must be considered to have failed to prove any act of negligence on the part of the Council. It is unnecessary, taking this view of the case, to speak of the damages claimed, but I must say that with the evidence before us, it would have been very difficult to assess what loss the plaintiff has suffered. Taking the case on the whole, we are bound to come to the conclusion that the plaintiff has failed to prove any liability on the part of the Municipality for any loss he may have suffered, and judgment must be given for the defendants with costs.

Maasdorp and Solomon, J.J. concurred.

[Plaintiff's Attorneys, Messrs. Silberbauer, Wahl and Fuller; Defendants' Attorneys, Messrs. W. E. Moore and Son.]

FOTHERGILL V. SOUTH
AFRICAN BREWERIES.

{ 1900.
Sept. 6th.
" 7th.

[Before the Hon. Mr. Justice SOLOMON and
a Jury.]

Lease — Licensing Court — Verbal
conditions — Knowledge of licen-
see — Damages — Jury.

*A. sued B. for £3,500 as and for
damages for deprivation of the
use and benefit of a liquor licence
in connection with a hotel which
B had leased to A.*

*The licence had been granted to a
previous licensee on the verbal
condition that enlarged premises
were to be erected in which a good
family hotel could be carried on,
plans of such reconstruction hav-
ing been produced at the meeting
of the Licensing Court.*

*A. applied for a renewal of the
licence the following year, and
it was refused him because the
condition had not been carried
out. Vide supra (page 364).
He immediately approached B.
who promised to carry out the
necessary alterations, but did not
do so. A. accordingly sued B,
and B. pleaded that he had no
knowledge of the condition, and
therefore was not liable on the
second claim, but subsequently
made a tender of £300 in full
settlement of both claims. A. re-
fused the tender, and it was then
clearly understood that the only
question at issue between the par-
ties was the amount of damages.*

*Held, that although A. led no
evidence at the trial before a jury
that B. had knowledge of the ver-
bal condition, the question of
damages in regard to the claim
for deprivation of use of the
licence could be put to the jury*

*as it was admitted in the cor-
respondence, that the amount of
damages was the only issue be-
tween the parties.*

The plaintiff's declaration was as follows:

1. The plaintiff resides at Rosebank, in the Cape Division; the defendant company is a Joint Stock Company, duly registered, with limited liability, and carrying on business in this colony and elsewhere.

2. In or about the month of July, 1899, the defendant company purchased and acquired certain property called the Hermitage Hotel, situated at Rosebank, in respect of which a retail liquor licence had been duly granted and was current.

3. The said licence had been granted by the Licensing Court at its meeting in September, 1898, on the distinct understanding and condition notified to the then owner of the property, that the said premises should, during the currency of the licence so issued, be enlarged and improved in manner then indicated, and at the next sitting of the Court it was distinctly intimated to all parties concerned that if the premises were not so enlarged or improved during the ensuing year, the said liquor licence would not be renewed by the said Court at its next annual meeting in March, 1900, and upon the confirmation of the transfer of the licence to the plaintiff, at the sitting of the said Court in September, 1899, a final warning to the same effect was given.

4. On August 18, 1899, a written contract of lease was entered into between the plaintiff and the company, in terms of which he hired from it the said Hermitage Hotel for a term of five years, reckoned from August 1, 1899, at a rental of £17 10s. per month for the first two, and £25 per month for the last three years of the said term, with the option of renewal for another five years at a rental of £30 per month.

5. The said lease set forth that there was a retail liquor licence for the said premises, and the plaintiff agreed to keep the premises open as an hotel, and to carry on an hotel business in them during the whole period of the said lease.

6. It was provided in the said lease that the plaintiff should not make any alteration in the leased premises without the consent in writing of the defendant company, but that any alterations or additions to the premises approved of in writing by the defendant company should be done and paid

for by it; but that the plaintiff should pay to it in addition to the rent, 10 per cent. per annum upon the total outlay.

7. The defendant company expressly understood by the said lease that if the plaintiff paid his rent, and observed and fulfilled all the conditions of the lease, then he should have and enjoy quiet and peaceable possession of the said property, and the use or benefits of the said licence during the period aforesaid. It is not necessary to set out the remaining provisions of the said lease, to which document, when produced, the plaintiff asks leave to refer this Hon. ourable Court.

8. At the date when the said contract of lease was executed, the defendant company was aware of the fact set forth in paragraph 3 of this declaration, but the plaintiff was not aware of the said fact.

9. It became and was the duty of the defendant company, after entering into the said contract: (a) To deliver over to the plaintiff possession of the said premises in such a state of repair as to be reasonably fit for use as an hotel, being the purpose for which they had been leased; (b) Duly to carry out such enlargement and improvements to the said premises as would satisfy the requirements of the Licensing Court indicated as aforesaid, and ensure a continuance of the said licence.

10. The defendant company did not perform its obligations in either of the said respects. The premises were delivered to the plaintiff in a state of such dis-repair and dilapidation that they were not reasonably fit for the purpose for which they were intended. The plaintiff called upon the defendant company to execute the necessary repairs thereto, and the defendant company undertook forthwith to put the roof in order, and execute certain inside work, and agreed that no rent should be paid by the plaintiff until the said repairs and work had been executed, and that the hotel, except the bar, should be closed until that time. The said repairs were not taken in hand by the company until the month of January, and were not completed until on or about the 10th day of March, 1900, and the plaintiff was deprived of the use of the said hotel premises in the interim.

12. The defendant company also failed and neglected to carry out the enlargement and improvements to the said premises which it knew were necessary to ensure a renewal of the said licence, though the plaintiffs, who became aware in September, 1899, of the facts

referred to in paragraph 3 hereof, called upon the company to carry out the said improvements. The plaintiff was ready and willing to pay an increased rental calculated on the value of the said improvements as provided in the contract.

12. By reason of the said failure of the defendant company, the Licensing Court at its meeting in March, 1900, refused to grant a renewal of the said liquor licence, and the said licence has lapsed.

13. The plaintiff has in all respects carried out his part of the said contract, but by reason of the defendant company's wrongful conduct and breach thereof as aforesaid, he has suffered damage.

(a) In being deprived of the use of the said premises as an hotel between the month of July, 1899, and March, 1900.

(b) In being deprived of the use and benefit of the said licence and of his said contract from the beginning of the month of April, 1900, to the end of the term of the said lease, and of the right of renewal as aforesaid.

He estimates his damage at the sum of £3,500.

The plaintiff claims:

(a) Payment of the sum of £3,500 for damages.

(b) Alternative relief.

(c) Costs of suit.

Defendant's plea and claim in reconvention. For a plea to the plaintiff's declaration, the defendant company says:

1. It admits paragraphs 1 and 2.

2. As to paragraph 3, it has no knowledge of the alleged facts as to the granting of the licence in March, 1899, and the intimation made at the sitting of the Licensing Court in September, 1899, and says that the defendant company was not at the first-mentioned date the owner of the licensed premises. It denies that in September, 1899, the alleged warning was given to the defendant company's agent.

3. As to paragraph 4, 5, 6, and 7, it craves leave to refer to the written contract of lease when produced, for the terms thereof.

4. As to paragraph 8, it denies that it was aware of the fact set forth in paragraph 3 of the declaration.

5. As to paragraph 9, it says that the plaintiff was in possession of the said premises when the said agreement of lease was signed, and that the defendant company has performed all the obligations imposed upon it under the said lease; and it denies the allegations in said paragraph.

6. As to paragraph 10, it admits that it was agreed between the plaintiff and de

fendant company, in or about September, 1899, that the defendant company should put the roof of the said premises in order, and should execute certain inside work, and that no rent should be paid by the plaintiff until the said repairs and work had been executed, but that the plaintiff should continue liable for the rent for half of the month of August, 1899; it also admits that the said repairs were taken in hand in or about the month of January, and completed about the 10th of March. Save as above, it denies the allegations in paragraph 10.

7. It denies the allegations in paragraph 11, save that the plaintiff was willing to pay an increased rental as stated, and that he requested the company to carry out the said improvements.

8. As to paragraph 12, it admits that the Licensing Court in March, 1900, refused to grant a renewal of the licence, and the licence has lapsed, but denies that this was by reason of any failure or default on the part of the defendant company.

9. As to paragraph 13, it denies that the plaintiff has sustained any loss or damage for which it was liable; and says that the said hotel premises, except the bar, were closed by the plaintiff between September, 1899, and March, 1900, under the arrangement above referred to in paragraph 6, and that the plaintiff is now in enjoyment of a temporary licence for the said premises for three months from April 1, 1900. Save as above, it denies the allegations in paragraph 13.

Wherefore, the defendant company prays that the plaintiff's claim may be dismissed with costs.

And for a claim in reconvention, the defendant company, now plaintiff in reconvention, says:

10. It craves leave to refer to the matters above pleaded.

11. There is due and owing from the defendant in reconvention, under the said contract of lease, the sum of £67 17s. 6d., in respect of rent of the said premises, and in respect of premium of insurance thereon paid by the plaintiff in reconvention for and on behalf of the defendant in reconvention, as will more fully appear from the account annexed hereto, marked "A."

12. Payment of the said account has been requested from the defendant in reconvention, and due notice, in terms of the contract of lease, has been given to him that the said rent is due and payable, but he has neglected and refused to pay the same or any portion thereof.

13. By reason of the said default in payment of the rent, the plaintiff in reconvention is entitled to demand a cancellation of the said contract of lease as therein provided.

The plaintiff in reconvention claims:

- (a) The sum of £67 17s. 6d., with interest, *a tempore morae*;
- (b) A cancellation of the said contract of lease.
- (c) Alternative relief;
- (d) Costs of suit.

ANNEXURE "A."

Cape Town, 18th May, 1900.

Mr. W. Fothergill, Hermitage Hotel,
debtor to the Martienssen Brewery
South African Breweries, Limited).

1899.

| | |
|---------------------------------|----------|
| August 31, to half-month's rent | £8 15 0 |
| 1900. | |
| March 31, to half-month's rent | 8 15 0 |
| April 30, to rent for month ... | 17 10 0 |
| May 31, to rent for month ... | 17 10 0 |
| To Insurance premium | 15 7 6 |
| | £67 17 6 |

REPLICATION AND PLEA IN RECONVENTION.

1. As to paragraph 5 of the defendant's plea, the plaintiff says that the agreement of lease was originally signed in July, 1899, and therefore at the defendant's request the present said lease was signed on the 18th of August, identical in terms with the original lease.

2. As to paragraph 9, the plaintiff says that the licence expired in March, 1900, and that in the said month the plaintiff agreed, at the request of the defendants, and without prejudice to his right of action in his declaration contained, to take out a temporary licence for and keep open the bar during the continuance of the same, and the defendants agreed to pay and did pay for the said licence, and agreed to pay the plaintiff reasonable remuneration for his services in keeping the said bar open.

3. Save as aforesaid, and save for admissions, the plaintiff denies the allegations in the said plea contained and joins issue with the defendants thereon, and again prays for judgment with costs.

For a plea to the claim in reconvention, the plaintiff says:

1. He begs to refer this Hon. Court to the matters and things set out in pleadings in

convention. He denies that he agreed to continue or be liable for the rent for half the month of August, 1899. As to the claim for half the month of March, the plaintiff says that by the time the said repairs had been completed the Licensing Court had refused the renewal of the licence, which expired in the 31st of March, and it was impossible for the plaintiff to have, and he did not have, the use and occupation of the said premises as hotel premises for half a month.

2. As to the insurance premium, the plaintiff has always been ready and willing to pay the same upon a due and proper account being rendered by the defendants showing the amount paid by them.

The defendants have failed and neglected so to do, and rendered the plaintiff an account showing that they insured the premises for £1,500 at 7s. 6d.

The said sum of £1,500 was far in excess of the value of the said premises, and the premium at the rate of 7s. 6d., with stamp, is less than £6.

Save as above the plaintiff denies that he is indebted to the defendants in any sum, and he denies all the allegations in the claim in reconvention contained.

Wherefore the plaintiff prays that the defendants' claim in reconvention may be dismissed with costs.

The rejoinder and replication in reconvention were general and joined issue with the plaintiff.

In correspondence subsequent to the pleadings, the defendant company tendered £300 in full settlement of both claims, and on this being refused, admitted that the only issue was the amount of damages.

Sir Henry Juta, Q.C. (with him Mr. Gardiner), for the plaintiff.

Mr. Searle, Q.C. (with him Mr. Buchanan) for the defendants.

The first witness called was

William Fothergill, the plaintiff in the case, who said that in June, 1897, he negotiated with Mr. Hodson, the then manager of the South African Breweries, for the lease of the Hermitage Hotel, at Rosebank. Witness had formerly been steward of the City Club, and had experience in catering. There was no family hotel between Cape Town and Newlands. After negotiations a lease was drawn up in July, but afterwards another, substantially the same, was substituted in August. According to the last lease, witness had the hotel for five years with the option of renewal for a further five years. The rental for the first two years was to be £17 10s. per month, £25 per month for the fol-

lowing three years, and £30 per month during the renewal. Generally a lump sum down was paid, and as he had not to do that he made a very good bargain. The premises were not in good repair, and the defendants promised to do whatever was required, witness to pay 10 per cent. on the cost of the alterations and improvements. Witness engaged a full staff of servants, including an expert cook, and also hired a couple of cottages adjoining the Hermitage Hotel for the purpose of putting guests in. A week after witness went into the hotel it came on to rain, and witness found the whole place leaked so badly that he could not put people in, although he had a large number of applications. In September last year a large number of people began to flow into Cape Town from the Transvaal. Accordingly hotel accommodation became limited, and the demand had been great ever since then. In reply to letters from witness, Mr. Hackblock, Mr. Hodson, and Mr. Ransome came to the place and instructions were given for the plans for the alterations to be prepared. Nothing, however, was done in September. The Licensing Court met in September, and it was necessary to have the licence transferred to witness's name. The Brewery Company applied for the licence, and witness had to pay a guinea for the agent's services. Witness went to Mr. Hackblock and told him there was some hitch about the licence, that the Licensing Court held that something should have been done which had not been done, and there was a bar where it ought not to have been. Witness had known nothing about this until he read the report and he asked Mr. Hackblock what his position was. Mr. Hackblock said he would be all right, and mentioned that he was going to submit plans for making the Hermitage a first-class hotel. Ultimately Inspector Clark, Mr. Hackblock, and Mr. Ransome came down to the Hermitage. Inspector Clark pointed out that there were certain stipulations made by the Licensing Court, and that the additions proposed were useless as they did not fulfil the stipulation, and he said that unless the stipulation was carried out he could not promise they would get the licence in March, because he was deputed by the Licensing Court to make a report, and his report would be unfavourable unless those things were carried out. It was clearly understood that unless they made those alterations the renewal of the licence would not be granted. During September nothing was done, and the whole hotel was closed with the exception of the bar. Witness

urged them to proceed with the alterations, and in October witness was informed that new plans had been prepared. He saw those plans, which provided for twenty-eight bedrooms, and to make it a very fine hotel. They told witness that an estimate had been made and they had called for contracts. Nothing, however, was done, and in November they offered witness the lease of the Masonic Hotel at Stellenbosch, in place of the Hermitage Hotel, for five years, at a rental of £30 per month, rising to £40, and £2,000 cash down for the good-will, the tenant to pay 10 per cent. on the cost of the repairs that would be required. Witness went to look at the Masonic Hotel and make inquiries. He found it a very dilapidated place, and that the total takings were £200 per month. He refused that hotel, and after further correspondence, in which he pressed for the repairs being made to the Hermitage Hotel, nothing was done, and ultimately witness placed the matter in the hands of his attorneys.

In the correspondence which followed it was pointed out that some repairs proposed gave even less accommodation than those which Inspector Clark said would not be accepted, and pointing out that the defendants would be responsible if the court refused to grant the licence. There was also some question as to the insurance of the premises. Continuing, witness deposed that at last a start was made on some alterations to the hotel, and witness had to leave the place during part of January, the whole of February, and up to March 7, when the Licensing Court sat, and the renewal of witness's licence was refused because the alterations required had not been made. At the Court Mr. Advocate Upington appeared on behalf of the defendant company. A suggestion was thrown out by the Court that they might ask for an adjournment, and try and do something in the meantime, but Mr. Upington, on behalf of the brewery, said they were not disposed to spend so much money, and the consequence was that the licence was refused. Thus witness was left with hotel premises without a licence. After some correspondence an attempt was made at the adjourned meeting of the Licensing Court to have the matter re-opened, but the Court would not hear them. At that adjourned meeting of the Licensing Court the original plans on which the police had agreed to the licence being granted were produced, and defendants then said they were willing to build on those plans, but the Court held that it could not

consider the matter at that meeting. Witness subsequently took out a temporary licence, but he did so without any prejudice to his rights, and only to oblige defendants, who were appealing to the Supreme Court against the decision of the Licensing Court. The defendants paid the £10 for the temporary licence, and plaintiff clearly gave them to understand he was not carrying on the business at his own risk. He wrote them to that effect, and the only answer he got was a demand for the rent for April and an intimation that if not paid within eight days the defendants would exercise their right under the agreement of lease, and resume possession of the premises. Witness left at the end of May, and had tried his best since then to get other places, but found it impossible to do so without paying a very high price. At Mowbray £2,500 was wanted for good-will, and that was as a monthly tenant—that was he could have been turned out any time at a month's notice. It was the same every place, a high price was asked, and it was impossible to get a hotel with a lease, but only as a monthly tenant. Witness then gave details as to his claim for damages. His gross takings from August to March were £297 15s. 8d., and his payments during that period £435 8s., showing an actual loss of £137 12s. 4d. From April 1 to May 31 he took £75 13s. 9d., and paid out £80 16s.; actual loss £5 2s. 3d. He also had £19 6s. less stock when he left the hotel than when he started. He estimated his profits from August 1, 1899, to March 31, 1900, if the premises had been put in repair as promised, and allowing two months for repairs at £840 4s., being £340 4s. on eighteen boarders, at a minimum profit of £3 3s. each, and bar profits at £500, on a profit of 33 1/3 per cent. on a basis of £250 takings per month. He estimated that from April 1, 1900, up to the end of the term of lease he would have made a profit of £14,700 18s. 8d., but he allowed for his probable earnings during the greater part of that period £12,203 3s. 3d., his net loss under this head being £2,497 15s. 5d. His estimate was reasonable, and the amount of damages he claimed was not excessive.

Cross-examined: Under his lease it was expressly stipulated that he should have no goodwill. Witness had inspected the house before he signed the agreement, but he did not know its condition until he was in it, and the rain came through the roof. Witness went in to try to work up the place. He had previously been steward of the City Club, and afterwards manager of the Stand

ard Restaurant, where he had £20 a month salary and commission, averaging from £15 to £20 per month. He intended to charge his boarders ten guineas a month each, and put two boarders in each of the nine bedrooms. He would have had no difficulty in getting boarders on these terms.

Charles Shaw Nicholson, Resident Magistrate of Wynberg, and as such President of the Licensing Court there, said he remembered the application made in September, 1898, for the licence of the Hermitage. That licence was granted upon condition that the place was rebuilt and made fit for a first-class family hotel. In September last year, when transfer had to take place from one owner to another, one of the members of the Court drew attention to the fact that the conditions on which the licence had been granted had not been complied with, and a discussion took place thereon, with the result that the police were instructed to look into the matter. They did so, and when the renewal of the licence was applied for it was reported that the alterations had not been carried out. There was some reluctance on the part of the members to withdraw the licence, and there was a sort of suggestion thrown out that an adjournment might be granted for the purpose of seeing what could be done. However, it was intimated that the expense of putting up a building such as that required would not be justified for a house in that place. No application was made for an adjournment, but at the adjourned meeting the Brewery Company made an application to have the matter reopened, when the Court would not hear it, because the adjourned meeting was held for a special purpose, and it was not legal for them to hear any other matter.

Cross-examined: No mention was made in the minutes, which were kept by the clerk, as to the conditions on which, as the result of discussion, it was decided to grant the licence originally. The plans produced by Mr. Bidewell-Edwards, when the licence was first granted, were for a first-class family hotel, with twenty or thirty bedrooms. If it had not been for the promise to erect such a building the licence would never have been granted.

By the Court: Bidewell-Edwards originally took out the licence in the name of one Bernard, but it was afterwards transferred. The view the Licensing Court took was that there was no necessity for a bar there, but that it was a convenient place for a good

family hotel, which would suit people from up-country who came down here for a time and wished to reside near town.

Alexander Clark, Inspector of Police in Cape Town, deposed to being present at the Licensing Court when the licence was originally granted, and again when it came before the Court for renewal in September, 1899. On September 19 witness saw Mr. Hackblock and Mr. Ransome in the presence of Mr. Fothergill, and he then pointed out that the conditions on which the licence had been originally granted had not been complied with, and explained that unless they did what was required they were not likely to have the licence renewed. Subsequently, about October 1, plans were shown to witness by the South African Breweries, through their architect, Mr. Ransome, to see if he would approve of them. Witness showed the plans to Captain Jenner, Chief of Police. They did not approve of those plans, and afterwards Mr. Ransome showed them new plans, fulfilling the requirements of the Licensing Court. Mr. Ransome asked witness whether, if they carried out those plans, there would be any danger of their not getting the licence, and witness said he had no say in that matter, but the police were prepared to report that the plans were similar to the original plans, and the building would be suitable for a first-class family hotel. Afterwards Mr. Ransome told him that they were not going to carry out the new plan. Witness saw the place in September, and found it in a very dilapidated condition. In February he went there, and finding that only some repairs were being made, reported against the granting of the licence.

Cross-examined: Witness took up the position that it would be impossible to make a place with eight bedrooms a first-class family hotel.

Archibald Bultitude, the manager of Ohlsson's Cape Breweries, said his firm had arrangements with regard to numbers of hotels, and was consequently cognisant with the prices for hotels, etc. For a place like the Hermitage, if taken on the monthly tenancy system generally adopted by Ohlssons, a fair price would be between £2,000 and £3,000. They would get a good class of people to drink there, and would make a good profit. A lease would be more valuable than a monthly tenancy out there.

Cross-examined: Witness's general system was monthly tenancies. A man paid so

much for the goodwill of that monthly tenancy, and when he left was allowed to dispose of the goodwill to another tenant.

Re-examined: During a lease the goodwill would belong to the tenant.

By the Court: With a five years' lease and a licence witness considered the goodwill worth £3,000. He should like to give £2,000 for a licence in that neighbourhood. There were very few licensed houses that did not pay. He would prefer an ordinary bar to a first-class family hotel, as it was more easily worked. There was no bother with the food or servants. In a place like the Hermitage it must be run as a sort of family hotel.

Mr. Justice Solomon: We have it that the plaintiff's takings in the bar were £54 per month at the highest, and he says that if he had had the accommodation for the eighteen boarders his takings would have been £250 a month; do you think that possible?

Witness: Yes, my lord, they are pretty heavy drinkers in these boarding-houses.

You don't think that an extravagant estimate?—It seems high, but I would not call it extravagant.

Robert Dickson deposed that he had large experience in connection with licensed houses, and within the past few months had had a great deal to do with the transfer of licensed houses in Cape Town and the suburbs. He believed a place like the Hermitage would do well. During the last few years licensed premises had become very valuable assets, in some cases the value had increased by 100 per cent., and the value was still increasing. For the privilege of going into a licensed business even as a monthly tenant, very high premiums had to be paid. At Newlands a place sold last year for £200, and was sold again last week for £1,250, although it had no lease and a turnover of barely £200 a month. One place in town last week, with no lease and a turnover of £400 a month, fetched £2,800, and a hotel at Mowbray, also without a lease, fetched £2,500. Witness believed that the goodwill of the Royal Hotel, which, however, had a lease of six years or so still to run, was sold the other day for £5,000 which was £2,000 more than it fetched two years ago. If a man wanted a place now with a turnover of £300 to £400 a month he would have to pay through the nose for it. He would have to pay £2,000 to £3,000. Personally, witness believed these prices may be going too high, but such was the demand that people would willingly pay them to get into the business even on a monthly tenancy.

He did not think £300 a month would be too much to estimate for the takings of an hotel at a place like the Hermitage.

Cross-examined: There would be a little more expense in working a family hotel than in working a hotel with only a bar trade. He would say that the proportion of profits was larger off liquor than off the boarding department.

Re-examined: The price of board and lodging had gone up higher in proportion than the price of provisions. In the case of monthly tenancy the tenant could sell during the month his notice was running, but of course, if he could not sell, he had to go out at the end of the month, and lost everything.

By the Court: There was not much risk of that happening at the present time, but in the past there had been instances.

This closed the case for the plaintiff.

Herbert Charles Hackblock, the manager in Cape Town for the South African Breweries Company, was the first witness called for the defence. He deposed that he first met Fothergill on the day he signed the lease, August 18. That was signed in the hotel, plaintiff having already taken possession. Witness could not remember anything being said about repairs. Originally the defendant company had bought the Hermitage—house, land, furniture, and everything there was—for some £3,500. They knew nothing about the stipulation as to the building of new premises until after the meeting of the Licensing Court in September last year. Witness did not think they had an agent at the meeting. However, shortly afterwards something came to their notice and witness saw Inspector Clark, as stated by that witness, and he told them about the stipulation, and his having to report. Afterwards Inspector Clark was shown several plans, but he did not consider the buildings provided large enough. Plans for a larger building were prepared. To carry out the larger plan would cost £5,500 for the building alone, and about £4,000 for the smaller plan, which would give some eighteen rooms. The repairs which were done between January and March cost between £500 and £600. They did not feel justified in carrying out the larger scheme. Witness was present at the March meeting of the Licensing Court, but he did not notice any suggestion that an adjournment should be asked. Proceeding, witness deposed to the endeavours to have the matter reopened at the adjourned meeting and the appeal to the Supreme Court. They were anxious to come to an

amicable settlement with plaintiff, and had offered him the Masonic Hotel at Stellenbosch, which they knew some months ago had a turnover of from £300 to £500 per month. Witness's firm was making a principle of asking nothing for goodwill, because their leases provided that the tenants should have no goodwill, and therefore they could not ask anything for goodwill. Witness did not believe plaintiff would have got a trade of £250 per month, especially after what the police said as to their not wishing an outside trade cultivated because then the bar trade would depend mostly upon boarders and their friends. Witness considered plaintiff's estimate of a net profit of 33 1-3rd per cent. on liquors sold excessive. He did not think plaintiff would have a net profit—even on his calculation of a turnover of £250—of more than 15 per cent. Witness did not believe plaintiff would have made the profits stated off the boarding department.

Cross-examined: Witness's experience of licensed businesses in Cape Town dated since August last year, but he had had large experience elsewhere. He had never run boarding-houses, but he had lived in them. Witness did not conduct the negotiations for this lease. It was Mr. Hodson who had conducted the negotiations. Mr. Hodson had been manager for Martienssen for ten years, and manager for the defendant company since the former business was taken over, and was well acquainted with the local conditions. Witness had promised plaintiff to put the hotel in good condition and make it a thoroughly good hotel, which they did in January. Before they heard about the Licensing Court stipulations Mr. Ransome had been instructed to draw up plans. They had promised to build a billiard-room, but had not done so. The condition of the premises was such that they agreed that plaintiff should pay no rent until the premises were in a really good condition. The Masonic Hotel they had let for 2½ years without any premium, but at a higher rent, viz., £50 over the lease, the highest rent being £55. The proportion of profits on the liquor was greater in a first-class hotel than in a canteen. The receipt produced showed that the company must have been represented at the September Licensing Court.

Re-examined: They delayed executing the repairs until they heard from England whether or not they were to go on with the rebuilding as said to have been required by the Licensing Court, but in January they decided to go on with the repairs.

By the Court: They bought the Hermitage from Mr. Bidewell-Edwards. They expected the Licensing Court would have given them a renewal after the repairs made. If they had known the court would insist on the stipulation he believed they would rather have built a new house adjoining the old one.

John Edward Poul Close, an accountant, deposed that he calculated that 15 per cent. would represent the net profits plaintiff would have made on liquors. Witness's experience as to the boarding department was that he kept the books of a leading club in town, and it was notorious that nothing whatever was made on boarding, the profit being made on the bar.

Solomon, J.: What is the position of the defendants with regard to the tender? Does the £300 tender cover the whole claim or only a portion of it?

Mr. Searle, Q.C. (with him Mr. Buchanan): We deny all liability on the first head. If the plaintiff shows that the defendants had previous knowledge of the conditions attached to the issue of the licence, they were not liable for the loss of the licence.

[Solomon, J.: The legal point had better be argued.]

Sir Henry Juta, Q.C.: There is no question of law; it is merely a question of fact. They cannot tender and also deny their liability. We wrote to defendants asking them what their position with regard to knowledge or otherwise of the conditions was. They admit that the only question was the amount of the damages. They offer £300 as full settlement. They could not object to our leading evidence as to their knowledge of the conditions. They had warranted quiet possession by the terms of the lease. They arranged to improve the premises and to charge 10 per cent. on the cost. They engaged to give us premises which would be licensed.

Mr. Searle, Q.C.: We are sued for damages for not putting the premises in repair before March 10, and for not carrying out alterations and enlargements as required by the Licensing Court. The first has been done. No conditions were endorsed on the licence, and the contracting parties must be taken to have contracted in terms of the licence. Plaintiff saw this, and so said in his declaration that we had knowledge of the conditions.

[Solomon, J.: The clause of the agreement is very strong. It says "The Breweries undertake to give." Are you not bound?]

That is no absolute undertaking. Lessors cannot be liable for the acts of the Licensing Court. The lessor here had no control over the Licensing Court.

As to the tender, see *Van der Spuy v. Colonial Government* (7 Sheil, p. 427), where it is laid down that if a tender is not accepted a defendant can plead a denial of liability. We have practically paid £300 in court, but that does not debar us from denying liability. There are two claims, and we can deny all liability under the second claim, and made a tender in full compensation.

Sir Henry Juta, Q.C., in reply: The correspondence clearly shows that the very point the defendants would raise was the amount of damages.

Solomon, J: The claim in this case is divided into two parts. In the first place the plaintiff claims damages from the defendant company on the ground that he was deprived of the use of the premises and hotel between the month of July 1899 and March, 1900, and in the second place that he has been deprived of the use and benefit of the licence under the said contract from the beginning of April, 1900, until the end of the term of the said lease. In his declaration, the plaintiff alleges that the defendants had knowledge of the conditions which were practically imposed by the Licensing Court when the licence was originally granted. It is common cause between the parties in the matter now to be referred to the jury that when the licence was originally granted, the licensee was clearly given to understand that no renewal of the licence would be granted unless suitable hotel premises were erected upon the spot. The position taken up by the Licensing Court was that there was in that neighbourhood no necessity for any bar, and therefore that a licence for a bar would not be granted, but that it was desirable to have a good family hotel. Therefore the licence was granted on condition that suitable premises were to be erected in which a good family hotel could be carried on, and at that meeting of the Court the original licensee produced plans for such a building. At the next annual meeting of the Licensing Court it appeared that this condition on which the licence had originally been granted had not been carried out—no enlargements or improvements having been made to the premises—and the Licensing Court refused to renew the licence. Now the defendants in this case take up the position that unless it can be

shown that they had knowledge at the time that this lease was entered into of the condition imposed by the Licensing Court they are not in law liable upon the second part of the claim, with regard to the plaintiff being deprived of the use and benefit of the licence from the beginning of April until the end of the lease. No satisfactory evidence has been given to show that there was knowledge on the part of the defendant company of the said condition at the time the lease was entered into, and the question now raised is whether the defendants would not be legally liable without proof of such knowledge. For the plaintiff it is contended that that position cannot now be taken up in face of the correspondence which passed between the parties, in which the tender was made, and in which according to the argument the defendants admitted their liability on both parts of the claim. The two parts of the claim are perfectly clear and distinct. On August 9 the first letter which is of importance to this argument was written by the solicitors for the defendant company in which they said that their clients had instructed them to approach plaintiff with a view to a settlement out of court and without going into figures their clients had authorised them to make a full tender "that they abandon their claim in reconvention and pay Mr. Fothergill the sum of £300, with taxed costs to date in full settlement of all claims." That was a tender made to the whole of plaintiff's claim, including both branches. The plaintiff, however, was anxious to clearly understand what the position was which was taken up by the defendants in consequence of this tender which was made, and accordingly a letter was written on August 12 in which he, through his attorneys, declined to accept the tender in full settlement of his claim, admitted that the tender was a legal one, and went on to say: "We (i.e., the attorneys) are specially instructed, however, to point out that the intention to plead this tender requires that you detail what position does the defendant company really now take up. The parties have joined issue, but the position is completely altered by the fact of the tender being made. We take it that the only evidence the plaintiff now has to lead at the trial is as to the measure of damages." In reply the following letter was written by the defendants' attorneys on August 14: "Adverting to your letter of the 12th inst., in reply to ours of the 9th, the only matter

really at issue between the parties now is as you state, the measure of damages." In a later letter, dated August 21, from the defendants' attorneys, they again say that the issues in this case are now really narrowed down to the question of how much. In the face of the correspondence it is difficult to see how the defendants can now raise the question whether they are liable upon the second part of the plaintiff's claim. If the tender had been intended to apply to the first part of the claim only it would have been easy to have made their intention clear by saying: "We admit liability on the first part, and tender the sum of £300 in satisfaction of the damages, but as regards the second part, we deny liability upon that." However, on this correspondence which has taken place between the parties, I can come to no other conclusion than that the defendants admitted liability not only upon the first but upon the second part of the claim, and that the only question which the jury have to determine is the amount of damages which has been sustained both as regards the first and second part of the claim. The case of *Van der Spuy v. The Colonial Government*, which has been quoted, appears to me to be on an entirely different footing. The further question has been raised whether upon the lease, even without any knowledge on the part of the defendant company, they are not liable to the plaintiff for damages in consequence of the loss of the licence. Certainly the words employed in this lease are exceedingly strong, when it was said that on the tenant paying the said rent and fulfilling the conditions, the defendants undertook that he should have and enjoy quiet, peaceable possession of the said property, and the use and benefit of the said licence during the period of such lease. One might go the length of saying that by that undertaking the defendant company was bound to do everything that was reasonable in order to ensure the continuance of the licence during the said lease. Here it is clear that the renewal of the licence was refused by the Licensing Court in consequence of the condition imposed when the licence was originally granted not having been fulfilled, and although the defendant might not have had any knowledge of that condition at the time the lease was made it was clear that they obtained the knowledge thereof very soon after the lease was entered into, and it is also clear that there was nothing unreasonable in the con-

dition imposed by the Licensing Court, because when the licence had been refused the defendants were perfectly willing to carry out the condition. They did not do so in the first instance, because, as Mr. Hackblock candidly stated, they thought the Licensing Court would be satisfied with the alterations that had made in the premises, and not take away the licence. Had they known at the time that the Licensing Court would not be satisfied and would require that the condition should be carried out, I think it is perfectly clear from the whole of the evidence that the alterations required would have been made. The condition was not therefore an unreasonable one, and if carried out the company would not have suffered any loss, as the rent would have been increased proportionately to the cost. It therefore appears to me that under this clause in the lease in which the company undertook that the plaintiff should have the use and benefit of the licence there was a guarantee to the extent that they would do everything reasonable in order to ensure the continuance of the plaintiff's licence. The defendants can now raise the question and say that they are not liable, because there was no knowledge on their part of this condition imposed by the Licensing Court. This point, therefore, cannot be decided in favour of the defendants, and the question of the damages sustained in consequence of the loss of the licence must go to the jury.

After counsel had addressed the jury, Solomon, J., in directing the jury, said: I have done my duty in settling the points of law brought forward, but I am afraid I cannot assist the jury in coming to a conclusion as to the amount of damages. However, it is my duty to direct your attention to some points which may perhaps assist you in coming to some conclusion as to the amount. In the first place you will find separately on two parts of the claim, viz., the amount of damage plaintiff has sustained in consequence of being deprived of the use of the hotel for six months, and secondly what damages he has sustained in consequence of his not having the use and benefit of the premises through the refusal of the licence.

After dealing separately with the various items in the schedule of damages in connection with the first portion of the claim, and directing the attention of the jury to the evidence bearing upon each, his lordship continued: As to the basis on which the profits from the bar were calculated,

viz., £250 per month and the percentage of profits, I can not possibly assist you in coming to a conclusion in that matter. It is a question which you will judge from your own common sense and knowledge of the circumstances of this and similar cases. It was assumed and plaintiff's witnesses said, that 33 1-3 per cent. of the takings for liquor would be a reasonable amount to allow for profit, while on the part of the defendants they had evidence to show that the allowance for profit would be more like 15 or 20 per cent. at the outside. With regard to the amount of profits estimated for the ten years of the lease, if the licence had not been refused, I would point out that the amount, £14,700, could not be taken as anything more than a purely speculative estimate, as so many things might happen in the ten years. From that amount the plaintiff has allowed for his probable earnings during the whole of that period £12,203 3s. 3d. It would be very interesting to know how that amount was arrived at, calculated down to shillings and pence, even down to the small detail of three-pence. Looking at all the circumstances, it rather looks as if the shillings and the three-pence were thrown in to bring the damages up to the round sum of £2,500. However, one would have liked to have known how £11,000, or £14,000 was not chosen instead of £12,000. Of course everything depends upon the work the plaintiff might have got. He might have got work which would have given him nothing like that profit, but on the other hand he might have got work which would have been still more remunerative. In a purely speculative estimate it is difficult to come to any satisfactory conclusion, though of course you may fairly assume that the tender having been made the plaintiff sustained some damage. It has been said that you might fairly judge the amount of damage the plaintiff has sustained by considering what he would have to pay to get into licensed premises, viz., from £2,000 to £3,000 for goodwill, and that even then he would only get the premises on a monthly tenancy. However, there are certain facts which have to be borne in mind. In the first place, although these premises were generally let on a monthly tenancy, the evidence shows that to all intents and purposes the parties under a monthly tenancy were in almost as good a position as under a lease, if a man behaved himself and did not endanger the licence, and when he left the

premises he could dispose of the goodwill so that it was just possible that an energetic man could so work up a business that he would obtain more for the goodwill than he paid. It will also be borne in mind that this was not an old-established business such as some of the houses mentioned. It has further been suggested that you might estimate the damage by considering what the plaintiff might have sold this good-will for. Here again I would point out that this was not an old-established business, for instance, like the Royal Hotel at Wynberg, which besides was on the main road and near the station, for the good-will of which it was said that some £5,000 had been given. It is true that witnesses have been called on behalf of the plaintiff, who said that they would have been willing to give £2,000 for this licence, and it was suggested that the plaintiff had lost that sum in consequence of his being deprived of his licence, but it remains for you to say whether you are prepared to accept implicitly that statement, and come to the conclusion that these persons would have been willing to pay that sum of money. You must be guided to some extent by the actual facts before you. Now you have the fact that the defendants themselves at that time had given the lease to the plaintiff without the payment of anything for good-will, and besides it does not appear that they charged a higher rent to make up for that. The defendants themselves had purchased the place—premises, grounds, and licence—for £3,500 shortly before the lease, and we have the fact that they let the premises to plaintiff for a rent of £17 10s. per month, and made no charge for the good-will. It was also said that the value which the defendants themselves put upon the licence was shown by the fact that they were afterwards willing to spend a sum of £5,000 on new buildings, and it was said that might be taken to be a fair estimate of the value of the licence. If that be so, one can only say that the plaintiff must be astonished at his own moderation in only claiming £2,500. It is for you to say whether that was a fair way of estimating the damage. It is all very well to say that the defendants were prepared to pay £5,000, but then under their agreement they were entitled to 10 per cent. on their outlay. It is impossible to estimate the amount to be given with any accuracy. You can only guess at the amount, and only give what to your minds appears to be a fair remuneration.

ation to the plaintiff for the loss of the licence. You will not give excessive damages in this case, in which it is so exceedingly difficult to estimate the damages which have been actually sustained. You must take a fair and reasonable and moderate view of the whole case, as you think will fairly compensate him for the loss he has been put to in not getting the renewal of the licence. The plaintiff's counsel has impressed upon you that the defendants must pay plaintiff for their gross misconduct in this matter, in not putting up the new premises so as to ensure the renewal of the licence by the Licensing Court, but looking at all the circumstances, I do not think it can be considered there was any gross misconduct, or any misconduct, on the part of the defendant company. There is no doubt they were placed in a difficult position. They said, and there was nothing to the contrary in the evidence, that they had no knowledge of this condition until after the lease was signed, and then they were placed in the difficult position of having to go to this large expenditure of £5,000 in building to the requirements of the Licensing Court. It was a difficult position to be placed in, and they hesitated to incur that expenditure under all the circumstances of the case, seeing that it was a new licence, and that it must be to some extent an experiment, and there was also no doubt that they thought they would be able to obtain the renewal of the licence after they had put the premises in a proper state of repair. They were mistaken, as the result proved, but I think it would be going rather far to say there was any gross misconduct on their part in acting as they had done, under all the circumstances of the case.

The jury then retired, and after an absence of forty minutes returned with a verdict for the plaintiff for £450 on the first part of the claim, and £2,000 on the second part.

Judgment was accordingly entered for the plaintiff for £2,450 and costs.

Mr. Searle asked that leave be granted to reserve the point of law as to the liability of the defendant company for the loss of the licence for the consideration of the full bench of the Supreme Court.

Solomon, J., said that of course that point would be reserved, and that was the reason for his asking the jury to find separately the amount of damages on the two claims in the declaration.*

[Plaintiff's Attorneys: Messrs. Silberbauer, Wahl, and Fuller; Defendant's Attorneys: Messrs. Van Zyl and Buissine.]

SUPREME COURT

[Before Hon. Mr. Justice MAASDORP and a Jury.]

PARKER V. EAST LONDON MUNICIPALITY. { 1900.
Sept 10th.
„ 11th.

Negligence—Damages.

This was an action brought by Harriett Ellen Parker, of East London, against the Municipality of East London, as owners of the electric tramway system of that town, to recover the sum of £1,500 as and for damages, for injuries sustained by her, owing, it was alleged, to the negligence of the defendant Municipality's servants.

The following were sworn in as a jury: Messrs. John Turnbull, Abraham John Abrahamson, Henry Stephenson, Frederick Ayres, Edward Harcombe, Thomas Arthur Phillips, John Paterson, Frederick B. Crosswell, and Robert B. Morrison.

The declaration set out that in the month of February, 1900, Mrs. Parker, who was then earning her living by carrying on a boarding-house, was suffering from an abscess in her face, which was very painful, and she used to frequently go to the residence of an East London medical practitioner in order to have the abscess seen to. In February last she got into one of the trams run by the defendants, and she was on that occasion the only passenger by that car. She told the conductor that she wished to get out of the tram near the residence of the doctor in question, and when nearing the residence the conductor

*On the 14th November following on an application for a new trial the Court held that, in the absence of a specific undertaking in the lease by the lessor to carry out the enlargement, &c., of the hotel, there had been a misdirection of the jury by the learned Judge with reference to the 2nd claim of the declaration.

The subsequent proceedings will be found fully reported under date the 14th November.

R.R.P.

rang the bell for the motorman to stop. Plaintiff then got up from her seat and came out on to the platform of the tram. At that time the tram was slowing down considerably, and she was waiting at the side in order to get down, as any sudden movement made her abscess exceedingly painful. While she was waiting the tram gave a big jerk forward, which threw plaintiff from the tram. She suffered considerable injuries as the result of the fall, she broke one of her legs, and she sustained several internal injuries. She was laid up for some months, and she then had to proceed up country in order to recruit. In the meantime the boarding-house was not sufficiently attended to, and eventually plaintiff had to give it up, as it was no longer a profitable undertaking. Altogether plaintiff was put to considerable expense, and she was still suffering both from her leg and the internal injuries which made it impossible for her to stand on her legs for any length of time, and therefore it was quite impossible for her to carry on a boarding-house. She therefore claimed £1,500 as and for damages, and costs of suit. The defence set up was that the tram was, at the time of the accident, slowing down prior to stopping, and that the plaintiff got down from the tram before it stopped, that she had been warned by the conductor that she must not get off before the tram stopped, and that as she got down before it stopped she met with this accident, the result of her own carelessness and negligence, and not through any fault of the defendants.

Sir Henry Juta, Q.C., and Mr. Close appeared for the plaintiff; Mr. Schreiner, Q.C. (with him Mr. Gardiner) appeared for the defendant Municipality.

Mrs. Harriet Ellen Parker, the plaintiff, said she was a widow living at East London, and in the month of February last she was carrying on a boarding-house. She had four children, aged eighteen, sixteen, fourteen, and eleven years respectively. The two elder were earning something for themselves, but the younger two she had to support. On the morning of the accident witness was suffering from an abscess in the face and went to Market-square to take a tram to Dr. Roulston's. The tram had just started, but witness came up with it a little further on, the power having gone off. That was about nine o'clock in the morning. The motorman and the conductor were sitting inside. Witness entered the car and asked if the tram was going to Park Avenue, and the conductor said, "Yes, when we can go on." Then the

lights appeared in the car and the conductor said "There she is," upon which the motorman rose to go outside. When he got up witness noticed that he staggered and steadied himself by the chairs. He appeared to be suffering from the effects of drink. Witness asked to be put down at Dr. Roulston's, and when they came there the conductor said, "This is Dr. Roulston's," and rang the bell. Witness was sitting just inside the door and got up. The tram slowed down and witness went on to the platform and stood near the edge, waiting for the tram to stop. The abscess was giving her great pain, and was such that any quick movement would increase the pain. That was the reason she stopped waiting, and did not try to step off. The tram had slowed down very considerably, but it suddenly gave a violent lurch forward with the result that witness was thrown violently into the road. She remained on the ground, but was quite conscious, and heard the conductor ring the bell and jump off. She then heard him say to the motorman in an angry tone, "Now see what you have done; when I rang the bell why didn't you stop?" The motorman replied, "This is not a stopping place." The conductor said, "When I ring the bell you must stop." Witness looked across the road and saw a man named Harding, who came towards her, spoke to her, and afterwards picked her up and took her to Dr. Roulston's. The tram-cars were similar to the double-deckers, but she thought not so large. There were steps on the right hand side coming down from the top, and witness was thrown off on the right-hand side. She was seriously injured, her leg being broken, and besides she sustained internal injuries. She was confined to bed for two months, and after that she was sent up-country to King William's Town and Middel-drift, being away about two months altogether, and had to use crutches. The internal injuries caused her severe pain and they still pained her. Her leg was better, but she was unable to stand on her feet for any length of time, and could not do ordinary household duties. At the time of the accident she was carrying on a boarding-house, by which she supported herself and her children. She took about £60 or £70 a month, and lived there with her children. She had generally £5 or £6 over every month. Before February prices had increased, and she was making more profit. There being a large influx of people owing to the war, she had been able to let rooms profitably. After the accident she kept her boarders for a month, but as

she could not attend to anything the result was that it cost more than came in, and she had to give her boarders a month's notice to leave. It was necessary in carrying on a boarding-house like that for her to see to things herself. Witness's medical bill came to £37 3s. Her journey to King William's Town and Middel drift cost her nearly £40. Nurses she engaged cost £18, a bath chair £13, crutches £3 10s., and chemists' bills £10. Other items brought her total expenses in connection with the accident to £153. Witness had saved about £80, and had spent it all. Two of witness's boys earned £7 and £2 a month respectively, and off that, together with assistance from her brother in England, she was able to live. But for that she would have had nothing at all. She had tried since then to go about her work, but she still suffered from her injuries, and was not able to carry on the boarding establishment in any way. She hoped to get better some day, but saw no signs of it at present.

Cross-examined: Witness was quite certain the motorman staggered that morning. The conductor never said he would put her down as near as possible to Dr. Roulston's. He rang the bell before she rose from her seat in the car. When she came on the platform he said to her, "Don't get down until the tram stops," and she replied, "I'm not going jo." The tram jerked and she fell. It was untrue that she jumped off. When Harding came up he asked witness how it happened, and upon her telling him she was thrown from the tram he said: "What a shameful thing; if it was my wife I would make them sit up for it." Witness was quite conscious, and could hear the conversation between the conductor and the motorman, because they shouted. Her maiden name was Parker, and she was divorced from her husband, who was in Brabant's Horse, and was killed in action near Dordrecht. She denied that she was walking about the streets on the day of the relief of Mafeking.

By the Court: She had hold of the iron bar of the tram while waiting for the car to stop, and when the lurch came she swung round and let go.

Dr. Robert John Roulston gave evidence as to the injuries received.

Correspondence was put in in which it was admitted that the motorman Tinsley had been convicted of drunkenness in April, 1899, and again on December 30, 1899, and

further that he had been found guilty of indecent behaviour in the public streets on January 2, 1900.

This closed the case for the plaintiff

For the defence,

John Powell, Town Engineer of East London, and as such, in control of the tramways, put in a duly published notice in which there was a regulation against any person leaving or mounting a tram in motion, stating that if they did so then it was at their own risk. At the spot where the accident occurred there was a steep down gradient. There were instructions to shut off power at a certain point on that down grade. It would be impossible for the car to jerk while going down useless power was put on. If the wheel-brake was taken off it would not cause a jerk.

Cross-examined: The car running by gravity would start at two miles an hour, but would be running slightly faster by the time it reached Dr. Roulston's. They worked unfortunately under a Council where there were twelve Councillors, and got a lot of complaints, and were now instructed to stop wherever passengers required. There had been no accidents in connection with the trams since the one in question. There was an action pending in connection with electricity; not with the trams. The tram always slowed down near where the accident took place. The motorman was dismissed five days later because there was friction between him and the conductor, when there was just a suspicion that the motorman had been drinking, and he was very excited.

Colin Campbell said he had been in the employment of the defendants as tram conductor since the beginning of January. He was a careful and a sober man. He had been conductor since January 29, when the trams started. On February 19 Tinsley, the motorman, came on duty at six, and so far as witness knew had nothing to drink. Witness did not see him the whole time, as they had breakfast, and the trip when the accident occurred was after breakfast. From February 1 to 18, while on duty, witness had no reason to suspect that Tinsley was addicted to drink. Tinsley was not staggering when Mrs. Parker boarded the tram. After plaintiff was on the tram she said she wanted to get off at Dr. Roulston's, and witness said he would put her off as near as possible. Before they reached Dr. Roulston's they were accustomed to run down without power, and that morning they were

running as usual there. When Mrs. Parker rose and came towards the platform witness rang the bell. He never went to her and said, "Here is Dr. Roulston's." The lady came out to the platform, and as the tram was slowing down witness put his hand on her shoulders, and warned her not to jump off, but she never answered him. Witness turned to look through the car, and the next thing he knew the lady was on the ground. There was no jerk, and the car did not go on and take a great turn of speed. The notice put in by Mr. Powell was posted up in the car the first day it ran.

Cross-examined: He had not made any complaints to anyone about Tinsley. On the Saturday after the accident, he had had to take complete control of the tram owing to Tinsley's refusal to carry out his signals. He thought Tinsley was drunk then.

William Tinsley said he was the motorman on this car when the accident took place. He heard a bell while passing down, and slowed up the tram a little. He next heard another bell after they passed Dr. Roulston's. He was certain he never put on any power between hearing the two bells, and it was impossible for there to have been any jerk. The second time he heard the bell it was an alarm, and he pulled up the tram within one length.

Cross-examined: He admitted he was the man against whom there were the convictions for drunkenness.

Joseph Arthur Harding said he saw everything that took place on the day of the accident. The lady stepped off the tram before it had stopped, and consequently fell. There was no jerk.

Cross-examined: He did not tell Mr. Wiggins, a solicitor, that the first thing he saw was the lady fall off the tram.

Charles Stewart West said he saw Tinsley three times on the day of the accident, and there was not on any one of the three occasions any trace of liquor about him.

Cross-examined: Tinsley was not dismissed for drunkenness, but because he wrangled with Mr. Campbell when the latter reported him as having been drinking.

After the counsel had addressed the jury, Maasdorp, J.: The plaintiff bases her claim for damages upon the negligence of the defendants' servants, the negligence complained of being the alleged careless and unskilful driving of the motorman, which produced such a violent jerk on the tramcar that the plaintiff, while standing on the platform, was thrown off and sustained injury. On the

other hand, the defendants pleaded negligence on the part of the plaintiff, in that she was alighting from the car while it was in motion, and that her fall was so caused. Now counsel on both sides seem to be agreed, judging by their argument, that if this lady stepped off the tramcar while it was in motion and so brought these injuries upon herself that would be an act of negligence which would throw her in default, as any person jumping off a tramcar while in motion did so at his or her own risk, and even although a driver did not stop a car when he ought to have done so a passenger had no right to arrive at his or her destination by jumping off a car while it was in motion. This case is very simple as regards the law, and the only difficulties the jury will have will be in dealing with the facts, there being undoubtedly a very great conflict of evidence upon very material points in this case. The plaintiff has given a very simple narrative of the occurrences of that day. Her statement seems to be very clear, and when her case was closed you would have had little difficulty in dealing with the matter, but in this case, as in all cases of the sort, the difficulties arose when the defendants' witnesses were put into the box, and then what might in the first instance have appeared a very clear case might be to some extent, or even wholly, upset by the witnesses for the defence. It remains for you to consider whether this was done in this case. The plaintiff put before you a very simple story, and if you once accept her evidence as reliable or conclusive, then you will have very little difficulty in coming to a conclusion. One feature of the case which has not been very much insisted upon by counsel. I suppose this is so because there might not be evidence in support of the position. It is this, viz., if a person was warned by the conductor that she was approaching her destination, and such person rose and stood upon the platform, she must use all due care to guard herself against accident. Even supposing she had a right, and she would have a right, to stand upon that step, in doing so she must use all due diligence to prevent any accident to herself. It was said by counsel for the plaintiff that such jerks were not at all infrequent; some might be violent and caused by great negligence, and some might be slight, and if such person might expect a slight jerk then she must guard herself against being upset by it. It remains for you to consider whether the plaintiff had in this case taken care

to guard herself against any such slight jerk. Now Mrs. Parker states that she had hold of the iron rail in the tram at the time of the jerk. If you find that Mrs. Parker has not been guilty of a negligent act, and that she did everything a careful person would do in taking hold of the rail, and that there was such a violent jerk as alleged, then you will find that she was flung off the tram owing to the negligence of the motorman. For the defence, the evidence of Tinsley, the motorman, and Campbell, the conductor, are in direct contradiction to the evidence of the plaintiff. The engineer has been called, for the same purpose, viz., to satisfy the jury that this jerk could not possibly have taken place. Theory on this question has been plentiful. You have been told that this was a down grade, and that no electricity would be used on it, but it still remains a question of fact as to whether it was used. A careful motorman would use no electricity on that down grade, but a careless motorman might keep the power on, and therefore it still remains a question of fact, whatever the theory might be. Mrs. Parker gave evidence which, if believed, would throw a great deal of light on the case when she said that after she was thrown off the conductor shouted out to the motorman asking him why he had not stopped when he rang the bell, and also telling him to see what he had done, to which the motorman had replied that it was not a stopping place. That corroborated the other evidence that the motorman did slow down to stop, but that, finding he had stopped sooner than he intended, had gone on again. Another thing which will aid you in coming to a conclusion as to which of these two parties is correct is that the very same thing seems to have taken place not long after between the very same conductor and the same motorman, when the latter's refusal to observe the signals given by the conductor led to a quarrel. Mrs. Parker said that was what occurred on the day of the accident, and it gives some probability to her story, although it does not dispose of the whole case. Mrs. Parker has made a positive statement, and when a positive statement is made by a fairly reliable witness it can only be upset by a more reliable witness or by an equally reliable witness who has a better knowledge of the facts. In this case you have the witness Harding, and the question is: does Harding know more of the circumstances than Mrs. Parker, and is he a more reliable witness? There was an obstruction to his view, but he claimed

that he could see the whole occurrence between the steps of the tramcar, and said that he saw the lady step off. You will consider whether he could do so. But the case goes further. Harding came up to Mrs. Parker, and she says that he then said that if it had been his wife he would have made the tramway people sit up for it. Harding, however, says that he told her that it was her own fault. It might be considered whether it was likely that when a man went up to a lady lying in the street suffering severely he would at once begin to reprimand her, and speak severely to her. It is not likely, but still Harding might be a man who would speak out under any circumstances and say what he felt. These little scraps of conversation throw a good deal of light upon the case. With regard to the conversation that the plaintiff says took place between the conductor and the motorman after she was thrown off, you have to consider where the probability lay, and to consider whether Mrs. Parker was likely to invent that story of the quarrel between the conductor and the motorman, and also to invent the further statement that Harding said if it was his wife he would make the tramway people sit up for it. Then the issue is simply whether Mrs. Parker fell off in consequence of the violent jerk due to the negligence of the motorman, or whether she fell off owing to her own negligence in not protecting herself in the manner she might have done, and so saved herself, notwithstanding the jerk. It is very often difficult to accept evidence as to negligence where the conduct of a careful man is in question. But you will consider here whether the conduct of a careful man is in question. You will note the admissions made by the motorman, viz., that before entering the service of the defendants he had been convicted of drunkenness. His answer is that he has abstained from the time he entered that service until after the accident. It does not follow that although a man has been convicted once or twice of drunkenness that he was drunk on that occasion, and you will still have to have conclusive evidence that he acted carelessly. There is the evidence that the man had given satisfaction in the capacity of motorman previously. On the question of damages, if you find a verdict for the plaintiff, you will take into account the sufferings of the woman and the actual out-of-pocket expenses. You must deal with the whole matter in a rational manner.

The jury brought in a verdict for the plaintiff for £500 damages.

Judgment was accordingly entered for plaintiff for £500 damages, with costs, the plaintiff, as a necessary and material witness, to have her witness expenses.

[Plaintiff's Attorneys, Messrs. Silberbauer, Wahl and Fuller; Defendants' Attorneys, Messrs. Fairbridge, Arderne and Lawton]

SUPREME COURT

[Before the Right Hon. SIR J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), and the Hon. Mr. Justice SOLOMON.]

ADMISSIONS. { 1900.
 { Sept. 12th.

Mr. Buchanan moved for the admission of Daniel Jacobus de Wet as an attorney and notary.

Order granted and the oath administered.

Mr. Nathan moved for the admission of Reginald Edmund de Beer as a notary.

Order granted and leave given for the oath to be taken before the Resident Magistrate at Vryburg.

Mr. Nathan moved for the admission of Gysbertus Johannes van R. d'Oliveira as a conveyancer.

Order granted and the oath administered.

Mr. Rubie moved for the admission of Laurentius G. S. de Beer as a translator.

Order granted and the oath administered.

PROVISIONAL ROLL.

ESTATE OF SERRURIER V. BAKER AND ANOTHER.

Mr. Close moved for provisional sentence on a mortgage bond of £25 with interest from November 10, 1898, and for balance of the bond, £100, with interest from September 22, 1898. The bond had become due by reason of the non-payment of interest. It was also asked that the property specially hypothecated be declared executable.

Provisional sentence granted as prayed and the property declared executable.

WRIGHT V. LOUIS HART.

Mr. P. S. Jones moved for provisional sentence on a mortgage bond for the sum of £600 with interest due thereon. The bond had become due by reason of the non-pay-

ment of the interest. It was also asked that the property specially hypothecated be declared executable.

Provisional sentence granted as prayed and the property declared executable.

LEVINKIND V. ISAAC VORSTER AND P. W. VORSTER.

Mr. P. S. Jones moved for provisional sentence upon a Resident Magistrate's Court judgment, given by the Assistant Resident Magistrate at Coleberg for £9 19s. 3d., and £2 17s. 3d. costs, less £6 7s. recovered on a writ of execution. It was also asked that the property mentioned in the summons be declared executable.

The Chief Justice said he thought there should be a stay of execution seeing it was a small debt of £6, for which a property of 1,400 morgen would have to be sold, and it was just possible there was some mistake. An order was granted, but with stay of execution for three months as against the immovable property.

MASTER V. P. H. VILJOEN.

Mr. Ward applied for the usual order upon the respondent, an executor testamentary in an estate, to render an account.

Granted.

VILJOEN V. P. J. VILJOEN.

Mr. McGregor moved that the provisional order of sequestration granted in the above matter be superseded.

Granted.

JAGGER AND CO. V. HENRY GEORGE HAWKINS.

Mr. Maskew moved that the provisional order of sequestration granted in the above case be superseded.

Granted.

VAN ZYL V. JACOBUS S. PIENAAR.

Mr. Maskew moved for provisional sentence on a promissory note for £247 10s., with interest from August 15, 1897.

Granted.

COPPENHAGEN V. WYGT.

Mr. P. S. Jones moved for provisional sentence on a mortgage bond for £125, with interest and costs, and he also asked for 5s. 8d. premium and stamp paid by plaintiff. The bond had become due by reason of notice calling up the bond having been given.

Provisional sentence granted as prayed.

IOUBSER V. JOHN A. PICKARD.

Mr. Maskew moved for the final adjudication of defendant's estate as insolvent.
Granted.

SMITH V. ALFRED MULLIGAN.

Mr. Gardiner moved for provisional sentence for £170 10s. due on a promissory note, with interest due thereon and costs.
Granted.

ILLIQUID ROLL.

MURRAY AND CO. V. J. FREIMOND.

Mr. P. S. Jones moved for judgment, under Rule 319, in default of plea, for £443 18s. 6d., less £343 18s. 6d., together with interest *a tempore morae* and costs of suit.
Order granted.

SMITH AND CO. V. J. D. ERASMUS.

Mr. De Waal moved, under Rule 329d, for judgment for £21 9s. 8d., balance of account for goods sold and delivered, with interest *a tempore morae* and costs of suit.
Granted.

KINNES AND ANOTHER V. ANDERSON.

Mr. Buchanan moved for judgment, under Rule 329d, for £31, money lent, with interest *a tempore morae*, and costs of suit.
Granted.

BRILL V. ANNA OLIVIER.

Mr. Rubie moved for judgment, under Rule 329d, for £54, goods sold and delivered, and 15s. 6d., money paid by plaintiff to defendant, with interest and costs of suit.
Granted.

LENG V. LEWIS GOLDSTEIN.

Mr. Buchanan moved for judgment, under Rule 329d, for £121 6s. 2d., being balance of account for goods sold by plaintiff to defendant, with interest *a tempore morae*, and costs of suit.
Granted.

REHABILITATIONS.

Mr. McGregor moved for the rehabilitation of the insolvent estate of Stephanus Abraham Cilliers.
Granted.

Mr. P. S. Jones moved for the rehabilitation, under the 117th section of the Insolvent Ordinance, of the estate of Jan Hendrik Jasper Visser.
Granted.

IN THE MATTER OF THE MINORS KROMM.

Mr. Gardiner applied for an order authorising the payment of certain moneys towards the maintenance and education of the said minors.

The Court granted an order in terms of the Master's report, the costs to come out of the funds.

IN THE MATTER OF THE PETITION OF WILLIAM SAUNDERS NEWCOMBE AND WIFE, CATHARINE NEWCOMBE.

Mr. Rubie applied for an order releasing the trustee under the ante-nuptial contract, and for the appointment of a new trustee.

The Chief Justice said no reason was given why the trustee wished to resign.

The case stood over until a further affidavit was filed.

CAPE TOWN COUNCIL V. WILLEMSSE.

Mr. Schreiner, Q.C., applied for an order restraining respondent from occupying or allowing any agent or tenant to occupy certain premises until the certificate authorising the occupation has been granted by the City Engineer.

The order was granted, on the conditions that the interdict be stayed for fourteen days, and execution of costs to be stayed for a month.

BLIGNAUT AND OTHERS V. DE VILLIERS. { 19C).
{ Sept. 12th.

Alien—Proof of burgher rights.

V.'s parents who were British subjects went to reside in the Orange Free State where B was born. V. subsequently came to the Colony, became domiciled there, and was elected Mayor of Paarl. It was sought to order him to vacate his seat on the ground that he was an alien.

Held, that the proof of alienage was on him who asserted it, and that as a mere statement by one burgher of the Orange Free State was not sufficient proof that V.'s father was a burgher of that State, the applicants must fail.

This was an application for an order declaring respondent disqualified from continuing as a Councillor of the Municipality of the Paarl by reason of his being an alien.

An affidavit made by the applicant was filed, in which it was alleged that the respondent was returned as a Municipal Councillor for the Paarl in 1889, and subsequently was elected Mayor for the ensuing year. It was brought to the notice of the applicant that respondent was an alien, and when challenged at a meeting of the Council by the applicant to state whether or not he was an alien, he declined to give an answer and ruled the question out of order. The respondents' parents took up their abode in the Free State, and remained there until their death. Respondent was born at Bloemfontein about thirty-four years ago, and resided in the Free State as a burgher until he removed to Barberton, where he held an appointment under the Transvaal Government. Recently respondent had applied for letters of naturalisation as a British subject. Applicant therefore applied that respondent be ordered to vacate his seat as a member of the Paarl Municipal Council on the ground that he was an alien, and as such disqualified by section 16 of Act 45 of 1892.

An affidavit in which the respondent stated that he believed he was not an alien was filed. He admitted that he was born in Bloemfontein, but he said that his parents were British subjects, having never been naturalised in the Free State. Respondent left the Free State when he was nineteen years of age, and during his residence in that State he never took the oath of allegiance to that State and never appeared on the burgher list. He resided at Barberton for about five years, but his name never appeared on any of the burgher lists of the Transvaal. During his residence at Barberton he occasionally, for short periods, gave his services to the Transvaal Government, taking the oath of impartiality and secrecy. For the last eight and a half years he had resided at the Paarl and had voted for Parliamentary and Municipal candidates and had exercised the rights of a British subject. If he were held to have been an alien originally he would point out that Lord Roberts, by a proclamation, had made the Free State and the Transvaal British territory.

An answering affidavit made by J. G. Fraser, stating that respondent's father was a burgher of the Orange Free State, was also filed. It is further stated that respondent was

a Free State burgher; at the age of 16 respondent was liable to be commandeered as a burgher.

Sir Henry Juta, Q.C., in support of the application: The proclamation of Lord Roberts, by which the Free State was declared annexed, will not make respondent a British subject. It might if he had been at the time resident in the Free State, and had agreed to submit to the conquerors. Respondent is still a citizen of the Free State. *Forsyth on International Law* says that when a State is conquered inhabitants may elect either to become subjects of the conquerors or may go back to their parent State. Here there was no parent State. He must show by some overt act that he has become a British subject.

[De Villiers, C.J.: He has done that: he has registered his name, voted and acted as a Councillor. He could be indicted for treason if he had gone into rebellion.]

Acting as a Councillor does not make him a citizen. He must do something more than that. Merely being a Councillor and applying for letters of naturalisation does not make him a British subject. Until he has become naturalised his natural allegiance was to the Free State. As a clerk to a Landdrost in the Free State he must have taken the oath of allegiance to the Free State.

Mr. Searle, Q.C., for the respondent: Respondent claims that he is a British subject because he was born of a British father, and has never made a declaration of alienage under 33, 34 Victoria, C. 14. The mere acceptance of burgher rights will not make him a Free Stater. He lost his burgher rights if he had acquired any by acquiring a foreign domicile or taking service under a foreign government. This he did by taking service with the Transvaal Government, and also by acquiring a domicile here. A mere change of nationality by the father does not deprive the son of his original rights of nationality. There was, however, no proof that the father was ever a burgher. See *Moll v. Civil Commissioner of Paarl*, reported at 7 Sheil, p. 454.

Sir Henry Juta in reply.

De Villiers, C.J.: The respondent in his affidavit states that during the last eight and a half years he has resided at the Paarl, where he owns immovable property of considerable value, that he has all along been a registered voter there both with regard to voting for members of Parliament and for Municipal Councillors, and that he has always while there exercised all the rights of a British subject

and has faithfully complied with the laws of this colony. It is now sought to oust him from his position as a Town Councillor on the ground that he is an alien and has never been a British subject. It is clear, in the circumstances of the case, that the burden of proof that this gentleman is an alien lies upon those who allege it. We have the fact that his parents were British subjects and went from this colony to the Free State. If it had been the case of an Englishman coming from London and going to the Free State there would have been no doubt whatever that without clear proof that he had become a burgher of a foreign State the presumption would be that he remained a British subject. The father of this gentleman happens to have come from this colony, but in this colony the British subject has the same rights as a British subject as an Englishman coming from London, and he retains those rights unless there is clear proof that he has lost them. What in the present case is the proof that he has lost them—that the father had lost his rights? The respondent says that he believes that his father never became a burgher of the Orange Free State or the Transvaal, but Mr. Fraser states that according to his belief the father of the respondent did become a burgher of the Orange Free State. But the applicants have not produced the best proof of such burghership. If the burgher rolls could be found, they would supply the evidence which is wanting, but they are not forthcoming, and in the absence of such proof the applicants are not entitled to succeed. The further question has been raised as to whether the annexation of the Free State, with the conduct of the respondent, makes him a British subject supposing he was not a British subject before the annexation. That raises a further question which it is not necessary at the present stage to decide. If hereafter it should be proved that the father of this gentleman had become a burgher the application may be renewed, and then the question might be decided as to how far the proclamation of Lord Roberts affects the status of the respondent. But the case is not yet ripe for decision on that point, and inasmuch as the applicants have not yet satisfied the Court that the respondent's parents ceased to be British subjects, or that the respondent himself has ceased to be a British subject, the application must be refused with costs.

Solomon, J., concurred.

IN THE ESTATE OF THE LATE { 1900.
JOHANNES JOCHEMUS SWART. { Sept. 12th.

Mr. Buchanan moved for an order to confirm the sale of certain property to the co-executor in the estate. With the exception of one daughter of the deceased and the representatives of one son of deceased, all the heirs were majors, and consented to the sale. The matter had been before the Registrar of Deeds, and he had reported that he had nothing to urge against this sale. The Master had suggested that the co-executor be allowed to take over the property at the valuation of a sworn appraiser. The property had since been valued by a sworn appraiser of experience, and he said £500 was a full value.

Order granted as prayed.

Re SLUITER'S WILL { 1900.
Sept. 12th.
„ 13th.

Holograph will—Executor testamentary—Usufruct—Legacy.

Application for letters of administration by executors testamentary under a holograph will, by which the testator bequeathed the whole of his estate valued at £30,000 to his only daughter subject to a life usufruct in favour of the surviving spouse, and the payment of a legacy of £2,500 to the testator's brother granted.

This was an application made on behalf of the Board of Executors, Cape Town, to have letters of administration granted to them as executors testamentary under the will of the late Herman van Loeven Sluiter. The will, which was signed by the testator but not witnessed, disposed of property to the value of £30,000, which was left to the testator's minor child, the testator's surviving spouse to have a usufruct of the estate until her death. She had also to provide for and educate the minor child. There was also a legacy of £2,500 to the testator's brother. The Master refused to grant letters of administration to the executors testamentary without an order of Court.

Mr. Schreiner, Q.C., in support of the application: This is a privileged will, being a holograph will disposing of the *corpus* of the estate to the child. The fact that the will contains other bequests such as the

legacy to the brother will not invalidate it. See *Eaton's Executors v. Eaton* (Buchanan, 1875, p. 173), and *Steer's Executors v. the Master* (5 Juta, p. 313). The legacy, of course, would not be upheld, and would have to fail.

[De Villiers, C.J.: If the testator knew that the legacy would fail, would he have made such a will?]

Despite the reluctance of the Court to uphold such a will, in *Steer's* case they felt they were bound by *Eaton's* case. The legacy will be considered *pro non scripto*, and the wife will not be directly entitled to the usufruct, but will receive moneys from the executors as guardian of the child. *Herbert's Case* (11 S.C.R., p. 105) is quite different, because there the *corpus* was left directly to the wife.

C.A.F.

Postea (September 13, 1900).

De Villiers, C.J.: I have considered the authorities bearing upon this case, and I think the Court may grant this application, although in doing so the Court is going further than it has in previous cases of privileged wills. The main point in favour of granting the application is that the estate is given to the testator's child. It is clear from the authorities that neither the wife nor the brother can take any benefit under the will. The Court will therefore make an order that the Board of Executors be appointed to administer the estate under the will so far as the child is benefited, but in such a way that no interest or benefit is given either to the brother or the surviving spouse, but as neither the wife nor the brother is formally before the Court, there will be some difficulty in embodying this in the order. Therefore the Court will simply grant an order appointing the Board of Executors to administer the estate. Costs of the application will come out of the estate.

SPIILHAUS AND CO. V. MUNT- { 1900.
WIJLER. { Sept. 12th.

Attachment of person—*Ad fundandum jurisdictionem*—Subsidiary action.

An application for the attachment of defendant's person ad fundandum jurisdictionem was refused where it was sought to attach his person for the purpose of founding jurisdiction in an action for civil imprisonment arising out of a judgment in a prior action against him.

This was an application for the attachment of the defendant's person to found jurisdiction in proceedings for civil imprisonment about to be instituted. The matter arose out of a judgment obtained by plaintiff against defendant in the Supreme Court. The amount adjudged to plaintiff was £531 9s., together with interest and costs, the amount found to be due on an agreement between the parties in connection with crystallised eggs. Part of that amount had been paid and it was now in contemplation to sue the defendant for civil imprisonment, as the balance had not been paid. The applicant stated that the defendant was about to leave the country by the mail steamer leaving for England that afternoon.

Mr. McGregor, for the applicant, stated that since the filing of the petition his attorney had ascertained that the defendant had changed his mind, and did not intend leaving that week, and had made an informal tender of £225 on the condition that he was allowed to reopen the judgment given against him by default for £531 9s. This had not been accepted.

De Villiers, C.J.: This is an application to attach the defendant's person *ad fundandum jurisdictionem*. But the Court already has jurisdiction, an action having been brought which the defendant has defended, and where there is jurisdiction in the main action there is jurisdiction in the subsidiary action. The application will be refused.

IN THE MATTER OF THE PETITION OF JACOB FREDERICK O'NEADIE.

Mr. Searle, Q.C., moved for an order authorising the Registrar of Deeds to cancel a certain bond without production of the bond.

The Court granted a rule nisi calling upon all concerned to show cause by October 12 why an order should not be granted as prayed, the rule to be published once in an English newspaper in Cape Town, and to be served on Mr. G. W. Steytler, the trustee in the estate of the firm which had held the bond.

KEYTER V. KEYTER. { 1900.
 { Sept. 12th.

Mr. Currey moved for leave to the petitioner, A. P. Keyter, formerly residing at Clanwilliam, to sue his wife by edictal citation for divorce on the ground of her adultery. Petitioner stated that he was married to M. D. Keyter (born Wykeveld) at Cape

Town in 1889, and there were two children of the marriage, one born in 1890 and the other in 1893. He alleged that his wife had committed adultery with one Harry White, and had since absconded with the said White, and was supposed to be living at Delagoa Bay. Counsel stated that the petitioner was a clerk at Beaconsfield, and it was now believed that his wife was at Bulawayo, but failing personal service it was asked that the citation and notice of trial might be published in the "Government Gazette" and in a Bulawayo newspaper.

The Court granted an order as prayed, failing personal service one publication in the "Government Gazette," one in "O Futuro," Lourenco Marques, and one in the "Bulawayo Chronicle," leave given to serve the intendit and notice of trial with the citation, returnable first day of next term.

IN THE MATTER OF THE MINORS WATSON.

Mr. Rubie moved on behalf of the petitioner, who was the trustee under a marriage settlement, for the appointment of a *curator ad litem* to represent the children in an application he was about to make to the Court at Quebec, Canada, for release from the trust.

Granted.

IN THE MATTER OF THE MINOR KOTZE.

Mr. Rubie moved for an order to confirm a certain proposed partition.

Granted.

IN THE MATTER OF THE PETITION OF ANNIE ELIZA MITCHELL.

Sir Henry Juta, Q.C., moved that the rule *nisi* for the payment of certain moneys be made absolute.

Granted.

IN THE MATTER OF THE PETITION OF NICHOLAS ALBERTUS JANSE VAN RENSBURG.

Mr. De Villiers moved that the rule *nisi* for the issue of a certified copy of a certain mortgage bond be made absolute.

Granted.

STEENKAMP V. STEENKAMP. { 1900.
Sept. 12th.

Attachment of property—*Ad fundandam jurisdictionem*—Domicile—Long absence.

Where a person had left the Colony for the purpose of joining

the Queen's enemies the Court granted an application for the attachment of his immovable property to found jurisdiction in an action to be instituted against him, on the ground that it might be presumed from his long absence, and the fact of his joining the Queen's enemies, that he had changed his domicile.

This was an application for an interdict restraining respondent from parting with certain property and for the attachment of the property to found jurisdiction. The petition showed that the applicant was married out of community of property to the respondent, and by an ante-nuptial contract certain live-stock and furniture were made over to her. In addition she had at that time certain live-stock, cash, etc., of her own, and since their marriage she had received inheritances of £1,041 and £1,739 from the estates of her father and mother respectively, all of which she had from time to time handed over to respondent. The latter had bought a farm in the district of Albert for £3,500 cash, and another in the Victoria West district for £1,500, for which he passed a mortgage bond. When the war broke out between the late Republics and Great Britain the respondent joined the Republican forces, and when the latter retreated back across the Orange River into the then Orange Free State he went with them, taking not only all his own live-stock, but that belonging to petitioner. There the stock was eventually seized by the military authorities and sold. Petitioner was not aware that respondent was possessed of any movable property in this colony, all he had being those two farms.

Mr. Schreiner, Q.C., moved.

[De Villiers, C.J.: The respondent is domiciled in this colony, is he not?]

Mr. Schreiner, Q.C.: When a man throws off his allegiance and goes away with the Queen's enemies, the theoretical doctrine of domicile seems rather strained.

[De Villiers, C.J.: Would not service of summons at the last known place of residence be sufficient?]

If your lordship thinks that, then I will only ask for an interdict restraining respondent from alienating the property.

De Villiers, C.J.: In the absence of any statement that it was respondent's

intention to alienate the property, the Court cannot grant the application for an interdict. If it is true that the respondent is fighting with the Queen's enemies outside this colony, it is a question whether that really does not amount to such a change of domicile as will justify the Court in granting an order for the attachment of the property *ad fandum jurisdictionem*. Under the circumstances the Court will grant an order of attachment *ad fandum jurisdictionem*, on the ground that the respondent left the Colony for the purpose of joining the Queen's enemies, and the Court may presume that he has changed his domicile in his long absence.

Leave was given to sue by edictal citation, and to serve the interdict and notice of trial by the same time, returnable first day of next term, one publication to be made in the "Government Gazette" and one in the "Bloemfontein Post."

RUSHTON V. JORDAAN.

Mr. Buchanan moved to have certain moneys in the hands of the High Sheriff declared executable.

Granted.

ZUIDMEER V. ZUIDMEER.

Mr. Currey moved for leave to attach certain money to found jurisdiction.

Order granted, and leave given to sue by edictal citation, personal service to be effected, returnable first day of next term.

*IN THE MATTER OF THE PETITION OF ABDOL WAHAB } 1900.
SALIE. } Sept. 12th.

Sir Henry Juta, Q.C. (with whom was Mr. Gardiner), moved that the rule *nisi* granted on the 13th July last in the above matter be made absolute. The applicant is priest in charge of the Malay community at Port Elizabeth and trustee for the said community, and had moved for leave to sell a certain mosque in Port Elizabeth. It appeared that the property in question was left in trust to the Malay community in 1853, for use as a place of worship and priest's house. Owing, however, to various extensions in the neighbourhood, the large Malay community which had formerly resided near the mosque had been compelled to leave,

and now without exception lived a great distance away from the mosque and priest's house. This caused great inconvenience, and in addition to this the quarter in which the mosque was situated being a busy and consequently noisy place, it was unsuitable for a place of worship. It was believed that the buildings and ground would realise £5,000, and the applicant had had the refusal of a piece of ground much more suitable for the purpose of a mosque, and with buildings thereon, for £3,000, so that it was believed that the sale of the piece of ground on which the mosque at present stood would realise enough to buy that ground and also pay for the erection of a new mosque. The application was the result of a meeting of the congregation. The Court on July 13 granted a rule *nisi*, calling upon all interested to show cause by August 16 why the prayer of the petition should not be granted, the rule to be publicly read at two successive meetings of the congregation, and to be published once in a Port Elizabeth newspaper.

Mr. Howel Jones now appeared on behalf of a member of the congregation to oppose the rule being made absolute. The opposition was principally on the ground that the majority of the congregation was opposed to the sale, and that such a sale of a sacred edifice was opposed to the precepts of the Koran.

Affidavits were filed in reply to those put in against the granting of the petition, in which it was pointed out that the respondent had actually given as the name of one of the objectors the petitioner in this matter, and he had also given the treasurer of the mosque as another objector, while as a matter of fact there was an affidavit from the treasurer in favour of the application being granted. It was also contended that the majority of the congregation were in favour of the sale, and that such sale was not contrary to the precepts of the Koran.

After argument

The Court made the rule absolute, and considering that the respondent should never have appeared in the matter, gave applicant costs of opposition.

WRIGHT V. WRIGHT. } 1900.
} Sept. 12th.

This was an application to have a rule *nisi* granted in the above-named matter made absolute.

The original application was for an interdict restraining respondent from disposing

* In the earlier report of this motion *Supra*, (p. 404), it is stated in error that there was no opposition on the return day. REP.

of the joint estate, for an order to pay over the sum of £100 to enable applicant to institute proceedings for judicial separation against him, and the sum of £15 per month pending the result of such proceedings. In her affidavit, the applicant, Mrs. Wright, then said that she was married to respondent at King William's Town in January, 1895, and two children had been born of the marriage. Three months after the marriage the respondent exhibited an intolerable temper and treated petitioner with great harshness, using disgusting language towards her, and on different occasions threatened to take her life. She feared that if she lived with him he would do her some grievous bodily harm, and she had left him, and was now residing at King William's Town with some friends. The defendant has considerable property in King William's Town and a third share in a business carried on there and elsewhere, and also £2,000 on fixed deposit in the Standard and other banks in King William's Town.

The Court then granted a rule nisi, operating as an interdict, and returnable on September 12, calling upon the defendant to show cause why he should not be restrained, pending the result of the action to be brought by plaintiff, from dealing with or disposing of the landed property, and the sum of £2,000 on fixed deposit, also why he should not pay plaintiff the sum of £100 to enable her to bring her action, and why he should not pay plaintiff the sum of £15 per month as alimony for her and the children of the marriage.

Mr. Howel Jones now moved that the rule be made absolute.

Mr. Searle, Q.C., now appeared for the respondent, and put in an affidavit in which he denied the allegations of cruelty against him. He admitted that their married life was far from happy, but said that was owing to his wife's extravagant habits, her neglect of her children and household duties, and her intemperate habits, and further, he did not approve of her intimacy with her uncle, John Barns. Respondent, in his affidavit, detailed the circumstances which led him to suspect an improper intimacy between the applicant and her uncle, and said that he intended to bring an action for divorce against her on the ground of her adultery.

The Court made the rule absolute, the applicant to institute her action forthwith; costs to be costs in the cause.

KNUPPEL V. F. C. W. KNUPPEL. { 1900.
 { Sept. 13th.

Mr. Nathan moved that the rule nisi, granted on June 12, for restitution of conjugal rights, failing which for divorce, be made absolute. An affidavit showed that defendant had failed to return to his wife.

Rule made absolute as prayed.

Ex parte ROBERT W. WATSON. { 1900.
 { Sept. 13th

Mr. Buchanan moved for an order authorising the Registrar of Deeds to transfer certain property to the petitioner. Petitioner had purchased the property from one Oosthuizen, who was described in the title deeds as Gert Johannes Jacobus Oosthuizen, while in a bond existing over the property he was described as Gert Jacobus Johannes Oosthuizen. The Registrar of Deeds reported that he had no doubt as to the identity of Oosthuizen, but the informality had to be rectified by an order of Court before transfer could be passed.

The Court granted an order as prayed.

HENRY V. HENRY.

Mr. P. S. Jones moved that the rule nisi to sue *in forma pauperis* for divorce be made absolute.

Rule made absolute as prayed.

REGINA V. JANTJE, SAPELLA { 1900.
 AND SELANI. { Sept. 13th.

Theft — Evidence — Admission by accomplice.

Where A. B. and C. were charged with and convicted of theft, and the only question as to the guilt of A. and B. was the credibility of the witnesses for the prosecution, the Court upheld the conviction of A. and B.

In the case of C. the only evidence against him was that when A. and B. were found in possession of the stolen property, he had run away, and that A. had then said that C. "the other thief" was to be shielded.

The Court quashed the conviction on the ground that the statement made by A. was inadmissible against C. and that possibly the Magistrate was influenced by it when dealing with C.'s case,

This was an appeal from the conviction of the appellants by the Resident Magistrate at Middledrift. The three accused had been convicted of stealing one sheep from Malmani at a native location near Middledrift on August 9, 1900. The evidence led was to the effect that Malmani had lost a sheep, and had reason to suspect the accused. Upon other persons proceeding to their hut, they found two of the prisoners, Sapella and Jantje, sitting in the doorway of the hut eating portions of a sheep, which they identified as Malmani's, from the skin which was lying near. When they were approaching the hut, Selani was seen to run away. The defence raised was that the sheep was one which Jantje was well known to have possessed, his mark being found on the skin. The only evidence against Selani was a statement at the time of detection by Jantje, that he would pay for Selani, whom they had to shield.

The Magistrate's reasons for his judgment were to the effect that the only question to be considered was whether the Court, having seen and heard the witnesses for the prosecution and defence, was to believe the story told on the prosecutor's side or that told on the prisoners' side, and he had no hesitation in saying that he believed the witnesses for the prosecution, while the evidence for the defence was unsatisfactory.

Mr. De Villiers, for the appellants: The case of Jantje and Sapella is very different from that of Selani. Even the evidence against the former was inconsistent and improbable. The evidence for the defence showed that the skin found bore Jantje's mark. Guilty persons would not sit in the open doorway of a hut in a crowded location eating stolen mutton. Jantje was known to have possessed a sheep, and the skin of this one bore his mark. The witnesses for the prosecution had made the incredible statement that Jantje and Sapella had offered them £1 each to say nothing about the matter. As to Selani, his conviction cannot be upheld; he was convicted on the evidence or admission of Jantje made while he was not present. The evidence was inadmissible.

[De Villiers, C.J.: But he ran away; that is the strongest point against him.]

That was proved by a very suspicious witness. Even if he was there, no evidence connected him with the crime. He might have been there quite innocently.

Mr. Ward, for the Crown: I admit the case against Selani is very weak. He was

there, and that late at night. Then he ran away when the others were detected. I leave his case in the hands of the Court.

De Villiers, C.J.: There certainly was sufficient evidence to justify the conviction of Jantje and Sapella, but as counsel for the appellants has properly stated, there is certainly a difference between their case and that of Selani. The evidence shows that Jantje when he and Sapella were found with the sheep, said: "We must not mention the other thief, Selani; I will pay for him." I am afraid that that evidence must to some extent have weighed with the Magistrate, but it is clear that that statement made by Jantje to implicate Selani was not evidence. There is no other evidence against Selani except that he ran away, and further, there is no previous conviction against Selani, as in the case of one of the other prisoners. I think the Magistrate must have been influenced by the statement made by Jantje, which is not evidence, and I am of opinion that the conviction against Selani should be quashed; the conviction of the other two appellants will be sustained.

Solomon, J., concurred.

PFUHL V. LAUGHTON.

This was an application for an order for the delivery of certain books for audit.

Sir Henry Juta, Q.C., appeared for the applicant, and Mr. Schreiner, Q.C., appeared for the respondent.

A consent paper was put in agreeing to the books being handed to Mr. Close, an accountant, for thorough inspection, and the framing of a balance-sheet showing the state of accounts between the parties, the accountant to make a full report to the Court by September 21, costs to be decided at the further hearing.

An order was made in terms of the consent paper.

BUYSKES V. DE MARILLAC.

Mr. Schreiner, Q.C. (with whom was Mr. Searle, Q.C.), moved the Court to fix a day for the trial of the above cause by a jury. The action is one brought by Buyskes against De Marillac for defamation of character.

Sir Henry Juta, Q.C., appeared for the respondent De Marillac, and said that according to the rules of Court the application could not have been made unless the defendant had agreed to it, as the notice of motion had not been filed within the time allowed by the

rules of Court. He agreed to it only on condition that the case was not tried until next term.

The Chief Justice said he was afraid there was no chance of hearing the case before next term, and ultimately the Court set the trial down for November 20.

REGINA V. BRIDGES. { 1900.
 { Sept. 13th.

Liquor—Selling to non-registered voter—Condition of licence—
Onus of proof—Act 28 of 1898,
Sections 1 and 2.

Where accused was convicted of selling liquor to an aboriginal native who was not a registered voter in contravention of sections 1 and 2 of Act 28 of 1898, it being specially endorsed on his licence that no sale to a non-registered native was allowed,

The Court held on appeal, that the onus of proving that the native was a registered voter lay on the defendant, it being a matter more specially within his knowledge than in that of the Crown.

This was an appeal from the conviction of the appellant by the Resident Magistrate of Wynberg. The appellant Bridges was convicted of contravening sections 1 and 2 of Act 28 of 1898, in that he did, being the holder of a retail licence, wrongfully and unlawfully sell intoxicating liquor to an aboriginal native in contravention of the restriction imposed upon him and endorsed upon his licence under Act 28 of 1898. According to the condition endorsed on the licence no native might be supplied with liquor unless he was a registered voter.

Sir Henry Juta, Q.C., for the appellant: The Crown must prove the offence, and so they had to prove that accused had sold liquor to a native and that that native was not a registered voter. They only proved that there had been a sale to a native and left the onus of proving that the native was a registered voter on the defendant. The Crown proved no crime. The question whether the native was or was not a registered voter was one more peculiarly within the knowledge of the Crown than the appel-

lant. The Crown could more readily ascertain the fact that the native was not a registered voter.

[De Villiers, C.J.: The leave given to serve natives with liquor who were registered voters is an exception to the general rule that natives must not be served. You must prove the exception.]

No, we have a right to sell to native registered voters, i.e., to persons of a certain class. If the seller had to in all cases before selling to procure evidence that the purchaser was a registered voter, then it would result practically in a total prohibition of sale to natives.

Mr. Ward, for the Crown: The appellant wishes to take advantage of an exception endorsed on his licence; it is therefore incumbent on him to prove that exception. The general rule is that natives may not be served. Any special exemption and the facts supporting that exemption must be proved by the appellant. The exemption endorsed on the licence here is mere surplusage, and forms part of the ordinary statute law. It need not have been specially endorsed on the licence. See Acts 28 of 1898, 28 of 1883, and 39 of 1887.

The probabilities that this man was a registered voter are small seeing that the evidence shows that he has in a short period resided in various places.

Sir Henry Juta, Q.C., in reply: This indictment could have been excepted to. The Crown should have charged accused generally with supplying liquor to a person to whom he was not entitled to sell. It is not in itself a crime to sell to a native who was not a registered voter. The indictment ought to have stated in what respects we have broken the conditions of our licence. According to my learned friend's argument, every native, who has obtained a certificate of registration as suggested by his lordship the Chief Justice, would have to carry it about with him wherever he went.

De Villiers, C.J.: The grounds of appeal in this case as stated in the notice of appeal are that the evidence did not show that the appellant had been guilty of any crime, and did not support the conviction. It would be very difficult from that notice to gather what the real grounds of appeal are, and the grounds Sir Henry Juta now relies upon were probably never thought of by the defendant in the Court below. These grounds are that it lay upon the prosecutor to prove that the man to whom the intoxicating liquor was sold was not a registered voter. In article 93 of

Stephen on Evidence it is laid down that he who affirms anything must prove it. No doubt that general principle has not been rigidly adhered to, and in criminal prosecutions it sometimes falls upon the prosecution to prove a negative, but even in criminal law that exception is not rigidly adhered to. Take the case of a person charged with selling without a licence. There it was held that it was for the man selling to produce his licence, inasmuch as it was a matter peculiarly within his knowledge. In the present case the charge is that the appellant did wrongfully and unlawfully sell liquor to an aboriginal native in contravention of the restriction imposed upon him and endorsed upon his licence, which states that no natives should be supplied with intoxicating liquor except such as are registered voters. The words "except such as are registered voters" are really superfluous, and if the licence merely stated that no native should be supplied with liquor, I have no doubt whatever that it would have been quite sufficient for the prosecution to prove that the man was a native. On referring to the Act 89 of 1887, it will be found that by the fifth section every native duly registered may claim a certificate from the Civil Commissioner, and it was assumed therefore that a native who intended to claim the privileges of this Act would see that he got the certificate. In my opinion where a native did apply to a canteen keeper to be supplied with liquor the proper course for the canteen keeper would be for him to insist upon the native producing his certificate. The onus is upon the defendant to prove that the native was a registered voter. If he could not have the certificate from the native himself there is a special provision in the Act that the Civil Commissioner should transmit to the Colonial Office a counterpart of the certificate and the counterpart could have been produced if it existed. The accused here is in the same position as that of a person charged with selling without a licence, and in such a case if the person did not produce the licence it would be assumed that he was not duly licensed. Here the defendant has not shown that the native to whom he sold the liquor was a registered voter, and inasmuch as he has not done that, I am of opinion that the appeal cannot be sustained.

Solomon, J., concurred.

BEGINA V. EICHHORN. } 1900.
Sept. 13th.

Vinegar—Act 5 of 1890, sections 9 and 10.

Although a liquid may resemble vinegar in smell, taste, and appearance, yet it is not vinegar unless it is the product of acetous fermentation of a vegetable infusion or decoction.

Vinegar to be genuine must be the product of acetous fermentation of a vegetable infusion or decoction.

This was an appeal from a decision of the Resident Magistrate of Bredasdorp, in a case in which Joseph Eichhorn, a general dealer at Bredasdorp, was summoned for having wrongfully and unlawfully and to the prejudice of the purchaser on May 3 last sold to John Huxham, Chief Constable of Bredasdorp, certain three bottles of vinegar, which were not of the nature, substance, and quality demanded (vinegar) by the said purchaser, in that the original vinegar was adulterated and did not represent a genuine vinegar, i.e., was not the product of acetous fermentation of a vegetable infusion or decoction. Eichhorn pleaded not guilty, but was found guilty and sentenced to pay a fine of £1. Against this decision he appealed on the ground that the conviction was not in accordance with the evidence adduced.

In the Court below the usual evidence was given as to the Chief Constable purchasing the bottles of vinegar, and then in accordance with the provisions of the Act dividing it into three portions, one of which was retained, another sent to the public analyst, and a third given to the seller. The certificate of the analysis made by S. T. C. O. Sinclair, public analyst, showed the result to be as follows: Specific gravity 15.5, 1.0062; in grammes per 100 c.c.; acetic acid, 3.323; total solids, 0.240; ash, 0.024; phosphoric oxide, 0.001; albuminoids, 0.019; nitrogen, 0.003; mineral acids, nil. The analyst further said: "I am of opinion that this sample does not represent a genuine vinegar, i.e., is not the product of acetous fermentation of a vegetable infusion or decoction."

For the defence, the defendant, J. Eichhorn, said that he got the vinegar from Bam and Co., of Cape Town, and had been selling it for a long time past, and no complaints had

ver been made by any of his customers as to the quality of the vinegar. He also stated that after receiving the summons he sent the third divided portion received by him from the Chief Constable to Dr. Marloth, public analyst, whose report he put in, from which it would be seen that the vinegar was of a pure and harmless nature. Dr. Marloth's report was as follows: "This vinegar contains 3.3 per cent. of acetic acid, and is quite free from mineral acids or other substances injurious to health. It is consequently a pure and wholesome vinegar of proper strength."

Mr. Solomon, Q.C., for the appellant, quoted from the *Encyclopædia Britannica* and the *Imperial Dictionary*, in which definitions of vinegar are given, and argued from these that the vinegar in question was genuine vinegar.

Mr. Ward, for the Crown: The question as to what was genuine vinegar has been raised in England. It had never been raised in the Higher Courts by way of appeal because apparently the chances of success were deemed to be small. In a case heard before the Recorder of Birmingham, reported in the Analyst, the Recorder, after hearing evidence for a day and a half, said that he had gone into the matter carefully, and had come to the conclusion that the only genuine vinegar was such as was produced by fermentation from a vegetable substance. An article might contain all the chemical ingredients of vinegar or wine without being vinegar or wine. Fermentation was the most important essential of vinegar. He might find an article to be diluted acetic acid, which was not vinegar. Dr. Marloth's certificate shows that the article sold was diluted acetic acid.

Mr. Solomon, Q.C., in reply: The prosecution must prove that the article sold had not the essential ingredients of vinegar, or contained ingredients which no genuine vinegar should contain.

[De Villiers, C.J.: All the articles from which vinegar is made are vegetable products; e.g., wine, beer, etc.]

De Villiers, C.J.: Everything in this case depends upon the meaning of vinegar. Of course the actual meaning of the word is "sour wine," but there is no doubt that vinegar has since acquired a wider meaning. It is no longer necessary that vinegar should be absolutely made from wine, but in my opinion it should still be a vegetable juice, and not only be a vegetable juice, but must be produced by acetous fermentation, and therefore any liquid which does not come up

to the standard of being a vegetable juice produced by acetous fermentation is not vinegar, whatever else it may be. Dr. Marloth has said that in the sample analysed by him there was 3.3 per cent. of acetic acid, and that it was quite free from mineral acids, and consequently a pure and wholesome vinegar. That is his definition, but the definition given by the public analyst—that genuine vinegar was the product of acetous fermentation of a vegetable infusion or decoction—is supported by all the authorities quoted. The vinegar must be made from a vegetable of some kind or another, and there must be acetous fermentation. In the present case the liquor sold, although it smells like vinegar, tastes like vinegar, and looks like vinegar, is not what the purchaser wanted, vinegar, and the appeal must therefore be dismissed.

Solomon, J., concurred.

[Appellant's Attorneys, Messrs. Van Zyl and Buissinne.]

SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C. K.C.M.G. (Chief Justice), and the Hon. Mr. Justice SOLOMON.]

BATTRAY V. THE STELLENBOSCH MUNICIPALITY. { 1900.
{ Sept. 14th

Municipal regulation — Contravention—Right of way—Necessity.

Appellant was convicted of contravening a municipal regulation passed in 1853, prohibiting all persons from riding or driving along any avenue in the municipality.

On appeal it was held, that as the municipality had a right to make the regulation and that as it was applicable to the avenue in question, and as the appellant had not shown that it was necessary for him to have a right of way over this avenue as a means of access to his property, the conviction must stand.

This was an appeal against a decision of the Resident Magistrate of Stellenbosch. The appellant, Rattray, had been convicted of contravening a Municipal regulation passed in 1853, which enacted that no one should ride a horse, or drive or ride wagons, or allow any cattle to roam in the avenue or on the footpaths thereof under a penalty of not more than 10s. The evidence showed that the appellant had driven his cart along the avenue, over which he alleged that he had a right of way, and that he had done so for the purpose of asserting his right.

The appellant further claimed in support of his right of way that the avenue in question was the means of access to his property, to which he was entitled under the original grant which had been made to his predecessors in title.

The Magistrate found that the avenue in question was such an one as was contemplated by the regulation. He, consequently, found the appellant guilty, and sentenced him to pay a fine of 1s.

Mr. Buchanan, for the appellant: Appellant claims that he has a right of way for the purpose of access to his property, which abuts on this avenue, and as he was merely acting as he did for the purpose of asserting his right of way, he cannot be convicted of a quasi-criminal offence.

[De Villiers, C.J.: That is not the way to assert a right of way. Why does he not bring an action to establish it?]

He was acting rightly in thus asserting his right of way. Why should he be put to the trouble of bringing his action? It is the duty of the Municipality to obtain an interdict against him by action.

[De Villiers, C.J.: If the parties were both private individuals that might be so. But in a case such as this he has adopted the wrong course.]

Even supposing his method of procedure is not commendable, yet that is no reason why, when acting in a purely *bona fide* way, in asserting his rights, he should be convicted of a breach of the regulations. He was wrongly convicted. No one could possibly tell whether the avenue in question was or was not a public thoroughfare until the Municipality took upon themselves to put in some posts 3 or 4 feet apart. This was only done a few years ago. When this was done the appellant decided to assert his rights by pulling up the posts and driving along the avenue.

[De Villiers, C.J.: Then your ground of contention is that the appellant claims the right to use this avenue because it is the only means of access to his property?]

Yes; that is so; but we also claim as being successors in title to the original grantee of the land, and can show that this avenue was frequently used as a road. Up to a few years ago the avenue was open and unobstructed.

[Solomon, J.: But you acquiesced in the regulation for 47 years and lay by. Now you suddenly reopen the question.]

There is nothing to show that the regulation passed 47 years ago referred to this avenue. It was not until a few years ago that we had notice that the regulation applied to this avenue. That we got by the placing across the avenue of these posts. Prescription cannot run in favour of a Municipality as against the rights of the public. The Municipality cannot claim that during those 47 years in which we lay by prescription was running to destroy common rights. This avenue had originally been granted as a street. No man can be convicted of a criminal offence when the Act charged against him was *bona fide* committed for the purpose of asserting his rights. He drove across this avenue in the *bona fide* belief that he had a right to do so.

See *Regina v. Twase* (14 Cox's Crown Cases, p. 145). *Mens rea* must be present to constitute a crime. See *Maxwell on the Statutes*.

Mr. Schreiner, Q.C., for the respondents, was not called upon.

De Villiers, C.J.: This is an appeal against a conviction under a municipal regulation made 47 years ago in 1853, which enacted that no one should ride a horse or drive or ride wagons or allow any cattle to roam in the avenue or on the footpaths, etc., under a penalty of not more than 10s. The only question in this case is whether the avenue along which the appellant drove his cart is such an avenue as was contemplated by the regulation. It is admitted by Mr. Buchanan that there is some discrepancy in the evidence, and where there is such discrepancy the Court will follow the view of the Magistrate, who has heard and seen the witnesses, that this was such an avenue. When that has been decided it seems to me that the whole of the appellant's case falls to the ground, unless he can prove that this road is absolutely necessary to him, and that it is impossible for him to have proper access to his property without using it. The Court has always held that there should be a clear necessity,

but in the present case there is not such a clear necessity as to justify the Court in holding that the appellant was right under the circumstances in taking the law into his own hands, and not only driving along the avenue, but taking out one of the posts that had been placed there by the Municipality for the purpose of protecting the avenue. It is quite possible that when the case is fully investigated the appellant may make out his case, and show that the Municipality has gone beyond its powers in declaring this to be an avenue. The Court will not prejudice the civil case by expressing an opinion one way or another, but *prima facie* as the case now stands the Municipality has a right to make this regulation, and it is the duty of every inhabitant of the place to abide by the regulations that have been made until they have been set aside in proper course. The Court will therefore dismiss the appeal with costs.

TABORSKI V. MCLOUGHLIN. { 1900.
Sept. 14th.

Arrest—Promissory notes not yet due—Intended absence.

Where for an amount due to the applicant, he had accepted two promissory notes payable in February and May, 1901, The Court refused to grant an order for the arrest of the debtor, who had sold all his goods and was leaving for England, on the ground that there was as yet no debt due.

Mr. P. S. Jones moved, as an emergency motion, in the application of Jacob Taborski for an order for the arrest of the person of one Patrick McLoughlin, until security was given for the payment of a certain debt of £31. The ground for the application was that the applicant had ascertained that McLoughlin had sold all his goods and was about to leave the Colony by steamer. The applicant was a picture frame maker, and it was alleged that he had made certain goods to the order of respondent's wife. The respondent at first refused to accept the goods when they were delivered, but ultimately, on the applicant insisting, did accept them, giving two promissory notes for the value thereof, the one note payable in February, 1901, and the other in May, 1901.

Mr. P. S. Jones referred to the remarks and cases quoted in *Van Zyl's Judicial Practice* (Chapter on Arrest).

The Court refused the application.

De Villiers, C.J.: This does not appear to me to be such a clear case as to justify the Court in granting the application. The respondent was willing that the goods should be taken back, but the applicant insisted upon his taking them, and gave him two promissory notes, which are not yet due, the one being payable in February next year, and the other in May next. Now it is asked that the respondent should be arrested on the ground that he is going to England, but the mere fact that he is going to England is not sufficient to show that the notes will not be paid when due. Anyhow there is no debt now due, and it will not be due for some time. The application must be refused.

MANFIELD AND OTHERS V. } 1900.
O'REILLY AND THE CAPE } Sept. 14th.
TOWN MUNICIPALITY.

Town Council—Election of Mayor—Tie—Drawing of lots—Rules of Order, 39, 60—*Ultra vires*—Act 26 of 1893.

Where on an election in the Cape Town Town Council for the position of Mayor, it was found that an equal number of votes had been cast for two of the Councillors who had received the highest number of votes,

The Court ordered that in accordance with Rule of Order No. 39 framed in accordance with Act 26 of 1893, the matter should be decided by the drawing of lots.

The Court also found that this Rule 39 was applicable to the election of mayor and was not inconsistent with nor ultra vires of Act No. 26 of 1893.

This was an application calling upon the respondent, O'Reilly, to show cause, if any, why his election to the position of Mayor of the City of Cape Town should not be declared void and illegal pending the determination by lot of the contested right to such position between Thomas Ball and the respondent, in accordance with Rule of Order No. 39, and why all proceedings of the Council

subsequent to respondent having wrongly and illegally taken up and acted in the capacity of Mayor, should not be decreed null and void, and why such further or other order should not be made regarding this dispute and the further proceedings of the Town Council as to the Court should seem proper.

The supporting affidavit of J. D. Mansfield stated that on September 13 steps were taken in accordance with Rule of Order No. 39 for the election of a Mayor for the City of Cape Town. The ballot was declared to have resulted in nine votes for the respondent, T. J. O'Reilly, and eight votes for Thomas Ball, but upon the Acting Town Clerk looking over the papers he discovered that this was erroneous, and that the ballot disclosed eight votes for the respondent, T. J. O'Reilly, eight votes for Thomas Ball, and one vote for C. A. Owen Lewis, and that there was therefore a tie between the respondent and Thomas Ball. In the meantime the respondent had been conducted to the chair, but as soon as the error was discovered his attention was drawn to it, and in accordance with Rule of Order No. 39 it was claimed to have the election determined by lot, but the respondent declined to put the question, and ruled that he was properly and duly elected, and further declined to adjourn the Council, but proceeded with the business of electing committees. Deponent and other Councillors protested and left.

The affidavit of the Acting Town Clerk, J. R. Finch, with the seventeen ballot papers annexed was filed. The names of all the Councillors were given on these ballot papers, and any Councillor might be voted for as Mayor. On the ballot papers there were two names beginning with "O," viz., Owen Lewis and O'Reilly, but the former had not been proposed and seconded for the post of Mayor at all.

[De Villiers, C.J.: Is it necessary by the rules that Mr. Lewis should have been proposed?]

Mr. Schreiner, Q.C.: No; but it has been the practice of the Council to have a proposer and seconder.

The affidavit of the respondent, T. J. O'Reilly, set forth that the facts relating to the election for the Mayor of Cape Town were as follows: Nominations were called for at the request of the Mayor, Mr. Thomas Ball, and the latter and respondent were duly nominated. A ballot was then held, the Mayor appointing Councillors Robertson

and Liberman as scrutineers. There were present seventeen Councillors, and the result of the poll was declared to be nine votes in respondent's favour and eight in favour of the then Mayor. The affidavit went on to give details of respondent's being declared Mayor, robed, and taking his seat, and the ordinary business being proceeded with, when Councillor Robertson, one of the scrutineers, announced to the Council that it had been discovered that an error had taken place, inasmuch as one of the votes supposed to have been cast for respondent had really been given to Councillor Owen Lewis. Some discussion on the subject took place, and ultimately it was moved that the Council should adjourn, but this proposition, on being put by the respondent to the Council, was rejected by a majority of nine votes to eight. Respondent said it was therefore untrue to say that he refused to adjourn the Council, in fact, he said, it would have been beyond his power to do so. In conclusion, the respondent said: "I dispute the allegation that one of the votes alleged to have been cast for me was really given for Councillor Owen Lewis, inasmuch as the Mayor and myself being the only two candidates it is manifest that it could not have been intended to vote for Councillor Owen Lewis, and the assumption is that the vote cast for him coming immediately after mine may have been intended for me."

Mr. Schreiner, Q.C.: I do not propose to argue that in law the vote cast for Mr. Lewis should be counted as one for Mr. O'Reilly.

De Villiers, C.J.: Is there no affidavit from the nine Councillors stating how they voted or intended to vote?

Mr. Schreiner: There is not. According to the Town Council regulations the vote has to be by ballot, and Councillors would not like to declare how they voted and furnish a precedent of that kind.

De Villiers, C.J.: Still it seems to me a matter of some importance, because on the face of these papers the two candidates are equal, and therefore if you wish to show that there was a mistake, I think you should produce the affidavits of the nine Councillors.

Mr. Schreiner: We wish a decision of the Court upon the facts without going to the individual Councillors for affidavits.

De Villiers, C.J.: As these voting papers are?

Mr. Schreiner: Yes.

Sir Henry Juta, Q.C., for the applicants: It is admitted that no nomination is necessary, and so a Councillor may vote for any

other Councillor whether nominated or not. Now, as the respondent does not claim the vote cast for Mr. Lewis, it is clear that the election was a tie. The only question now is what must be done upon a tie. According to section 68 of Act 26 of 1893, the Council can from time to time make rules of order not inconsistent with the Act. In pursuance of that Act the Council framed a rule which was the same as the Parliamentary rule in regard to a tie, and that is that the matter must be decided by casting lots. Rule 39 is as follows: "The election of His Worship the Mayor and of the Deputy-Mayor (subject to the provisions of section 52 of the Act No. 26 of 1893) and of members of committees of the Corporation shall be determined by ballot in the manner set forth in Rule No. 41, provided that if in taking the ballot for the election of Mayor and Deputy-Mayor there shall be an equality of votes for any two Councillors, and such Councillors shall have received a greater number of votes than any other Councillor, the election shall be determined by lot, and in such case the Town Clerk shall write the names of the two Councillors having an equal number of votes on separate pieces of paper of the same size and alike in all respects; such paper shall be placed in a ballot box, and the chairman shall take one of such papers from the box and declare the Councillor whose name appears upon such paper first drawn duly elected." Applicants maintain that lots should be drawn, there being a tie. It is clear that under the Municipal Act, section 63, it is provided that no act or proceeding of the Council should be questioned on account of any vacancy in that body or lack of qualifications, and it might be argued that if that were so with regard to ordinary proceedings of the Council, it should be so with regard to what took place after Mr. O'Reilly took the chair, but by the rules of order the chairman *ex officio* was a member of all committees, and therefore part of the proceedings having been the election of committees great hardships might result if these committees were to stand elected as they were on the supposition that the person who was then thought to be the Mayor was *ex officio* the chairman. There might be great hardship even as far as Mr. O'Reilly himself was concerned.

[De Villiers, C.J.: But supposing lots are drawn and Mr. O'Reilly is elected, then all the proceedings would be good.]

That is so.

[De Villiers, C.J.: It is only in the case of the lots falling against him that this difficulty would arise?]

Then he will not be a member of any committee at all, because, of course, he has not been appointed to any committee, it being supposed that he was Mayor, and therefore an *ex officio* member of all the committees.

Mr. Schreiner, Q.C., for respondents, after referring to Act 26 of 1893, sections 51, 58, and 60: The rule providing for the drawing of lots cannot be recognised, as it is inconsistent with the Act. There were 17 members present at the meeting. Now, suppose five votes were cast for A, five for B, four for C, and three for D, there would be an equality of votes for two Councillors, and lots would have to be cast between them. Now, the Act requires that the Councillor who commanded the majority of votes should be Mayor. Neither A nor B would have a majority; they each only commanded five votes out of seventeen. So the Court will never recognise such a rule. Now, section 60 provides what should be done in the event of an equality of votes; the chairman should have a casting vote. Rule 41, which provides for the drawing of lots, is *ultra vires*, and did not contemplate such a case as the election of Mayor. A special meeting should be called under section 51, and the vote taken over again. The rule which gives the casting vote contemplated only an equality in a case in which a definite case of "Aye" or "No" was before the Council, and only two propositions before the Council, but not when the number of propositions was indefinite. There was no real equality of votes in this case.

[De Villiers, C.J.: How do you say there was no equality, if there were eight for one and eight for another, and one for a third? There was equality between the first two?]

So it might have been with five for one, five for another, four for a third, and three for a fourth. Then I say the rule is *ultra vires*, and is inconsistent with the rule that the Mayor should be elected by a majority.

[Solomon, J.: But what about the case of there being several candidates and one got five votes, two others got four each, and a fourth got three, and a fifth one. Would not the one who got five be Mayor?]

[De Villiers, C.J.: If two got five votes each, then there is an equality, and the chairman must give his casting vote.]

The equality meant was an equality of "Aye" or "No," but there is no casting vote dealt with in the section regulating the election of Mayor. The rule is inapplicable and *ultra vires* of the Act.

[De Villiers, C.J.: It might be referred to the chairman of the meeting to give the casting vote.]

That would be an invidious position in which to place a candidate. The best course, a mistake having occurred, is to direct a fresh election.

[De Villiers, C.J.: It is quite possible eight intended to vote for Mr. Ball, eight for Mr. O'Reilly, and one for Mr. Owen Lewis. The one who voted for Mr. Owen Lewis might now vote for one of the others. The Court has to inquire what was in their minds at the time.]

Mr. Schreiner: That is not the point. If a Councillor wanted to vote for Mr. O'Reilly he would not have placed the cross against the name of Mr. Lewis. Legally, Mr. Ball is still Mayor of Cape Town, by reason of the error in the return, but the course is plain. Another election should take place.

[Solomon, J.: Supposing there were an equal number at the next meeting, and at the next, and so on?]

Then there would be room for a rule of order such as No. 58, but it should not be inconsistent with the Act. Mr. O'Reilly, as *de facto* Mayor, quite approves this application; he only wants the decision of the Court.

[De Villiers, C.J.: Who is to preside at the meeting to frame the new rule of order?]

The present Mayor.

[De Villiers, C.J.: Who is the present Mayor?]

Mr. Schreiner: Mr. O'Reilly, *ex confesso*, because of the mistake, although I do not go the length of saying he is legally Mayor to-day, in view of this notice, and he does not say so. But having been declared elected, and enrobed, he had to take the position. Then the casting-vote contemplated could not have been given. It was too late; the Mayor was not in the chair, and Mr. O'Reilly was, after the declaration. It was a mistake for Councillors to refuse to attend later in the meeting, because they would not have prejudiced their position, and it is no use discussing the legality of what was done, which would not be affected by questions as to the qualification of those taking part in the meeting.

Sir Henry Juta, Q.C., in reply: The only consistent point in my learned friend's argument is that by section 60 the chairman should have a casting vote. Now we do not claim this right, but we do say that the rule providing for the drawing of lots is reasonable and gives finality. If my learned friend is right, Mr. O'Reilly should have left the

chair when the mistake occurred, Mr. Ball then gone back and given his casting vote. But our contention is that the matter should be settled by drawing lots.

De Villiers, C.J.: It is common cause between the parties that the scrutineers made a mistake, in consequence of which Mr. O'Reilly was declared to have a majority of votes. The ballot papers have been produced, and from them it appears that Mr. Owen Lewis had one vote; thus Mr. O'Reilly had eight votes and Mr. Ball eight. There was therefore an equality of votes, and one of three courses is open to the Court. Either the Court can order that a fresh election should take place and that all the proceedings commence *de novo*. That is the course now suggested by Mr. Schreiner on behalf of the respondent. The second course would be to refer the matter back to the chairman who presided at the meeting, and to direct him to give a casting vote in terms of the 60th section of the Act. The third course would be to declare the election invalid and to refer the matter back to the Town Council, to take the proceedings directed by the 39th rule. With regard to the first course, the objection seems to be that the Court should, as far as possible, seek to restore the parties to the position in which they were at the time the mistake was made. The Court could not well allow any change of mind on the part of Councillors since the election took place to affect a fresh election, a principle which has been adopted in other ways. The second course which might have been taken would be to refer the matter back to the meeting and get the chairman to give a casting vote. But there seems to be a great anomaly—I might almost say injustice—to Mr. O'Reilly himself in referring the final decision to his opponent, or rival. The chairman of that meeting, it appears now, was Mr. Ball, and to leave him to give the casting vote would, I think, be not only unfair to Mr. O'Reilly, but extremely unfair to Mr. Ball himself, and I am quite sure it is a responsibility he would not care to undertake. Anyhow, whether he would or not, if it were the legal course the Court would be bound to take that course. The third course would be to refer the matter to the Town Council to decide it in terms of the 39th rule of order. But the objection raised to this course by Mr. O'Reilly is that that rule of order is *ultra vires*, and that there was no power in the Town Council to make such a regulation. It is urged that this is not in the truly democratic spirit. Of

ecurse, the Court cannot consider the democratic spirit; it has to consider the Act and the regulations framed under the Act, and if such a rule were not inconsistent with the Act the Court would be bound to give effect to it. The only section which is relied upon as being inconsistent is the 60th, which provides that in case of an equality of votes the chairman shall have a second or casting vote. It is by no means clear that this section could have been intended to refer to the election of Mayor. But it seems to me improbable, at least, that it could have been intended that the chairman himself—who would generally be the outgoing Mayor—should be the person who had practically to decide, in case of an equality of votes, whether he was to be Mayor or not, and unless it were perfectly clear from the general tenour of the Act that such was the intention of the Legislature, I should hesitate to hold that the Legislature did intend such a result to follow. I am not satisfied that this 39th regulation can be looked upon as *ultra vires*. I do not know whether these regulations were approved of by the Governor.

Mr. Schreiner: No.

De Villiers, C.J.: If not, they represent the wishes of the Town Council, and I presume, of the ratepayers, and unless it is made perfectly clear that the regulation is inconsistent with the Act, I think the Court is bound to give effect to it. Mr. Schreiner has not by his argument satisfied the Court that the 39th rule is *ultra vires* and inconsistent with the Act. Therefore I am of opinion that it is the 39th rule which should guide the procedure. The proper course will be to declare the election so far invalid, and to refer the matter back to the Town Council for the purpose of making the election by lot, as directed by the 39th rule of order. There is no necessity now to deal with the legality of what was done later at the meeting. The costs will be paid by the Corporation.

Solomon, J., concurred.

[Applicants' Attorneys, Messrs. Van Zyl and Buissinne; Respondents' Attorneys, Messrs. Fairbridge, Arderne, and Lawton.]

SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), the Hon. Mr. Justice MAASDORP, and the Hon. Mr. Justice SOLOMON.]

CABRITA V. DU PREEZ. } 1900.
} Sept. 17th.

This was an action in which the plaintiff, Jose Antonie Cabrita, sued the defendant, Hercules Petrus du Preez, for the recovery of moneys lent and advanced.

The plaintiff's declaration was as follows:

1. The plaintiff is Jose Antonie Cabrita, of Cape Town, and the defendant is Hercules Petrus du Preez, also of Cape Town.

2. The plaintiff avers that on August 20, 1896, the defendant made and signed in favour of plaintiff or his order a promissory note for the sum of £143 0s. 6d., of which the plaintiff is the legal holder, payable on October 20, 1896, and bearing interest at the rate of 6 per cent. per annum from October 20, 1896.

3. That the plaintiff obtained in this Honourable Court on April 12, 1900, provisional sentence with costs against the defendant on the said promissory note for the sum of £143 0s. 6d., less £5 which had been paid on account.

4. That the defendant has entered appearance according to law to answer the action and has satisfied the said judgment under security *de restituendo*.

5. The plaintiff further declares that on or about February 21, 1896, he lent and advanced to the defendant at his special instance and request the sum of £350, which sum the defendant accepted, agreeing to pay to the plaintiff interest on the said sum at the rate of 7 per cent. from the date of the loan.

6. That further on or about July 12, 1895, the plaintiff lent and advanced to the defendant, at his special instance and request, the sum of £5, which sum the defendant accepted.

7. That on or about April 17, 1895, the plaintiff lent and advanced to defendant, at his special instance and request, the sum of £175, which sum the defendant accepted.

8. That on or about November 1, 1894, the plaintiff lent and advanced to defendant at his special instance and request, the sum of £80, which sum the defendant accepted.

9. That all things have happened, all times have elapsed, and all conditions have been fulfilled necessary to entitle the plaintiff to

claim the above-mentioned sums of £143 0s. 6d. (less £5 paid on account), £350, £5, £175, and £80 owed by the defendant to the plaintiff, together with the said interest.

Wherefore the plaintiff prays judgment of this Honourable Court for (a) the sum of £143, less £5, together with interest at the rate of 6 per cent. from October 20, 1896; (b) the sum of £350, with interest at the rate of 7 per cent. from February 21, 1896; (c) the sum of £5 interest *a tempore morae*; (d) the sum of £15, with interest *a tempore morae*; (e) the sum of £80, with interest *a tempore morae*; (f) alternative relief; (g) costs of suit, including costs of the provisional case.

The defendant's plea was as follows:

1. Defendant admits paragraph 1 of the declaration, and also paragraphs 2, 3, and 4, subject to the allegations in paragraphs 2, 3, and 4 hereof.

2. Defendant states that the note for £143 0s. 6d. was a renewal of an accommodation note arising out of certain transactions in connection with the Sea Point waterworks, and that the amount hereof has been paid by set-off in respect of a counter promissory note made by the plaintiff in favour of the defendant for £130 on September 20, 1894, which is overdue, and of which the defendant is the legal holder.

3. This note was renewed several times, and after deducting £143 0s. 6d., with interest as claimed, from the said £130, together with discount on renewal and interest due on the note, there remains due to the defendant the sum of 2s. 3d.

4. Defendant is accordingly entitled to be repaid the sum of £186 8s. 6d., paid by him under security *de restituendo*, together with interest thereon from the date of payment.

5. Defendant denies the allegations in paragraph 5.

6. Plaintiff and defendant had certain transactions in connection with the Paarl Tramway Syndicate, in respect of which the parties made counter promissory notes in each other's favour, and plaintiff paid defendant certain moneys.

7. There is due to the plaintiff on these transactions a balance of £231 4s., which defendant claims to set off against the moneys due to him as above or as hereinafter set forth.

8. Defendant denies paragraphs 6, 7, 8, and 9 of the declaration, subject to what is stated in paragraphs 9, 10, and 11 hereof.

9. During the years 1894 to 1899, both inclusive, defendant acted as attorney and agent

of plaintiff in various legal matters, and with respect to the purchase and sale of certain properties, details of which are too numerous to be herein specified.

10. Upon various occasions throughout the said period defendant performed services for and paid out certain moneys to and on behalf of the plaintiff of the total value of £3,513 18s. 2d., while on the other hand he received from and on behalf of the plaintiff at various times different sums of money amounting in all to £3,197.

11. There is therefore legally due and owing to the defendant on a general account current during the said period the sum of £324 11s. 11d.

Wherefore defendant prays that plaintiff's claim may be dismissed with costs.

As a claim in reconvention the defendant (now plaintiff in reconvention) claimed (a) the return of the sum of £186 8s. 6d. paid as in paragraph 4 of the plea mentioned, with interest from the date of payment thereof, as also payment of the sum of 2s. 3d. mentioned in paragraph 3; (b) payment of the sum of £324 11s. 11d., as in paragraph 11 of the plea mentioned, less a sum of £231 4s. referred to in paragraph 7, i.e., the sum of £93 7s. 11d., together with interest thereon *a tempore morae*; (c) alternative relief; and (d) costs of suit, including the costs of the provisional case.

For a replication the plaintiff said:

1. The plaintiff denies the allegations in paragraphs 2, 3, and 4 of the plea, specially denying that the signature affixed to the promissory note for £130 is his.

2. With regard to paragraphs 6 and 7 of the plea, the plaintiff admits that he had certain transactions in connection with the Paarl Tramway Syndicate, but says that he owes the defendant nothing in respect thereof, and craves leave to refer to paragraph 3 of the declaration in connection therewith. Save as above he denies the allegations in paragraphs 6 and 7.

3. Save and except that the plaintiff admits that the defendant acted as his attorney for the period stated, he denies the allegations in paragraphs 9, 10, and 11, and says that he owes the defendant no money in that respect. He further says that no account of the alleged disbursements has ever been rendered to him.

4. Save in so far as the plaintiff admits any of the allegations in the plea contained, he denies each and every allegation therein, joins issue thereon, and again claims judgment in terms of the declaration with costs.

For a plea to the defendant's (now plaintiff in reconvention) claim in reconvention, the plaintiff (now defendant in reconvention) referred to the matters set forth in the replication, and prayed that the defendant's claim in reconvention might be dismissed with costs.

Mr. Schreiner, Q.C. (with him Mr. P. S. Jones), appeared for the plaintiff.

Mr. Buchanan for the defendant.

Mr. Schreiner, Q.C.: It is not intended to press the claim for £80, as it appears to have been brought up in the account of November, 1894.

After some little discussion the Court decided to hear the evidence of the principal witnesses on the question of the advance of £350, in regard to which the defendant alleged that he only received £242, and to refer the rest of the question to a referee to report.

Jose Antonio Cabrita was called, and said he came down from the Transvaal in 1892, at which time he had £5,000. He knew Du Preez, who did work for him from 1894 to 1899. Du Preez told witness that a company was being formed to start tramways at the Paarl, and witness advanced him £350. This money witness raised by mortgaging to Mr. Van Noorden certain property in Bree-street for £400. Of this £400 commission absorbed £20, witness kept £30, and gave £350 to Du Preez. He handed over the money, in gold and notes, to Du Preez in the street. Mr. Du Preez was making a mistake if he said he only got £242. For security witness received a document authorising him to receive £500, and after paying himself he was to hand over the balance to Du Preez. Witness never received any portion of the money back, Mr. Du Preez putting him off from year to year, saying the tramway company matter had to come before Parliament, and then someone had to go to England, and so on.

Cross-examined: After witness gave Du Preez the £350 he accompanied Du Preez and his clerk Thomas to the door of the African Banking Corporation, but he did not go inside. Witness got no receipt beyond the order on the Paarl Tramway Company.

Emil H. van Noorden deposed to advancing £400 to Cabrita. Du Preez arranged the matter for Cabrita. Shortly before that Du Preez had wanted £400 or £500 for himself, but witness would not advance that amount, as the security was not good enough.

Cross-examined: For the £400 witness gave a cheque on the African Banking Corporation for £380, £20 being deducted as commission.

The plaintiff was recalled by the Court, and stated that he was alone when he cashed the cheque for £380, which he received from Van Noorden. He gave the money to Du Preez in the street. Thomas was following them, and must have seen witness give Du Preez the money.

B. G. Heydenrych deposed as to Du Preez as attorney for Cabrita borrowing £440 from him. Du Preez got the money, but witness got the security from Cabrita.

Mr. Buchanan said that £440 was admitted now.

The Chief Justice: Yes, it is admitted now, but nothing was said until Saturday.

Mr. Buchanan said they had not discovered it until then.

The Chief Justice: This did not need discovery.

This was all the evidence called at this stage for the plaintiff.

Hercules Petrus du Preez, the defendant, said with regard to the alleged loan of £350, that he was with Cabrita when he received the cheque from Van Noorden. They went together to the African Banking Corporation, where Cabrita drew the money and paid witness £242, which he deposited right away.

By the Court: How was it that Cabrita borrowed £400 when he only gave to you £242?

Witness said Cabrita had other debts, and had not ready money.

Cross-examined: Thomas was a creditor of witness's at the time, and was interested in the £500 coming from the Tramway Syndicate. Cabrita promised to pay some of the money to Thomas.

Thomas W. Thomas was called by the Court, with the consent of counsel, and said he did not know what was paid. Witness was interested in the Paarl Tramway Syndicate. He went to the Bank of Africa one morning and saw Cabrita pass some money round his back to Du Preez. The latter then went to the African Banking Corporation and deposited the money. Witness was certain it was in the Bank of Africa that the money was handed to Du Preez.

The Court decided to refer the matter to Mr. Maynard Nash, accountant, for report before October 12, copies of the record to be referred, including copies of the Judge's notes of evidence.

[Plaintiff's Attorneys, Messrs. J. and H. Reid and Nephew; Defendant's Attorneys, Messrs. Silberbauer, Wahl and Fuller.]

COLONIAL GOVERNMENT V. } 1900.
STEPHAN BROTHERS. } Sept. 18th.

Pleading—Exception—Proclamation of August 6, 1813—Re-assumed land—Claim for transfer—Public purposes.

Under Sir John Cradock's proclamation of 6th August, 1813, the farm Otterdam was granted on perpetual quitrent to defendants' predecessor in title on December 31, 1831. In 1849 and 1899, the Government by virtue of proclamations issued under the provisions of the proclamation of 1813, re-assumed 20 morgen of the farm for public purposes, and now claimed transfer.

The defendants before pleading excepted that the declaration disclosed no cause of action on the ground that by section 5 of the proclamation the Crown could "re-assume," but could not claim formal transfer.

The exception was overruled inasmuch as the Crown could not re-assume without obtaining transfer from the successor in title of the original grantee.

Per De Villiers, C.J., another objection which might have been raised was that the declaration did not allege what the public purposes were for which the land was required, for not only should that be proved, but it should form part of the judgment and be stated in the transfer as well.

This matter was argued on an exception taken by the defendants to the plaintiff's declaration.

The plaintiff's declaration was as follows:

1. The plaintiff is the Hon. Sir Pieter Hendrik Faure, in his capacity as Secretary

for Agriculture, and as such representing the Colonial Government. The defendants are Hendrik Rudolph Stephan and the secretary for the time being of the Cape Town Board of Executors, in their capacity as executors testamentary of the estate of the late Johan Carel Stephan, and the said Hendrik Rudolph Stephan, in his individual capacity.

2. The said Hendrik Rudolph Stephan and the said late Johan Carel Stephan are the registered owners of the farm Otterdam situated at Lambert's Bay, in the division of Clanwilliam.

3. The said farm was granted to the defendants' predecessors in title on December 31, 1831, on perpetual quitrent title subject to the provisions of Sir John Cradock's proclamation of August 6, 1813.

4. It was provided by the fifth section of the said proclamation that on all places adjoining to the sea or communicating with the sea by inlets therefrom the rights of the Crown are reserved with the power of re-assumption of any quantity of land not exceeding twenty morgen, paying the proprietor for such buildings as he may have erected according to a fair valuation, provided such ground be wanted for public purposes; and if given up by the Crown it shall not be transferred to another individual, but shall revert to the proprietor or his representatives.

5. Acting under the above provisions by proclamations dated June 6, 1849, and November 18, 1899, issued by the Governor of the Colony, the Colonial Government has re-assumed twenty morgen of the said farm as being required for public purposes.

6. The said twenty morgen have been duly surveyed, and the plaintiff has called upon the defendants to sign all necessary documents and to do all things necessary to pass transfer of the said twenty morgen to the Colonial Government, the said Government undertaking to pay such reasonable compensation, if any, as may be payable for buildings erected, and to satisfy all costs incidental to transfer, but the defendants refuse to give transfer of the said land.

7. All things have happened, all times have elapsed, and all conditions have been fulfilled necessary to entitle the plaintiff to demand transfer of the said land from the defendants.

The plaintiff claims (a) that the defendants be ordered to do all things necessary to pass transfer of the said twenty morgen of land, the plaintiff undertaking to pay

compensation for any buildings erected and to satisfy costs of transfer; (b) alternative relief; (c) costs of suit.

Before pleading to the merits the defendants excepted to the declaration on the ground that it disclosed no ground of action, and wherefore they prayed that the plaintiff's claim might be dismissed with costs. The position taken up was that the Crown might resume the land, but the defendants were not bound to give transfer.

Sir Henry Juta, Q.C., for the defendants and exceptors: I admit that we are bound to hand over the land in question, but claim that we need not give transfer. The Crown was given the right to reserve twenty morgen of land for public purposes by Sir John Cradock's proclamation of August 6, 1813, para. 5. If the land was not required for public purposes, it should revert to the original owners. The Crown cannot in any case demand transfer; they can simply take possession of the land. They did this in 1849, but now come forward and ask for transfer. This case stands on an entirely different footing to an expropriation under the Railway Acts.

See *Gillet v. Colonial Government* (7 Sheil, 187).

Under the proclamation the Government had only a right of user, and as soon as they ceased to use the land for public purposes, it reverted to the original owners. The Government would pay nothing for the land. This was not so in regard to expropriation for railway purposes, where compensation was paid; there the Government acquired title to the land. The Government here wants transfer in order to acquire absolute *dominium*, to which it is not entitled.

[De Villiers, C.J.: Section 5 of the Proclamation provides that the Government shall not pass transfer to a third party. Does that not imply that they are entitled to transfer now and can obtain it?]

Mr. Searle, Q.C. (with him Mr. Ward) for the Government: The Government are entitled to transfer. (See section 10 of the Proclamation.) In *Gillet's* case it was contended that the word "re-assume" showed that the Government took the land itself, and not the mere user thereof. It is true they cannot use the land for any other than public purposes. Act 9 of 1858, section 11, entitles the Government to claim transfer. If the Government takes this land and does not use it for public purposes, the defendants can obtain an interdict restraining the Government against such mal-appropriation. See *Landmark v. Van der Walt* (3 Juta, p. 300), and

McDonald (7 Juta, 190). See also *Clayton v. Metropolitan Railway Co.* (10 Juta, p. 291), and *Stellenbosch Divisional Council v. Myburgh* (5, Juta, p. 8), and *Voët*, (1, 4, 17).

Sir Henry Juta, Q.C., in reply.

De Villiers, C.J.: The question raised in this case is a very important one. The question is what is the meaning of the words "with power of re-assumption of any quantity of the land not exceeding twenty morgen" in section 5 of the Proclamation of May 6, 1813. This word re-assumption is no doubt somewhat vague and might have different meanings under different portions of the Act. For instance, under the fourteenth section there might be a re-assumption without transfer, but when once quitrent tenure has been established, as the Court has held in a previous case, a transfer is required, and I fail to see how the Crown can re-assume any portion of the land without a fresh transfer, because the whole policy of the law is that the register of deeds should be a complete record of real rights in respect of land, and unless some record of this kind can be established in regard to land re-assumed by the Crown there would be a defect in the system of registration. In my opinion the word re-assumption is quite wide enough to include a case of re-transfer. The section provides that the Government should pay the proprietor for such buildings as he might have erected, and then if the ground is afterwards given up by the Crown it should revert to the proprietor. Sir Henry Juta relied upon the concluding words of the section, that the land should revert to the proprietor or his representatives, and that therefore it was unnecessary for him to obtain a re-transfer. He would undoubtedly succeed in case the Crown attempted to transfer to any other individual, and possibly also he might succeed in case the Crown used the land for other purposes than public purposes. I am therefore of opinion that the exception should not be allowed. Another objection which might have been raised is that the declaration does not allege what the public purposes are for which the land is required, but a defect of this kind in the declaration may be remedied at the trial. In my opinion it will be necessary for the Crown clearly to prove at the trial what are the purposes for which the land is required, and not only should that be proved, but it should form part of the judgment and be stated in the transfer as well. Upon the present application the exception will be overruled with costs,

Maasdorp and Solomon, J.J., concurred.
[Plaintiff's Attorneys, Messrs. J. and H. Reid and Nephew; Defendants' Attorneys, Messrs. Van Zyl and Buissine.]

SUPREME COURT

[Before the Hon. Mr. Justice MAASDORP
and the Hon. Mr. Justice SOLOMON.]

CROWDER V. WHELAN. { 1900.
Sept 19th.

This was an action brought by Alfred Crowder against Patrick Whelan for the recovery of certain money due as brokerage. The declaration stated that in June, 1899, the defendant was the owner of a certain hotel in Cape Town known as the Silver Cloud and of certain adjoining ground, of which he had not received transfer. On June 9 defendant sold the said hotel through the agency of the plaintiff for £5,000 and the adjoining land for £600 to the South African Breweries. Thereafter the defendant was unable to give transfer of the said adjoining land and the South African Breweries refused to buy the hotel without the said adjoining land, but were willing to take instead thereof certain other ground not belonging to the defendant upon which two cottages had been built. The owner of the ground upon which the cottages were situate was unwilling to sell the said ground without selling certain other adjoining ground, his property, upon which four other cottages were situated, and thereupon in August, 1899, it was agreed between the parties that if the plaintiff would buy or obtain a purchaser for the ground on which the six cottages were situated and would pass or cause to be passed transfer of the ground to the South African Breweries, which the latter desired to buy, and thus bring about the sale of the Silver Cloud Hotel to the South African Breweries, the defendant would in consideration pay the plaintiff the sum of £368 15s. The plaintiff procured his wife as a purchaser of the ground on which the six cottages were situate, and in pursuance of the above agreement the ground on which the two said cottages were situate was sold to the South African Breweries, who at the same time bought the Silver Cloud Hotel from the defendant for the sum of £5,000, and on August 2 the defendant

signed a written document authorising Mr. Hassell, of Cape Town, to receive the £5,000 from the South African Breweries Company and pay the plaintiff the sum of £368 15s. and the balance to the defendant. The £5,000 was paid to Moore and Son, and on behalf of the defendant, who though requested to do so refused to pay the plaintiff the £368 15s., or to allow Messrs. Moore and Son to do so, and on April 12 last the Supreme Court granted an interdict restraining Messrs. Moore and Son from paying over to the defendant the said sum of £368 15s. pending an action. The plaintiff therefore now claimed (a) the sum of £368 15s. with interest *a tempore morae*; (b) alternative relief; (c) costs of suit. In his plea the defendant said that when he discovered that he could not give transfer of the adjoining land the Breweries Company bought the Silver Cloud Hotel for £5,000 without any stipulation for the purchase of the said two cottages, and he had no knowledge of any of the negotiations relating to the said cottages and he was at no time a party to the same. As regards his signing of the document of August 2, 1899, defendant said he was an illiterate man and incapable of making arithmetical calculations, and that the only agreement he made for the payment of brokerage was that he agreed to pay the usual and customary brokerage, viz., the brokerage agreed upon in the broker's note, being 2½ per cent. upon the purchase price. That relying upon representations made to him that £368 15s. represented the amount of the said brokerage at 2½ per cent. upon £5,000 he signed the said document in error. He therefore tendered payment of £125 and costs.

Sir Henry Juta, Q.C. (with whom was Mr. Buchanan), appeared for the plaintiff.

Mr. Molteno appeared for the defendant, and said that he was instructed on behalf of the defendant to confess judgment.

Judgment was accordingly given in terms of the prayer of the declaration with costs.

[Plaintiff's Attorneys, Messrs. Silberbauer, Wahl and Fuller; Defendant's Attorneys, Messrs. Van Zyl and Buissinne.]

COOK V. GARDINER. { 1900.
Sept. 20th.

This was an application by the defendant for the postponement of the trial by jury of the above-named cause, which was set down for hearing on October 2, 1900.

The defendant's attorney, Mr. Trollop, stated on affidavit that on August 16, after the Court had fixed October

2 as the day for the trial of the action, he duly cabled to the defendant, who is at present in England, to come out. Some little time after he cabled he received a letter dated August 12 from the defendant, in which he asked how the case was getting on, and giving an address which he said would always find him. As defendant had changed his address Mr. Trollip again cabled on September 5, and on September 15 he received a cable from defendant as follows: "Wife sick, postpone, coming soon." Proceeding, Mr. Trollip stated that it was clear from that that defendant was detained owing to his wife's illness, and as defendant was a highly necessary witness in the action he asked that the hearing of the case be postponed for two or three weeks, so as to give defendant an opportunity of being present at the trial.

In a replying affidavit, the respondent opposed the postponement on the ground that the pleadings had been closed months ago, and the delay in regard in the hearing of the case was due to defendant's action. The respondent further said that if the matter was further postponed he would not be able to prosecute the same, owing to his going up-country as soon as the war was finished.

In reply to the Court, Sir Henry Juta, Q.C., who appeared for the respondent Cook, stated that the case arose out of the sale by plaintiff to defendant of a house, in which a club was then carried on at Observatory-road. The defendant repudiated the sale on the ground of fraud, the property sold not being as described, and claimed damages in reconvention. The misrepresentation alleged was that it was stated that the licence to the place as a club was safe.

Mr. Searle, Q.C., for the applicant and defendant.

The Court allowed the postponement, defendant to pay the costs occasioned by the postponement, and the case was set down for trial on October 24.

CARMAN AND WORKMAN V. } 1900.
RAILWAY SICK FUND } Sept. 20th.
BOARD.

This was an action brought by Messrs. Carman and Workman, carrying on business as chemists at Woodstock, against W. B. Frood in his capacity as acting secretary, and as such representing the Railway Sick Fund Board, appointed by the Railway Department and under the control of the Commissioner of Public Works, for the recovery of sums of £59 12s. 10d. and 19s. 3d. in respect

of drugs and medicines supplied to members of the Railway Sick Fund under circumstances set out below.

The declaration stated that in November last year the defendant Board invited public tenders for the supply of medicines, etc., to the railway staff and contributors to the sick fund in Cape Town and suburbs on the prescription of the railway medical officers during the year 1900. It was stated that a list of the various articles to be contracted for might be had from the acting secretary, and that the lowest or any tender would not necessarily be accepted. A further condition was as follows: "The Board reserves to itself the right to permit patients on receiving the railway medical officers' prescriptions to obtain medicines, etc., from any chemist who may be a contractor to the Board." The plaintiffs tendered for the supply of medicines at Woodstock in accordance with the terms of the notice and the tender was accepted, and thereafter with the knowledge and consent of the defendant Board, in terms of the contract between the plaintiffs and the defendant Board, the plaintiffs from time to time in January supplied medicines under the contract to the value of £59 12s. 10d., and medicines not covered by the contract to the value of 19s. 3d., a total of £60 12s. 1d. These accounts had been certified by the railway medical officer, Dr. Robertson, as correct, but the defendant Board refused to pay.

The plea admitted the formal facts as to the tender and the parties, but said that separate tenders were received by the defendant Board from the plaintiffs for the supply of medicines, etc., to Woodstock and Salt River respectively. Only the tender for Woodstock was accepted, a lower tender having been received from Salt River, which was accepted. The medicines, etc., were supplied by plaintiffs partly from a shop in Woodstock and partly from one in Salt River. As to the medicines, etc., supplied from the Woodstock shop the defendant said he was and always had been willing to pay and had asked for an account for the same, but those supplied from the Salt River shop were not so applied under any contract with the Board, nor with its knowledge and consent.

In their replication the plaintiffs admitted that they sent in two separate tenders, but at the same time. They had three shops in the Woodstock Municipality, two in Albert-road, and one at Salt River. They admitted that defendant had asked for a

separate account of the medicines supplied at Woodstock, but plaintiffs were unable to supply this, the amounts being entered together in the books.

The defendant's rejoinder said that a tender had been made on account of the medicines supplied from the Woodstock shop, but that had been done solely to avoid litigation.

Mr. Searle, Q.C. (with him Mr. Currey), for the plaintiffs; Mr. Ward (with him Mr. H. Jones), for the defendant Board.

In reply to the Court, Mr. Searle said that as he understood the rejoinder amounted to a withdrawal of the tender made. The practice for railway men who were contributors to the sick fund had been for them to go to any chemist who might be on the list of contractors to have their prescriptions made up. A circular was issued annually, giving a list of the contractors and stating that contributors to the sick fund could obtain medicines from any of the contractors mentioned in the list. The circular was posted up in the Government workshops and a copy supplied to the plaintiff.

Francis Lever Workman was then called, and said he was a partner in the firm of Garman and Workman, who had three shops in Woodstock, two in Albert-road and the other nearer to Salt River Station. The firm had always had the contract for the supply of medicines to the Railway Board for the last four years, during which time witness had been a partner in the firm. In December last year they contracted for the supply of medicines, and they were asked to tender separately for Woodstock and Salt River. They did so, although the prices tendered were the same. On December 29 the firm was informed that their tender for Woodstock had been accepted, but witness had not seen the form of contract which the Board had promised in their communication of that date to send the firm. A circular in the same terms as the one produced had been supplied to the firm every year, and the circular produced was supplied to witness in the Salt River shop in January. Up to about the 10th of that month, Dr. Robertson, the medical officer to the Railway Board, had his consulting-room in witness's shop, and the prescriptions given by him were, during this time, dispensed at the shop. The shop of the firm Messrs. Cameron and Hamilton, whose tender was accepted for Salt River, was about 600 yards distant from the shop of Messrs. Carman and Workman, in the direction of Observatory. Witness, after Dr. Robertson

had removed to another consulting-room, continued to give medicines to railway men who came in with the doctor's prescriptions. He felt he was obliged to do so. It was not until the middle of February that this course was taken exception to by the Board.

Mr. Justice Masendorp asked if medicines were supplied in February.

Mr. Searle: That is so, but we are only claiming for January in the present action.

The witness, continuing, said he had a conversation with Dr. Robertson in the middle of February, and after that every railway patient who came for medicines brought a copy of the circular produced, and they were then supplied. Separate accounts for medicines supplied at the different shops were not kept. They had, however, kept separate accounts the previous year, and they took the proportion at each shop during November and December and applied it to January. According to a calculation on this basis the supplies from the shop nearest Salt River amounted in value to £43 17s., and from the other two shops to £17. The witness explained that previously they kept separate accounts, but they then had only two shops, and on opening the centre shop towards the end of the year they kept the accounts there. Before January they had tendered on different scales for Salt River and Woodstock.

By Mr. Ward: Formerly the prices tendered for Woodstock and Salt River were different, so that the price then depended upon which the prescriptions were dispensed. From the beginning of the year they had had the account kept at the middle shop for the sake of convenience; and the original prescriptions and orders were sent there from the other shops. The middle shop was opened some time before the new year, but it was only when they had failed to obtain the Salt River contract that they adopted the system of keeping one account.

Mr. Ward: Wasn't it in order to drive a coach-and-four through the contract that you adopted this?

Witness replied that it was not, and also denied that it was in order to mix up the accounts that they adopted this system.

Mr. Ward explained to the Court that the defendant Board held that according to the contract medicines and drugs could only be supplied at the shop at Woodstock for which the tender was accepted. They contended that he had no right to supply from Salt River.

Replying to further questions by Mr. Ward, the witness said that he considered he

was placed under an obligation by the terms of the contract to supply medicines from Salt River when a prescription or order was brought there, even had the prices risen. He considered he would be obliged to do this if the firm had a shop at Kimberley to which orders or prescriptions were taken.

Frederick Henry Carman, the other plaintiff, said the third shop of the firm was opened in June last year. They had had the contract for Salt River and Woodstock for four years. Last year the prices for Salt River were somewhat higher; but this year the prices for both Woodstock and Salt River were the same. At the beginning of March witness went to see Mr. Frood, the acting secretary, respecting payment of the account, and Mr. Frood asked that separate accounts should be sent in for the different shops as the Board could not pass the account in the form in which it was in. The Board were then informed that it was impossible to send separate accounts, as one account only had been kept, viz., the one at Woodstock middle shop. Further correspondence (read by counsel) followed, and on March 27 the Board wrote declining to pay for medicines supplied from the Salt River shop. Later the Board wrote offering payment for medicines supplied from Woodstock, but the plaintiffs could not furnish an account of the kind as only one account had been kept. The witness said that until February he did not know that objection would be taken to the supply of medicines from any particular shop. He considered he was obliged to supply on prescription from railway medical doctors.

Mr. Ward: Practically your contention is that you are in the same position as when you had the contract for Salt River last year?

Witness: Yes, practically so.

Then why did you send in a separate tender for Salt River?—Because it was mentioned.

Witness, in answer to further questions, said he was under the impression that Salt River was mentioned in the advertisement inviting tenders, but he might be confusing it with the circular. They could have initialled the prescriptions and orders, so as to be able to distinguish the shop at which they were received, but when they were received they did not think there would be any occasion for doing this.

James Smith said he had been a mechanic at Salt River for the last twenty-one years. He had assisted Dr. Robertson while the doc-

tor had his consulting room in the plaintiff's shop. Witness had taken in orders from the doctor to the plaintiff's shop, but he could not say whether they were original prescriptions or repeats. Witness always took these to one of the contracting firm's shops. At the beginning of February a notice was put up outside Dr. Robertson's new surgery, stating that the Board would not be responsible for payment for medicines obtained at Salt River other than through the contractors there, Messrs. Cameron and Hamilton. Before this witness had thought that medicines could be supplied from any of the contractors' shops, and he had taken the prescriptions or orders to Messrs. Carman and Workman at Dr. Robertson's orders.

This closed the plaintiffs' case.

Mr. Ward called

Wm. Bell Frood, who said he was the secretary of the Railway Sick Fund administered by the Board appointed by the Commissioner of Public Works. This year they invited separate tenders for Woodstock and Salt River. For the former the plaintiff firm's tender was accepted, and Messrs. Cameron and Hamilton was given the contract for Salt River. On receipt of the plaintiffs' account witness noticed that it was unusually high. The account of the Salt River contractors was also very low, amounting to £4 instead of about £60, which it usually amounted to. The Board had declined to pay for medicines supplied contrary to contract by Messrs. Carman and Workman. This step was necessary to protect the Salt River contractors, and if the Board paid the account they would perhaps be rendering themselves liable for a breach of contract; at any rate, it was not likely that if they did so they would get a tender from that firm again.

Mr. Searle: Then you take up the position that after having received the medicines, you refuse to pay for them?

Witness replied that the plaintiffs had no contract for Salt River, and had no right to supply. He stated, in further cross-examination, that some of the men contributed in a small way towards the cost of the medicines, and had, in fact, paid partly for the medicines for which the Board now refused to pay.

Asked by Mr. Searle to define the limits of Woodstock, the witness said he could not do so, but he stated, in answer to Mr. Justice Maasdorp, that the tenders were for a particular shop. Further questioned, he said there was a condition attached to the acceptance of Messrs. Cameron and Hamilton's

contract, which was that the firm should have a telephone erected. This had not been complied with in consequence, witness believed, of the orders for Salt River being taken in the main to Messrs. Carman and Workman, so that the Salt River contracting firm had not had sufficient orders to justify the expenditure of establishing a telephone. Witness, however, said that Messrs. Cameron and Hamilton were the recognised contractors for Salt River from the 1st January.

Maasdorp, J., asked if the defendant Board were still willing to pay the £17 provisionally tendered if the plaintiffs were not in a position to give a clearer statement of the medicines received from the Woodstock establishments.

Mr. Ward said they would consent to pay the £17. They had no desire to take the medicines for nothing.

Solomon, J.: What about the remainder? You see you have had the benefit of the medicines.

Mr. Ward replied that a fair way to pay for these would be at the Salt River contractors' prices. But then the supplying of medicines by the plaintiffs had injured the contractors, and a fair sum might be paid to Messrs. Carman and Workman in respect of the medicines supplied by them. The Board had no desire to take the medicines without paying for them.

Maasdorp, J.: The contention of the plaintiffs is that, under the footnote of the circular of the Sick Fund Board, they could supply medicines everywhere, and they base their contention upon the fact that "medicines can be demanded from any of the above-named contractors." I think the word "contractors" must be taken in a limited sense, that medicines can be demanded from such contractors under their contract, under which they agreed to supply medicines at certain places. That reading of the footnote therefore disposes of their contention. It seems that the plaintiffs also contended that Woodstock embraced their Salt River shop, and that they were quite within their contract in supplying medicines there, but I cannot see upon what ground the plaintiffs call upon the defendants to pay for medicines supplied at a place which did not form the subject of their contract. The defendants are not bound by any action on the part of their medical officer outside the contract. Under the circumstances, I think the claim in the case cannot go beyond what was supplied at the Woodstock establish-

ment. The account is a general one, and embraces money for items supplied at Woodstock and Salt River, and no specific account has been supplied for medicines supplied at Woodstock. There being no evidence of this kind before the Court, we cannot give judgment for the specific items connected with the Woodstock shop, and under the circumstances the only judgment which can be given is one of absolution from the instance. Upon this it would be open to the plaintiffs to take action in respect of the medicines supplied from the Woodstock establishment, but it seems to me that there is every likelihood of the parties coming to a proper understanding amongst themselves, and of the plaintiffs receiving what they are justly entitled to under the contract.

Solomon, J., concurred.

[Plaintiff's Attorneys, Messrs. Fairbridge, Arderne and Lawton; Defendant's Attorneys, Messrs J. and H. Reid and Nephew.]

FRIEDGOOD V. ESTATE OF { 1900.
CARDINAL. { Sept. 21st.

This was an action for damages for breach of contract, instituted by Solomon Friedgood, a speculator, residing in Cape Town, against Mr. Steytler, secretary of the Colonial Orphan Chamber and Trust Company, in his capacity as executor dative in the estate of the late Mr. Christopher Timothy Cardinal.

The declaration stated that Mr. Cardinal died in October, 1899, and Mr. Steytler was appointed executor in his estate. On April 19 last the executor sold by public auction, and the plaintiff bought, for £1,430, certain property registered as belonging to the late C. T. Cardinal, being lots 1, 2, and A, situated in Hope-street, Cape Town. The plaintiff made improvements on the property and expended the sum of £600 thereon, and thereafter in the month of May last sold the property to Kaiser Brothers for £2,500. Thereafter the defendant refused to give transfer of the said lots 1, 2, and A, although plaintiff was willing to comply with his part of the agreement. He therefore asked that the defendant be compelled to give him transfer of the said property or to pay him damages to the amount of £600 for breach of contract.

Defendant in his plea admitted that on April 19 last he offered for sale by public auction, pursuant to a previous advertisement, certain property belonging to the es-

tate, which property was sold for £1,430. The conditions of sale stated that the property consisted of two houses, Nos. 33 and 35, Hope-street, as shown on the transfer and diagram. The plea went on to say that the two houses were situated upon Lots 1 and 2, as stated in the declaration, and also referred to in the diagram of July, 1890, on which other properties were also included, but Lot A was not offered for sale, and really belonged to Mrs. Cardinal, and not to the estate of the late Mr. Cardinal, certain proceedings for judicial separation having come before the Court on July 12, 1899, when an order was then made for the transfer of certain three houses in Perry-street to Mrs. Cardinal. These three houses included Lot A, now in dispute, but by a mistake this lot, although it was possessed and occupied by Mrs. Cardinal, was not transferred to her, and still remained registered in the name of the late Christopher Cardinal. This mistake was discovered after the sale by auction, but the plaintiff wrongfully and unlawfully laid claim to Lot A as well as to Lots 1 and 2. The defendant was perfectly willing to transfer to the plaintiff Lots 1 and 2 on his receiving the purchase price, but he contended that plaintiff was not entitled to Lot A. In reconvention defendant claimed the sum of £1,430 on the terms and conditions of sale, and tendered transfer of Lots 1 and 2.

The replication stated that plaintiff bought not only Lots 1 and 2, but Lot A.

Sir Henry Juta, Q.C. (with whom was Mr. Gardiner), appeared for the plaintiff.

Mr. Schreiner, Q.C. (with whom was Mr. Buchanan), appeared for the defendant.

Such evidence as is material to the issue is fully discussed in the judgment.

After hearing Sir Henry Juta on the facts and without calling on Mr. Schreiner, Maasdorp, J., delivered judgment as follows: The plaintiff in his declaration alleges that he purchased from the defendant certain three lots known as Lots 1, 2, and A, and he now claims transfer of these three lots, or in the alternative £500 damages. It would appear, however, that the claim as stated in the declaration is not what was intended, and that what the plaintiff really claims is the transfer of Lots 1 and 2, and as it seems to be admitted that the defendant is not in a position to give him transfer of Lot A, he claims the £500 damages in respect of the loss he suffers in not receiving transfer of Lot A, and for some improvements he has made upon that lot. The defendant alleges in his plea that he

only sold to plaintiff Lots 1 and 2, and states that he is willing to transfer these lots upon receipt of the purchase price, £1,430. The lots in question were sold by public auction after an advertisement which appeared in the newspapers, from which it appeared that the defendant was prepared to sell by public auction Nos. 33 and 35, Hope-street, which are described as two valuable houses. The one is described as an excellent double-storied house, to which there is attached a yard. I mention this yard because some points seem to hinge upon this mention in the advertisement of a yard attached to one of the houses. After this advertisement appeared the sale took place, upon conditions of sale which were read out at the sale. According to these conditions of sale, the auctioneer sold two houses at Cape Town in Hope-street, being Nos. 33 and 35, according to the deed of transfer and diagram thereof. The purchasers at that sale were made acquainted with what was sold as described hereon. Now it would appear that at the time when these properties were advertised for sale they belonged to the estate of the late Mr. Cardinal. These two blocks formed part of properties hereunder by the deed transferred to the estate of Cardinal, and amongst these lots also appears another lot known in this action as Lot A. As a matter of fact, at the time the sale took place only these two houses belonged to the estate of Cardinal, but through some mistake in omitting to transfer Lot A to Mrs. Cardinal, to whom it should have been transferred upon the division of the property between herself and her late husband, this lot appeared subsequently as still belonging to Cardinal's estate, and this omission to transfer to Mrs. Cardinal has been responsible for a great deal of the difficulties in this case. However, this sale of the two houses, Nos. 33 and 35, took place according to the deed of transfer and the diagram thereof. It would appear that anyone examining these properties, Nos. 33 and 35, and then looking at this diagram, which forms part of the diagrams which were attached to the transfer in this case, would find out that the diagram referring to Nos. 33 and 35 was a composite diagram upon which are reserved composite diagram upon which is reserved to the estate of Cardinal Lots 1 and 2. Such an examination, I say, would have led to the conclusion that the only diagram referred to was the diagram which contained Lots 1 and 2, and such persons upon inspection

tion would have discovered that Lot A did not purport to be the diagram here described in the conditions of sale. Consequently merely upon the conditions of sale, the advertisement, and upon inspection of the property it would have been deduced that the diagram according to which the property was sold was the diagram which embraced Nos. 33 and 35 only, and not Lot A, which is separate and detached, and between which and No. 35 lies other property which had been already transferred to Mrs. Cardinal. It is alleged, however, that at the sale a conversation took place between Mr. Juritz, who represented the defendant in this case, and for whom therefore the defendant would be responsible. It is said that Mr. Juritz made certain representations which misled the plaintiff and induced him to believe that he was purchasing not only according to the diagram which embraced Lots Nos. 33 and 35, but that he was also purchasing according to the diagram Lot A. The plaintiff says that having seen the advertisement that not only the houses were to be sold, but also a yard, he made inquiries as to where this yard was situated, and that Mr. Juritz represented to him that Lot A was on the diagram which fell into the property that was then being sold, and that it was upon Lot A that there was plenty of room for a yard. Here then the plaintiff alleges that a direct misrepresentation was made by Mr. Juritz, that he was also selling the lot represented by diagram A. If that is so, and if Mr. Juritz has led the plaintiff by mistake or otherwise to believe that, and if the plaintiff was induced to buy by that misrepresentation made by Mr. Juritz, the plaintiff would no doubt be entitled to claim transfer of what the defendant's agent said at the sale he was selling, or on the other hand he might have claimed transfer of such property as the defendant was in possession of still, with an abatement of price for such portion as defendant was not able to sell, and the latter is the claim on which the plaintiff now brings the defendant to this Court. It is therefore necessary to ascertain exactly what took place at that sale, and here we have the statement by Mr. Friedgood, the plaintiff, and Mr. Kai er, that this statement was made by Mr. Juritz, that he showed them the diagram containing Lot A, and that he clearly stated that that was the property, together with the property represented by the other diagram, which was then being sold. Mr. Juritz, however,

denies this, and says that he constantly said: "Here are the diagrams, but remember I only sell the dwellings 33 and 35." Well, that is in direct conflict with the statement of the plaintiff, and the question is, which is true? If what Mr. Juritz said is correct, then there was no misrepresentation made to the plaintiff, and Lots Nos. 33 and 35 were sold, and nothing more. Now, is it true that Mr. Juritz said to the plaintiff, "I will sell according to the diagram Lots 1, 2, and A." Upon referring to the diagram it would appear that the separate diagram of Lot A contains no letter at all, and therefore no reference could have been made on this separate diagram to Lot A. Upon the other diagram the figures 1, 2, and A are given, but Mr. Juritz said that if his attention had been called for a moment to that he would have known perfectly well that he was not selling Lot A. It would seem improbable that Mr. Juritz with the composite diagram before him would have represented that he was selling Lot A as well as the other two lots. Mr. Juritz denies that he said that, and then the question arises, would these diagrams without such misrepresentation have misled the plaintiff at all? Suppose these diagrams had been handed over to him, and Mr. Juritz had said: "Here are the diagrams, I sell according to the diagrams," what was there to induce the plaintiff to believe that Lot A was that yard at the back. The picture does not make any such suggestion, and the question arises whether anything else happened at the sale which would have prevented the plaintiff from regarding this picture as correct and induced him to question that the property did not go beyond the gates. At least one witness states that Mr. Juritz did call attention to the fact that the property did not extend beyond the gates, and several witnesses have been called to show that they knew perfectly well that nothing was to be sold beyond the houses, Nos. 33 and 35. It is all a question of credibility, and in a question of that kind it is necessary to go further and see whether there is any conflict of evidence between Friedgood and Kaiser and some of the other witnesses, and compare their evidence with that of other witnesses, and the Court can then inquire whether there is any reason to believe those other witnesses. Well, Mrs. Wagner has been called, and she has told us that she told both Friedgood and Kaiser that nothing beyond that gate was to be sold, while those two denied that and said that she never told

them anything, but said she was cross with them and would not allow them to go beyond the gate. Anyhow, she told them that their attention was called to the matter and they must have had some sort of notion that they were not buying anything beyond the gate. Then Mr. Le Sueur says he told these persons that a dispute had arisen, and that nothing could be done with reference to the further sale until this was settled, although of course both Friedgood and Kaiser say that when they brought the money to Mr. Le Sueur he did not tell them anything about the cheque having to be held over until the dispute was settled. Here again the question is whether the Court is to believe the statements of Mr. Le Sueur or those of the plaintiff and Kaiser. Mr. Le Sueur knew that the dispute had arisen at that time which would first have to be settled, and the question is whether his evidence is not more reliable than that of the plaintiff and Kaiser. Now it is quite clear that a mistake was made and this circumstance seemed at one stage of the case to support the plaintiff's claim. This mistake was made by the conveyancer allowing Lot A to be put into the declaration of seller and a mistake was made by Mr. Smuts in allowing that to be included in his survey, and consequently the plaintiff's counsel also wishes us to infer that a mistake was made by Mr. Juritz, and that he made these representations, being under the same misapprehension that he was selling Lot A with the other lots, as plaintiff states in his declaration. Mr. Le Sueur's mistake, however, was a very natural one, seeing that he was unacquainted with that locality, and if he had been acquainted with that locality I could not have understood how he made that mistake, because if he had, with the diagrams before him, he would have known immediately that the Lot A did not form part of the transfer. Mr. Smuts made a mistake, and the question was upon what grounds did he do so. He must have surveyed upon what Mr. Friedgood bought, and he must have got his information from Mr. Friedgood. I do not see upon what

other basis he made his survey. If he got his information from Mr. Friedgood, then he proceeded to include in his survey this Lot A. As it is, I am inclined to think that if no representation had been made to him, Mr. Smuts would have had no reason to include Lot A in his survey. Notwithstanding that the diagram was found among the papers, he must have satisfied himself as to what was actually sold. There is some rather vague evidence that representations were made to Mr. Smuts that these two diagrams represented the property, and that everything belonging to Mr. Cardinal was sold. Mr. Smuts therefore upon one diagram which did not form part of the property sold 33 and 35, goes upon the statement that everything that had belonged to Mr. Cardinal had been sold, and sets to work and frames his survey, and that, I think, accounts for the case having come into court. When Mr. Smuts made his survey, it was probably pointed out that Lot A fell into the sale, and upon that information being given to Mr. Friedgood, he was very pleased, and such an impression was made upon his mind that whatever he might have thought at first, he was now satisfied that he actually bought A. Then of course he would remember the diagrams being shown him, and then he may have referred further back, and thought that the conversation spoken of took place between him and Mr. Juritz. I am of opinion that the representations alleged were never made, and that consequently the sale took place upon the conditions of sale, which referred to the two dwelling-houses, Nos. 33 and 35, according to the deed of transfer and the diagram. The plaintiff is therefore only entitled to receive transfer of Nos. 33 and 35, and nothing more. In the claim in reconvention judgment must be for the defendant (plaintiff in reconvention) for the purchase price, £1,430, with interest from May 1 last.

Solomon, J., concurred.

[Plaintiff's Attorneys, Messrs. Van Zyl and Euisziane; Defendant's Attorneys, Messrs. Silbertauer, Wahl and Fuller.]

"Cape Times" Law Reports.

CASES DECIDED IN THE SUPREME COURT, CAPE COLONY.

SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS, P.O., K.C.M.G. (Chief Justice),
and the Hon. Mr. Justice MAASDORP.]

ADMISSIONS. { 1900.
 { Oct. 12th.

Mr. Buchanan moved for the admission of Malcolm Stewart Brown as a notary public. Granted, the oath to be taken before the Resident Magistrate of Aliwal North.

Mr. Buchanan moved for the admission of Henry George Willmot as a conveyancer. Granted, and the oath administered.

Mr. Close moved for the admission of H. W. Wright to practise as a conveyancer at King William's Town, the oath to be taken before the Resident Magistrate at King William's Town.

Granted.

PROVISIONAL ROLL.

SCHWEIZER V. JOHANNA M. P. VILJOEN.

Mr. Nathan moved for provisional sentence on a promissory note for £198 2s. 4d. Provisional sentence granted as prayed.

BLAKEWAY V. ELIZABETH HEWAT.

Mr. Buchanan moved for provisional sentence on a mortgage bond for £200, with 8 per cent. interest from August 9, 1898. The bond had become payable by reason of the non-payment of interest. It was also asked that the property specially hypothecated be declared executable.

Provisional sentence granted and property declared executable.

LENG V. LEWIS GOLDSTEIN.

Mr. Buchanan moved for the final adjudication of defendant's estate as insolvent. Granted.

BOOTH V. ALEXANDER MCKECHNIE.

Mr. Nathan moved for provisional sentence on two promissory notes, for £102 15s. 4d. and £147 11s. respectively.

Granted.

ZOER V. J. P. THERON.

Mr. Currey moved for provisional sentence on a mortgage bond for £700, with 6 per cent. interest. The bond had become due by reason of the non-payment of interest. It was also asked that the property specially hypothecated be declared executable.

Provisional sentence as prayed, property declared executable.

PHILPOTT V. VAN RENSBURG.

Mr. Nathan moved for provisional sentence on a mortgage bond for £1,000. The bond had become due by reason of the non-payment of the interest. It was also asked that the property specially hypothecated be declared executable.

Provisional sentence granted and the property declared executable.

BOSMAN V. R. A. FALCONER.

Mr. De Waal moved that the provisional order for the adjudication of defendant's estate as insolvent be discharged.

Provisional order discharged.

LOUW V. J. J. C. SMIT.

Mr. Nathan moved for provisional sentence for £300 on a mortgage bond, with

interest at the rate of 6 per cent., and £1 2s. premium on policy of insurance paid. It was also asked that the property specially hypothecated be declared executable.

Provisional sentence granted and the property declared executable.

ESTATE OF BARRY V. J. J. KASNER.

Mr. P. S. Jones said this was an application for provisional sentence for £37 10s., being interest due on a mortgage bond for £500, but this amount having been paid after summons was issued, provisional sentence was now asked for the costs only.

Provisional sentence for costs as prayed.

GORDON AND GOTCH V. THOMAS WOODBURN.

Mr. Currey moved for the final adjudication of defendant's estate as insolvent.

Granted.

KEESE V. J. J. BASSON.

Mr. Gardiner moved for provisional sentence for £52 10s. 7d., goods sold and delivered, and for £56 due on a promissory note, with interest and costs of suit.

Granted.

WILMOT V. J. HANNES LA GRANGE.

Mr. Buchanan moved for provisional sentence on two promissory notes for £57 19s. 3d. each, with interest and costs of suit.

Granted.

SCHWEIZER V. WESSELS J. M. GOUS.

Mr. Rubie moved for provisional sentence on two promissory notes, for sums of £208 and £135 11s. 3d. respectively, with interest and costs of suit.

Granted.

BARR V. WILLIAM WARNER.

Mr. Close moved for provisional sentence on two promissory notes for £8 and £7 10s. respectively, less £5 paid on account, with interest and costs of suit.

Granted.

DE WAAL V. P. W. VORSTER.

Mr. P. S. Jones moved for provisional sentence on a Magistrate's Court judgment for £48 6s. 10d., being £44 10s. 6d. amount of judgment and £3 16s. interest and costs. In a previous action against the same defendant provisional sentence was given, but as the amount was small, £5, stay of execu-

tion for three months was decreed. Now that the property would have to be attached it was desired that the previous judgment should now be altered to a decree for the amount asked without any stay of execution.

Provisional sentence was granted as prayed, and the property declared executable. The order for the stay of execution for three months in the previous judgment to be cancelled.

ESTATE OF THWAITES V. M. J. ESTERHUIZEN.

Mr. Joubert moved for provisional sentence on a mortgage bond for £3,850, with interest at the rate of 6 per cent. from August, 1899. The bond had become due by reason of the non-payment of interest. It was also asked that the property specially hypothecated be declared executable.

Provisional sentence granted, and the property declared executable.

HAMMERSCHLAG AND CO. V. J. J. LAUBSCHER.

Mr. Molteno moved for the final adjudication of defendant's estate as insolvent.

Granted.

PELSE V. P. J. VENTER.

Mr. Buchanan moved for the final adjudication of defendant's estate as insolvent.

Granted.

ESTATE OF SHAW V. VAN DER.

Mr. P. S. Jones moved for provisional sentence for £200, with interest at the rate of 8 per cent., due on a mortgage bond, which had become due by reason of the non-payment of interest. It was also asked that the property specially hypothecated be declared executable.

Provisional sentence granted, and the property declared executable.

ESTATE OF HOWE V. ROENEWALD.

Mr. Howel Jones moved for provisional sentence on a mortgage bond for £300, with interest at the rate of 6 per cent. It was also asked that the property specially hypothecated be declared executable.

Provisional sentence granted, and the property declared executable.

HOLMES AND CO. AND ANOTHER (1899). V. ESTATE OF FRIER. (Oct. 12th.)

Mr. Howel Jones moved for the final adjudication of the estate of Frier. It ap-

peared that the plaintiffs had obtained judgment in the Resident Magistrate's Court at Gordonia upon two promissory notes amounting to £488. A writ of execution had been issued, and the return was that there were not sufficient goods pointed out to satisfy the judgment, and accordingly this application was made under the 10th section of the Insolvent Ordinance.

Mr. Searle, Q.C., appeared for the respondent, and read an answering affidavit by the executrix in the estate, in which it was stated that practically there were no movables sufficient to pay the debts, but there was valuable landed property. The executrix alleged that she had applied to the High Court of Griqualand West for leave to mortgage the property to pay the debts, but the provisional order of sequestration having been granted by this Court as far back as August, the High Court practically referred the matter to this Court, and would not go further than to grant a stay of execution. The respondent wanted time to raise the money on mortgage, and thus satisfy the claim as well as preserve the interests of the estate.

In an answering affidavit by Mr. Haines, it was pointed out that the executrix had been most dilatory in administering the estate, her husband having been dead fourteen months, and she had not yet filed an account nor made any attempt to meet the creditors. He was, however, prepared to have a curator appointed.

The Court granted an order discharging the provisional order and appointed Mr. Will curator of the estate with power to mortgage the property for such amounts as should be sufficient to discharge the debts in the estate, the curator to proceed with all convenient despatch, and report to the Court what had been done.

ILLIQUID ROLL.

COLONIAL GOVERNMENT V. ESTATE OF RAUTENBACH.

Mr. Ward moved, under Rule 319, for judgment in default of plea, for £68 18s. 1d., being survey expenses of a farm in Gordonia, with costs.

Granted.

COLONIAL GOVERNMENT V. LYER.

Mr. Ward moved, under Rule 319, for judgment, in default of plea, for £104 18s. 4d., survey expenses, with costs.

Granted.

BOLGER V. P. H. HENNING.

Mr. Nathan moved for judgment, under Rule 329d, for £23 4s., medicines supplied, professional attendance, and costs of suit.

Granted.

FLEMMER V. VENTE^r. { 1900. Oct. 12th.

This was an application for judgment under Rule 319 in default of plea, the amount claimed being about £68 15s., maney and materials advanced and supplied by plaintiff to defendants. There was a claim for an order compelling defendant (who was sued in his individual capacity and as the father and natural guardian of his minor son), to pass a bond over certain properties in his capacity as guardian.

Sir Henry Juta, Q.C., moved.

Mr. Close made an application on behalf of defendant for leave to remove the bar and plead, on the ground that the default had been due to the fact that defendant's means were very small, and consequently it had been difficult to arrange for the defence.

An affidavit made by plaintiff's attorney set forth that the removal of the bar was opposed on the ground that no sufficient reason had been given for the delay, no affidavit on the merits had been filed, and defendant had admitted the debt.

Sir Henry Juta, for respondent in the motion for removal of bar: We are entitled to judgment against defendant (applicant) in his individual capacity. He has admitted that he owes the money, but in his capacity as guardian in the plea which he now tenders he is going to take an exception that he is not bound to pass the bond. We say that the minor has had the benefit of the money, and that therefore the defendant should pass the bond. According to the Rules of Court, there must be an affidavit on the merits; none such has been filed. We, however, will consent to the bar being removed so far only as to allow the defendant to plead in his capacity as guardian.

Mr. Close: Defendant wishes to make a claim in reconvention for damages for delay in the transfer of the property to him by the plaintiff's husband.

[De Villiers, C.J.: Plaintiff is married to her husband by ante-nuptial contract.]

See *Heydenryck v. Woolven* (7 Sheil, p. 406) as to "set-off."

[De Villiers, C.J.: This is not a case of "set-off."]

"Counter-claim" is a species of "set-off."

The plaintiff was the agent of his wife who was an "undisclosed principal."

Sir Henry Juta, Q.C.: There is nothing on the affidavit to show that.

[De Villiers, C.J.: Sir Henry Juta, you cannot take out execution against the minor's property.]

That is so.

De Villiers, C.J.: The defendant really has no defence; this he has admitted in his affidavit. If he has a counter-claim for damages against Mr. Flemmer himself, he can bring his action for that. Judgment with costs will be given against plaintiff in his individual capacity in the main claim. With regard to the removal of the bar, that will not be allowed as far as defendant (applicant) is individually concerned, but as far as concerns the minor, the bar will be removed, costs to be costs in the cause.

[Plaintiff's (reponent) Attorneys, Messrs. Walker and Jacobsohn; Defendant's (applicant) Attorneys, Messrs. Von Zyl and Buis-sine.]

AURET V. W. B. AURET.

Mr. De Waal moved for judgment, under Rule 329d, for £10 16s., less £5 paid on account, for goods sold and delivered.

Granted.

ROUX V. JACOB CHURCH.

Mr. Buchanan moved for judgment, under Rule 329d, for £10 3s. 4d., balance of purchase price of certain lots of ground, with costs of suit.

Judgment was given for £10 3s. 4d., but with Magistrate's Court costs only, the Chief Justice pointing out that from what appeared on the papers it would seem that both the parties resided in Cape Town, and therefore the action should have been brought in the Magistrate's Court. Leave was, however, given to mention the case again if it turned out that the defendant did not reside in Cape Town.

PENTELOW V. CARL MEYER.

Mr. Molteno moved for judgment, under Rule 329d, for £46 1s. 3d., board, lodging, rent, and goods supplied and cash advanced.

Granted.

REHABILITATIONS.

Mr. Buchanan moved for the rehabilitation of the insolvent estate of Jacobus Stephanus du Toit.

Granted.

Mr. Joubert moved for the rehabilitation of the insolvent estate of William Patrick Cuthbert.

Granted.

Mr. Searle moved for the rehabilitation of the insolvent estate of Jacob Stephanus Naude. The circumstances were peculiar. The estate was surrendered as far back as 1883, the only assets then known of in the estate being a few movables. At the meetings in the insolvent estate no creditors appeared, and no trustee was appointed. Naude and his wife died some years ago, and it was discovered by the executor in 1898 that there was some landed property in the estate, and this he could not transfer so long as the sequestration stood.

The Chief Justice said that he did not see that rehabilitation would help the applicant in any way, because if the estate had passed to the Master on sequestration it would still remain there after rehabilitation. The reasonable course was for the Court to authorise the Master to join the executor in passing transfer. The Court would therefore grant an order authorising that course.

COLONIAL GOVERNMENT V. } 1900. BEADY. { Oct. 12th.

Servitude — Railway station — Encroachment — Trespass.

B., for valuable consideration, granted to the Government certain land for the purposes of a railway station with sidings, platforms, passenger and goods sheds, subject to a reservation in his favour of a portion of the land on which he had erected a house.

After he had made the grant, B. built a verandah to the house on the ground reserved, and this verandah encroached on the railway platform some six or seven feet.

B. also authorised a lessee of the house to sell refreshments on the platform.

The Court, on the application of the Railway Department, ordered the respondent to remove the verandah, and granted an inter-

dict restraining the respondent from allowing persons to sell refreshments on the platform.

The Government have the right of excluding persons from its railway platforms.

— — —
This was an application on notice to the respondent that the Court would be moved for an order restraining the respondent, his agents, and servants, from trespassing upon certain property, situate at Fourteen Streams, now lawfully in possession of the Railway Department, and compelling him to remove a certain balcony or erection made by him, and which encroaches upon the said property.

On the 21st October, 1898, the Colonial Government acquired from the respondent by notarial deed the right to the use of a certain portion of his farm, situated at Fourteen Streams.

In February, 1899, the respondent erected a balcony or verandah, supported by brackets, to a building of his, situated on the portion of the ground coloured red on the plan annexed to the notarial deed, and this verandah projects over the railway platform at Fourteen Streams a distance of between 6 and 7 feet.

The respondent refused to remove the verandah.

It was further alleged that on various occasions, and frequently during the month of December, 1898, one Maglona Parker, the wife of one Alexander Parker, who leased the respondent's building above referred to, trespassed upon the property used by the Railway Department, and more particularly upon the platform, for the purpose of selling refreshments to passengers upon the railway, and refused to desist, alleging that she had authority from the respondent to do so.

On the 19th April, 1900, Maglona Parker was criminally prosecuted, under section 5 of Act 19 of 1891, at the instance of the Railway Department, but the case was dismissed.

The position taken up by the respondent was that the verandah complained of was not an obstruction to the department, and was not inconsistent with the rights granted by him in the deed of servitude, and did not interfere with the use by the department of the ground granted to the Government for the purposes of a station.

He further alleged that he reserved the piece of ground tinted red on the plan for the purpose of erecting refreshment-rooms thereon, and at the time informed the de-

partment of his reason in reserving it, and that it was on this piece of ground that the verandah had been erected.

The notarial deed referred to was headed "Deed of Servitude," and *inter alia*, gave and granted as a servitude against, and to be endorsed upon the respondent's deed of grant to the Colonial Government: "So much additional land on Fourteen Streams Station, situate on the farm No. 20, H.V., as may be necessary for the purposes of a station, with sidings, platforms, passenger and goods sheds, in extent 30 chains long," etc., subject to the reservation to the respondent of the plot of ground tinted red on the plan annexed.

Mr. Ward, in support of the application: The respondent has made an out-and-out grant of the land in question for railway purposes. Consequently the Railway Department is entitled to the property *usque ad cælum*. The projection over the platform of the balcony is therefore an infringement and violation of the right of the Railway Department. See *Suffield v. Brown* (33 "Law Journal," p. 349).

Mr. McGregor, for the respondent: In order to be successful, the applicant must show that some right recognised and defined by law must have been made over to the Government. Now in the agreement between the parties the word "servitude" was used. The Roman-Dutch Law recognised and defined this term. There has been a making over of certain right of "user," and if the Government cannot show that respondent has infringed these rights, they have no *locus standi*. The respondent has not in any way infringed such rights. He gives up all right to sell refreshments on the platform, and so it is incumbent on the Government to show that this balcony is an encroachment on their rights. This they have not done. All they do is to say that they have *dominium*. If they could show even that they had a "superficiary" right, their contention would be good. But since they can't alienate, they can have no "superfices." They merely have a *usus* of the land, somewhat akin to the hereditary *usus* spoken of by *Grotius* (2, 44, 7). The Government wish to introduce a new kind of tenure. The space over and above the platform belongs to the respondent. He is the *dominus*, and the applicant is the mere user of the platform.

De Villiers, C.J.: In a case of this kind the old Dutch authorities are not of much assistance to the Court. The servitudes, for instance, with regard to a right of way, were very different to the rights which it is neces-

sary that the Government should have for the purpose of carrying on its railways and for the purpose of railway-stations. In the present contract certain land for the purposes of a station, sidings, platforms, passengers' and goods sheds at Fourteen Streams was granted, subject to the reservation by the respondent of the plot of land tinted red on the plan. In a contract of this kind there is no analogy to a right of way. The right is quite *sui generis*. The question the Court has to determine is what rights are essential for the purposes of enabling the Government to carry on its railways and to use its stations and platforms in the manner in which railway companies generally do. I cannot conceive any railway company, much less a Crown railway, allowing the public to have the free use of its line of railway or the free use of its platforms. The Government must surely have exclusive right to the platforms and stations, and must have the right to prevent anyone from going on the platform of any particular station without its consent. It is essential to the working of the railway that that right should belong to it, and that must have been known to Brady when he entered into the contract. It is, moreover, clear that Brady did not retain the right of sending persons to sell refreshments on the platform. The only question that remains is whether he has a right to leave the projection over the platform. In my opinion, any projection of the kind must interfere with the free use of the station by the Government. Many ways might be suggested in which the existence of such a projection would injure the Government. In my opinion, it is not necessary to wait until actual inconvenience arises; it is quite sufficient for the Government to allege that if such a projection were made its tendency would be to encroach upon their rights, and to prevent their having free use of the platform, and consequently to claim the right to prevent this projection. For these simple reasons I am of opinion that the Government is entitled to an order for the removal of the projection, and to an interdict restraining the respondent from selling refreshments on the platform. The respondent must pay the costs of the application.

[Applicants' Attorneys, Messrs. J. and H. Reid and Nephew; Respondent's Attorneys, Messrs. Fairbridge, Arderne and Lawton.]

[Before the Hon. Mr. Justice MAASDORP.]

WARD V. WARD'S TRUSTEES. { 1900.
Oct. 12th.

Removal of cause—Circuit Court
—Pleadings incomplete — Ill-health.

On an application for the removal of a case to a Circuit Court, when the pleadings were not complete and the case was not yet ripe for trial, on the ground of the inability of the plaintiff to come from Uitenhage to Cape Town because of ill-health, the Court refused the application, there being nothing to show that at the date of the trial the plaintiff would still be unable to come to Cape Town.

This was an application for the removal from the Supreme Court to the Circuit Court at Uitenhage of the trial of an action in which the applicant (Mrs. Ward) was about to sue the trustees in her husband's insolvent estate.

The grounds of the application were that the plaintiff (and applicant), who was resident at Uitenhage, was too ill to travel to Cape Town, and was, further, too poor to pay the expenses that would be incurred in bringing her witnesses to Cape Town: she stated in her affidavit that she would consequently be prejudiced at the trial if the case was heard in the Supreme Court. The witnesses (ten in all) resided in the Uitenhage, Humansdorp, and Steytleville districts, and it would be more convenient to take their evidence at the Circuit Court.

The respondents opposed the application on the ground that as no pleadings had as yet been drawn there was no complete record to be removed. The pleadings should first be closed before any removal could be ordered. They further stated that as the case was an extremely complicated one it would be eminently more satisfactory that the case should be heard in the Supreme Court.

Sir Henry Juta, Q.C., for the applicant.

Mr. Schreiner, Q.C., for the respondents.

Maasdorp, J.: I will not decide now that the Court would not under any circumstances grant a removal before issue is joined in pleadings. It is only

necessary in this case to say whether the record should be removed under the circumstances stated in the affidavits. The sole ground for the application seems to be that the plaintiff in this matter is at present in a precarious state of health. The doctor says that he could not allow her in her present state of health to travel. This application has been made some time before her attendance is required. If she is in an unfit state of health to appear when the case comes on for trial the application can be renewed. but I do not think any injustice will be done in leaving the case where it is at present. The application will be refused with costs.

[Applicant's Attorneys, Messrs. Van Zyl and Buissonne; Respondents' Attorneys, Messrs. Scanlen and Syfret.]

IN THE MATTER OF THE PETITION OF
WILLIAM SAUNDERS NEWCOMBE AND
CATHERINE NEWCOMBE.

Mr. Rubie moved for leave to the trustee, appointed under the anti-nuptial contract entered into by petitioners, to resign, and for the appointment of a new trustee.

The order was granted as prayed.

IN THE ESTATE OF THE LATE GEORGE REX.

Mr. Currey moved for an order to confirm a certain partition of the property in the estate.

Granted.

IN THE MATTER OF THE PETITION OF JACOB
FREDERICK CONRADIE.

Mr. Searle, Q.C., moved that the rule nisi for the cancellation of a certain mortgage bond be made absolute.

Granted.

JACKSON V. EAST LONDON MUNICIPALITY.

Mr. Schreiner, Q.C., moved the Court to fix a day for trial of this action by jury.

The trial was fixed for Monday December 3.

HUGHES AND ANOTHER V. { 1900.
HENNING. { Oct. 12th.

Transfer—Liquid document—Practice—Liability.

On an application for an order authorising the transfer of pro-

perty belonging to a person absent from the Colony, which property had been purchased and paid for by the applicant, the Court refused the application, there being no admission by the respondent that he was liable on the document produced in support of the application. Liability must first be established by taking judgment on the liquid document.

This was an application for an order authorising the Registrar of Deeds or any other person whom the Court might appoint to pass transfer of certain property which had been purchased by the applicants from the respondent. The respondent had been paid the amount of the purchase price, and had signed a document admitting the receipt of the amount. In this document it was stated that the amount so received was for the purchase of the property in question. The respondent had left the Colony without passing transfer, and his whereabouts were unknown to the applicants. It was alleged that he left the Colony to join the Free State forces then at war with Great Britain.

Mr. P. S. Jones, for the applicants: The document is a liquid one upon which provisional sentence can be obtained. The course now pursued without first taking a provisional judgment is one which will commend itself to the Court as being a means of saving unnecessary expense to the respondent. There is no direct precedent for the course taken. The applicant has been kept out of the enjoyment of his full rights for a long time through no fault of his own. See *In re Trycross v. Jennings* (1 Menz., 503).

Maasdorp, J.: The usual practice is to obtain transfer by action. The applicant is adopting an unusual step in asking the Court to appoint the Registrar of Deeds to pass transfer on behalf of the defendant in a matter in which the Court has not established liability, there being in this case no admission by the respondent that he is bound under the circumstances to pass transfer. The application will be refused.

IN THE MATTER OF PIETER CORNELIS DU
TOIT, ALLEGED TO BE OF UNSOUND
MIND.

Mr. Joubert moved for the appointment of a *curator ad litem*.

The Court appointed Mr. Smit a *curator ad litem*.

IN THE MATTER OF THE PETITION OF
HYMAN TUROK.

Mr. Close moved that the rule *nisi* granted under the Derelict Lands Act be made absolute.

Granted.

IN THE ESTATE OF THE LATE WILLIAM
PARKIN.

Mr. Schreiner, Q.C., moved for leave to transfer certain property. The circumstances of the application, which arose out of the will of the late Wm. Parkin, were as follows: The testator had left his widow to enjoy the life usufruct of the estate, which on her death was to be divided amongst his sons. The widow had renounced her title and it was sought to transfer the property to the heirs. The difficulty arose through the Registrar being of opinion that under the terms of the will the transfer could not be made until the widow had died, as the children's children might have been intended by the testator to participate in the benefit of the will.

The order was granted.

SOUTH AFRICAN BREWERIES V.
FOTHERGILL.

Mr. Searle, Q.C., moved for a stay of execution of judgment in the case of Fothergill v. South African Breweries, in which judgment was given on the 7th September for the sums of £450 and £2,000. There was an appeal against the judgment for the latter amount.

Sir Henry Juta represented the respondent.

An arrangement was come to by counsel that the sum of £450 should be paid, and that the £2,000 should be handed to Mr. Fothergill's attorneys, on their undertaking not to part with the money until the appeal had been decided upon, and his lordship ordered that the costs should stand over pending the application for a new trial.

MICHAU V. ARGUS PRINTING AND PUBLISHING COMPANY.

Mr. Burton moved the Court to fix a day for trial of this action by jury.

Mr. Searle, Q.C., appeared for the defendant company.

The Court ordered that the trial take place on Wednesday, December 5.

SUPREME COURT

[Before the Hon. Mr. Justice MAASDORP,
the Hon. Mr. Justice SOLOMON and the
Hon. Mr. Justice LANGE.]

ADMISSIONS. { 1900.
Nov. 1st.

Mr. Gardiner moved for the admission of Mr. Saul Solomon as an advocate of the Court.

Order granted and the oath administered.

Mr. Buchanan moved for the admission of Clarence de Jager as an attorney and notary.

Order granted, and leave given for the oaths to be taken before the Resident Magistrate of Colesberg.

Ex parte ANDERS. { 1900.
Nov. 1st.

Articled clerk—Attorney—Admission—Cession of articles—Continuous service—Rule 213.

A. became articled to M., a partner in the firm H. and H., attorneys practising in Kimberley, on October 9, 1897, and served with him until October 15, 1899, when M. left Kimberley for a short visit, and owing to the place being immediately invested by the enemy could not return.

A. continued to serve with the firm until January 1st, 1900, when on the advice of one of the partners of the firm, he joined the Kimberley Town Guard and served therein until February 15th 1900, attending at the firm's office for a part of each day.

From February 15th 1900, to May 1st, 1900, he continued in the office and then his articles were in turn ceded to each of the remaining partners, but no registration of such cession with the Registrar of the Supreme Court was made.

The Court refused to allow A. to be admitted as an attorney, as

Rule of Court 213 requires a registration of any transfer or cession of articles.

It was further ordered that A. serve another six months under duly registered articles. The six months service with the firm being allowed to count together with the six months to be served as continuous service.

This was an application for the admission of Paul Clement Anders as an attorney and notary of the Court. The affidavit of the petitioner showed that he was articled to Mr. J. J. Michau on October 9, 1897, at Kimberley. On the 14th or 15th of October, 1899, the said Michau left Kimberley for Modder River, and was unable to return, owing to the Republican forces investing the town, which investment continued until February, 1900. The said J. J. Michau was arrested, but afterwards released on bail, and the petitioner wished to have the articles ceded, but the said Michau said there was no necessity for that, as the case of treason alleged against him (Michau) was so weak that he did not believe the Attorney-General would prosecute, and that he (Michau) would be allowed to return to Kimberley. The Attorney-General did not prosecute, but the said Michau opened business in Cape Town, and requested the petitioner to join him there, but as the latter could not afford the expense he decided to remain with the firm of Haarhoff and Hertog, of which firm J. J. Michau had been a partner. From October 14 until January 1, 1900, the petitioner attended to his duties in the office of Haarhoff and Hertog, and then, acting upon the advice of the said Haarhoff, he joined the Town Guard on January 1, 1900, continuing to serve in that until February 15, 1900, but during that time he attended the office for a part of each day. From February 15 until May 1, 1900, the petitioner continued to attend to his duties in the office of Haarhoff and Hertog, and then his articles were transferred first to Hertog and afterwards to D. J. Haarhoff. Petitioner was the holder of the degree of Bachelor of Laws in the University of the Cape of Good Hope, and had duly satisfied examiners that he was qualified to be admitted as an attorney and notary of the Court.

He understood there was opposition by the Law Society on the ground that the cession of the articles had not been registered with the Registrar. There was a further affidavit by the petitioner in which he said that in May, 1900, he wrote a letter to the secretary of the Law Society asking whether a cession of articles required to be registered, and received a reply saying that it did not. He had further written to J. J. Michau and received a reply from the latter to the effect that registration of the cession was not required.

An affidavit made by Mr. Peters, secretary to the Incorporated Law Society, was filed, to the effect that he had merely been asked as to the necessity of registration of the cession in the books of the society, and he had not at any time informed applicant that the registration of the cession was not required by the Registrar of the Court, what he stated in the letter being that it was not necessary to have the cession of articles registered with the Law Society.

Mr. Burton (for the applicant): The applicant wishes to be admitted subject to the registration of the cession of the articles.

Mr. Searle, Q.C. (for the Incorporated Law Society): There are two matters in respect of which the papers in this case are not in order. The first is as to service, which has not been continuous in this case, inasmuch as there were really no articles at all between the middle of October, 1899, and May 1, 1900. Yet the applicant served in the office of Haarhoff and Hertog. With regard to that, I am instructed that the Law Society will not make any active opposition to the prayer being granted in respect of the defect of service, seeing that there are several cases in which the Court has in somewhat similar circumstances allowed the period to count as service. Only yesterday, the 31st October, 1900, however, the further question of the registration of the cession of articles was brought to the notice of the Law Society. The settled practice, supported by the rule of Court, is that all cessions of articles must be registered. The answer given by the secretary to the Law Society in reply to applicant's query as to registration is not misleading, Mr. Peters having only been asked if it was customary to register cession in the books of the society. He replied that it was not. He was not consulted upon the question as to whether registration with the Registrar of the Supreme Court was required.

[Solomon, J.: It is clear that it was a *bona fide* mistake on the applicant's part.]

Clearly; but the society is bound to bring the matter before the Court. I am instructed not to strenuously oppose the application if the Court thinks it can get over the rule in this case, and at the same time lay it down that the rule must be strictly observed in future. See *In re Brown* (Buch. 79, p. 73).

Mr. Burton in reply: Rule 213 is silent about the registration of ceded articles; only original articles require to be registered. There was clearly no necessity to register the cession of the articles.

[Solomon, J.: Does not a cession involve a new contract?]

The rule does not say so. If any mistake were made in not registering it was clearly *bona fide*, and was only made after strenuous efforts on the part of the applicant to arrive at the truth. The rule speaks of a "contract in writing," but that clearly refers to the original contract. The Court will not construe the rule too strictly, especially as in this case the circumstances, taken as a whole, are very exceptional. The applicant has used every endeavour to obtain a true interpretation of the rule.

[Maasdorp, J.: He did not write and ask the Registrar of the Court.]

No; because he was misled by the letter of the secretary of the Incorporated Law Society.

[Maasdorp, J.: You ask us to recognise as service the period served under no articles at all. There is a want of continuous service, but the Court will overlook that in this case.]

The contract can be registered to-day, and so the application for subsequent registration of the ceded contract is in order. This is the first time this matter has been before the Court for decision. It is an extremely hard case.

Maasdorp, J.: Rule 213 is very strict, and the Court is bound to observe it. It provides that every clerk articulated to an attorney shall serve for a certain period, that his articles shall be registered, and that such clerk shall not be entitled to admission as an attorney unless his contract has been registered. The question raised in this case is whether the original contract having been registered there is any rule specially applying to the registration of cession of these articles. Now when there is a cession of articles there is actually a new contract to serve with another attorney, and the said cession being a new contract, it cannot

be governed at all by what has been done under the original contract, and therefore such new contract would have to be registered. In the absence of such registration, the rule lays it down that no admission shall take place. In this case the applicant's counsel has urged that some consideration might be shown to the applicant by allowing the registration to take place now, the registration dating back to the period when the cession was made, but on reference to the latter part of the rule, it appears that if registration is neglected for a certain period such articles shall be considered to date only from the period of registration, and not from the time the articles were entered into. The Court is bound to give effect to that rule, and therefore cannot grant the request with regard to the registration of the cession. The applicant seems to be in another difficulty, and in that respect he may be assisted. Under the rule it is necessary that there should be three years' continuous service under articles duly registered. In this case service has been broken through some misapprehension on the part of the applicant. He served in the office under Mr. Michau for two years, but he then continued to serve in the office during the temporary absence of Mr. Michau, lasting for six months, and the Court will come to the assistance of the applicant by allowing him to serve for six months more under articles duly registered, and regard such service a continuous service, so that he will have to serve six months more only. The application therefore for admission as an attorney will be refused, but upon applicant serving six months more under a contract duly registered such six months will be considered continuous service, and so applicant will complete his period of service. The application for applicant's admission as a notary will be granted, that being in order, and leave will be given for the oath to be taken before the Registrar of the High Court at Kimberley.

Solomon and Lange, J.J., concurred.

[Applicants' Attorney, J. J. Michau; Attorneys for the Law Society, Messrs. Van Zyl and Buissinne.]

PROVISIONAL ROLL.

— —

CHANDLER V. C. G. LOMBARD, JUN.

Mr. P. S. Jones moved for provisional sentence on a mortgage bond for £80, together with interest at the rate of 6 per cent.

from July 1, 1899, and that the property specially hypothecated be declared executable. The bond had become due by reason of the non-payment of the interest.

Order granted and the property declared executable.

BOARD OF EXECUTORS V. J. C. VAN ZYL.

Mr. Buchanan moved for provisional sentence on a mortgage bond for £600, with interest from July 1, 1900, and that the property specially hypothecated be declared executable. The bond had become due by reason of the non-payment of interest.

Order granted and the property declared executable.

DUNN V. KOHLER.

Mr. P. S. Jones moved for provisional sentence on a mortgage bond for £1,300, together with interest from July 1, 1900, at the rate of 6 per cent., and also that the property specially hypothecated be declared executable. The bond had become due by reason of the non-payment of the interest.

Provisional sentence granted as prayed, and the property declared executable.

KNUPPEL V. STESSE.

Mr. Joubert moved for provisional sentence upon a mortgage bond for £150, with interest at the rate of 6 per cent. from January 1, 1900, and also that the property specially hypothecated be declared executable. The bond had become due by reason of the non-payment of the interest.

Provisional sentence granted as prayed, and the property declared executable.

BURGHERSDORP DUTCH REFORMED CHURCH
V. C. J. H. VAN DER WALT.

Mr. Close moved for provisional sentence upon a mortgage bond for £765, due by reason of the non-payment of interest, and also that the property specially hypothecated be declared executable.

Provisional sentence granted as prayed, and the property declared executable.

MAYERS V. B. SAPERSTEIN.

Mr. Buchanan moved for provisional sentence upon a promissory note for £100, balance of the purchase price of a share in a certain property, with interest and costs.

Granted.

WHITAKER V. STEWART. { 1900.
Nov. 1st.

Provisional sentence—Wife as surety
—*Senatus Consultum Velleianum*
and *Authentica si qua mulier*—
Consideration—Public trader.

Provisional sentence on a mortgage bond was refused when claimed by plaintiff against a married woman, who appears to have signed the mortgage bond without consideration, was not a public trader, had not renounced the benefits Senatus Consultum Velleianum and Authentica si qua mulier, and was merely a surety for her husband.

This was an application for provisional sentence on a mortgage bond for £200, made by the defendant in favour of the plaintiff. The defendant resides at Umtata, and the plaintiff carries on business at King William's Town. An affidavit by the defendant was filed, which set forth that the defendant's husband, Andrew Stewart, was indebted to the plaintiff in a large amount, and Whitaker refused to supply him with more goods unless he was secured. An agreement was then entered into with the plaintiff to supply further goods on the defendant's husband giving a general bond, covering the amount already owing and any amount that might be due for further goods to be supplied. On these conditions the defendant was induced to give a second mortgage on the property she possessed in Umtata as collateral security for £200. The goods were not supplied and the defendant urged that the bond should be cancelled, it being given under the distinct promise that the goods should be sent. This not having been done, the bond was invalidated. The defendant stated she had received no consideration for the passing of the bond, and also that she had not renounced the benefits *Senatus Consultum Velleianum* and *Authentica si qua mulier*, and was not a public trader.

There was a replying affidavit made by plaintiff's manager now at East London, but who in November, 1898, was manager of the business at King William's Town. He stated that he went to Umtata to investigate the defendant's business. Stock was taken by defendant, who appeared to take an active part in the management of the business. After the passing of the bond goods to the

value of £53 were forwarded, and further goods would have been forwarded, but other creditors were pressing, and it was found that the statement of the defendant's position was over-estimated. Stewart surrendered his estate as insolvent, and the plaintiff proved against the estate to the amount of his claim less the amount of £200.

Robert Heathcote also deposed that he had, as agent, drawn up the mortgage bond, and that defendant had undertaken to pass a bond for £200, and nothing was said at the time about there being any further supply of goods.

Mr. Schreiner, Q.C., moved.

Mr. Searle, Q.C., for the defendant: The defence set up is (a) that defendant has not renounced the benefits *Senatus Consultum Velleianum*, and *Authentica si qua mulier*; (b) she is not a public trader; and (c) she has received no consideration. *Oak v. Lumsden* (3 Juta, p. 144) is the leading case on this point. The indirect benefit she might receive by reason of the fact that her husband was assisted is not sufficient to deprive her of the second benefit. See also *Mackie, Dunn and Co. v. McMaster* (9 Juta, p. 212). One of the conditions of the bond was that more goods should be supplied. That this condition was fulfilled is denied.

Mr. Schreiner, Q.C., in reply: The defendant is not a surety. To say so is inconsistent with the terms of the bond. A surety requires a principal, and so if she were a surety, there would be no principal. The defendant is by the terms of the bond the principal. The cases referred to have nothing to do with this case; the benefits do not apply. The defendant has an interest in the husband's business. It is clear that there was no absence of consideration; goods to the value of £53 have been supplied. Even if there was no consideration, that exception should be taken in the principal case, *Bevern's Trustees v. Kretschmar* (11 S.C.R., 18). If there is a consideration the benefits do not apply. *Smuts, Louw and Co. v. Coetzee* (3 Buchanan, p. 55).

Maasdorp, J., in giving judgment, said: The plaintiff in this case asks for provisional sentence against defendant upon a bond made by her in his favour for the sum of £200. Now on a reference being made to the power of attorney and to the bond which has been put in, it appears to be clear that the defendant is indebted to the plaintiff in the sum of £200, and that she gave the bond as security for the payment of £200 due by her to the plaintiff, but when all the circumstances of the case are inquired into quite a

different complexion is put upon the matter. The evidence shows that the transaction was one of suretyship by which the defendant became a surety for her husband to the extent of £200. These are the circumstances as they appear on the affidavits. If there are other circumstances which the plaintiff can put before the Court, then he can go into the principal case, but as it stands at present the authorities are very clear that the defendant can take advantage of the exceptions allowed for her protection by law. Notwithstanding these, if it had been proved that she had received consideration she might have been liable in respect of such consideration, or if it had been proved that she was a public trader she might have been held liable, but she has never carried on business as a public trader, and she has received no consideration herself for the bond. Upon these grounds the plaintiff must fail, and provisional sentence must be refused with costs.

Solomon and Lange, J.J., concurred.

ILLIQUID ROLL.

SAYMANN V. H. GRADY.

Mr. Gardiner moved for judgment under Rule 329d for the sum of £50 deposited in respect of a certain contract which had been abandoned.

Granted.

MCGIVERN AND HENRY V. WRANGHAM.

Mr. Close moved for judgment under Rule 329d for £47 1s. for goods sold, with interest and costs of suit.

Granted.

BLANCKENBERG V. OWEN.

Mr. Buchanan moved under Rule 329 for judgment for the sum of £100.

The matter was allowed to stand over for a week, so that personal service might be effected, if possible, only service at the last-known place of residence having been made.

VAN DER BYL AND CO. V. DE VRIES.

Mr. S. Solomon moved for judgment under Rule 329d for the sum of £455-3s. 6d. for goods sold and delivered, with interest and costs of suit.

Granted.

TALJAARD V. JACOBS.

Mr. Molteno moved in terms of a summons b7 default that the defendant be compelled to take transfer of certain property to carry out a certain contract of purchase and sale.

Granted.

FORREST V. LUCAS AND ANOTHER.

This was an application for judgment under Rule 329d for £45 for rent of certain land at Somerset West, and costs of suit.

Granted.

REHABILITATIONS.

Mr. Howel Jones moved for the rehabilitation of the insolvent estate of Henry John Stockdale.

Granted.

Mr. Molteno made a similar application in respect of Raphael Saul Levy.

Granted.

Mr. Close moved for the rehabilitation of the insolvent estate of William Stephen Webber.

It appeared that the insolvent had kept no books; that the trustees doubted whether he had made a full and fair surrender. Certain memoranda of his accounts had been destroyed, and were not available for the trustees. The sequestration took place in 1895.

The Court refused the application, granting the insolvent leave to apply again in six months' time.

GENERAL MOTIONS

MACININDONA V. MACININDONA.

This was an action for restitution of conjugal rights.

Respondent was in default.

Mr. Buchanan, who represented the plaintiff, applied for a postponement till Thursday next, as the witnesses had not arrived.

Granted.

BROPHIE V. BROPHIE.

This was an action for divorce brought by Mrs. Lena Louisa Brophie against her husband, Charles Hy. Brophie.

Mr. Buchanan appeared for the plaintiff, and said that it was an action for a divorce on the ground of respondent's adultery. The parties were married at

Salt River on the 2nd of January, 1895. Adultery was alleged to have been committed on divers dates during 1899 and 1900 with Minnie Joseus at Woodstock. The petitioner applied for the custody of the two surviving children (girls), aged three and five, with a reasonable amount for their maintenance.

Respondent was in default.

Formal evidence was given as to the marriage. The petitioner and Minnie Joseus were called in proof of the charge of adultery. The respondent's wages were stated to be £12 a month.

The Court granted a divorce, petitioner to have the custody of the children, and respondent to pay £1 a month for the maintenance of each child until sixteen years of age.

WILCOCKS V. WILCOCKS.

This was an action for restitution of conjugal rights, and failing that, divorce.

Mr. Buchanan was for the plaintiff; respondent was in default.

The plaintiff, Mrs. Annie Dawson Wilcocks, said she was married to the respondent, A. H. Dawson Wilcocks, on the 2nd November, 1896, at Uitenhage. There were two boys born of the marriage. In May, 1899, he left her at Imvani, where he was employed as the manager of an hotel, and went to England. He left his debts unpaid, and told witness that he would arrange for her passage to England a fortnight later. He, however, did not do so. In England he had been sentenced in August last year to six months' imprisonment for theft by false pretences, and was also convicted of being found carrying a loaded revolver.

An order for restitution was granted, restitution to be made on the 31st January next, failing which the respondent to show cause, on the 28th February, why a decree of divorce should not be granted.

HAUSSMANN V. HAUSSMANN. { 1900.
Nov. 1st.

Husband and wife—Divorce—Costs.

The Court refused to order a luncheon for the defendant in the Cape Town High Court, who was in receipt of 5s. per diem (there being no evidence that he had any other means) to contribute a sum of money to enable his wife to institute an action against him for divorce.

Mr. Buchanan moved for an order on respondent to contribute to the support of the applicant pending the result of the action for divorce to be instituted by her, and to pay over a sum of money towards applicant's costs. Mr. Buchanan said that the respondent, who was a lance-corporal in the Cape Town Highlanders, had filed an affidavit, but did not appear to bear it out. In this affidavit he admitted that he was earning 5s. a day, which was free of board and lodging. He had not supported her and her two children since November, 1897.

[Maasdorp, J.: The Court will not make an order of there is no prospect of its being complied with.]

Mr. Buchanan: It is not unreasonable to suggest that the respondent will be able to pay £25.

Maasdorp, J.: If the respondent's contribution towards the cost of the action were less than £20 or £25, it will be practically nothing at all. The question for the Court to decide is whether on the evidence of his means before it, we will be justified in ordering him to pay such an amount, and we are of opinion that we cannot make such an order. As regards the maintenance, we have it that the action will be heard in a short time. There is nothing before the Court to show that he can contribute any substantial amount. The application will be refused.

LYNCH V. VERSTER. § 1900.
(Nov. 1st.

Evidence - Conflict—Interdict.

Where in an application for an interdict, there was such a conflict of evidence, that it was impossible to determine which side was speaking the truth, the Court refused the application, ordered an action to be instituted, and allowed the notice of motion to stand as the summons.

This was an application on notice calling on the respondent to show cause why he should not be interdicted from using, obstructing, and damaging a certain lane situate in Cape Town and known as Keerom-lane. The applicant alleged that the lane in question belonged to him, and had been obstructed habitually by respondent, who made a practice of allowing his horses and carts to remain there throughout a great portion

of the day, and also of washing the said horses and carts there. This, he alleged, caused a great deal of damage to the lane in question, besides causing great inconvenience and annoyance to the applicant and his tenants.

The respondent said, in answer to these allegations, that the first intimation he had had that any objection was raised to his washing his horses and carts in the lane was when a letter was written to him shortly before the hearing of this application by the applicant's attorney. That since the receipt of that letter he had immediately desisted from washing his horses and carts in the lane, and had discontinued to allow them to remain standing there.

There was a further application for an order restraining respondent from making use of a certain 3-foot passage, indicated on a plan put in. The respondent had used this passage for the purpose of carrying along it manure from the respondent's stables, and had also made use of it as a means of access for his horses and mules to his stables.

The respondent, in reply to this, claimed a right of way along this passage. He said that this passage afforded the only means of access to the stables. There was a possibility of obtaining an entrance to his stables through the cart-shed, but this could not always be used, as it was more often than not full of carts. He contended that no nuisance was caused by leading his horses through this passage and carrying manure along it. He also stated that in this, as in the matter of the lane, no objection had been made to his using it until he received the notice of motion.

Sir Henry Juta, Q.C., appeared for the applicant, and stated that there were a number of answering affidavits, which could not be filed in time, owing to the short time available between the receipt of copies of the respondent's affidavits and the time within which the affidavits would be received by the Registrar.

[Maasdorp, J.: I suppose there are affidavits in contradiction of the statements made by the respondent?]

Yes.

[Maasdorp, J.: How is it possible for the Court to decide a matter of this kind on affidavit where the statements are so conflicting?]

Mr. Schreiner, Q.C., appeared for the respondent.

After hearing counsel,

Maasdorp, J.: In this case there is a direct conflict of evidence. If the

statements made by the applicant in his affidavit are true he will be entitled to an interdict at once. If the obstructions continued notwithstanding his remonstrance, he would have been entitled to an interdict at once, but the statements of the applicant are contradicted by the affidavits of the respondent. It is impossible for the Court to decide on which side the truth lies, and under the circumstances the interdict will be refused. As to the question of costs, the Court thinks that ought to stand over until an action has been brought, because the interdict has been merely refused on the ground that there is such a strong conflict of evidence. It might be that the statement of the applicant is correct, and would entitle him to an interdict. The application will be refused, the question of costs to stand over, and the applicant to bring an action forthwith. If the applicant does not proceed with an action forthwith the respondent will be entitled to his costs in this matter.

Sir Henry Juta, Q.C.: Will the notice of motion be allowed to stand as a summons?
[Maasdorp, J.: Yes.]

SUPREME COURT

[Before the Hon. Mr. Justice MAASDORP,
the Hon. Mr. Justice SOLOMON, and the
Hon. Mr. Justice LANGE.]

WAR DEPARTMENT V. MCKENZIE & CO. { 1900.
ZIE AND CO. { Nov. 2nd.

This was an application on notice of motion calling upon the respondents to deliver up to the Base Commandant, who was the applicant, certain goods which had been stored in the premises of the respondents, in terms of an agreement entered into between the parties in February, 1900. The goods so stored and taken charge of by the respondents fell under three classes, to wit: (1) Ordnance stores proper; (2) goods belonging to the various battalions of Imperial Yeomanry throughout the country; (3) goods belonging to the officers of the Imperial Yeomanry. According to the agreement, McKenzie and Co. were entitled to £40 rent per month, which was later increased to £50 per month. There was a claim of £750 by McKenzie and Co. for a

certain amount of rent for the store and certain charges in connection with the goods. These latter charges were claimable from the officers, but the Base Officer was prepared to take the liability for those charges, provided the goods were delivered to him. Below coming into court, however, the parties had agreed that the matters in dispute should be settled by action, and had accordingly agreed to a preliminary order in the following terms:

That the goods be forthwith handed up; that £1,000 be paid into the hands of Messrs. Van Zyl and Buissinne in trust; that Colonel Graham, the Base Commandant of the Imperial Yeomanry, be personally liable to be sued on behalf of all concerned for all charges claimed by Messrs. McKenzie and Co. in connection with the goods and their storage, Colonel Graham to be at liberty to make counter-claims on behalf of all concerned; and that respondents bring their action forthwith, costs to be costs in the cause.

Mr. Innes, Q.C., A.G. (with him Mr. Ward) for the applicant.

Sir Henry Juta, Q.C., appeared on behalf of the respondents, and consented to an order being granted on the above terms.

Order granted in terms of the consent paper.

STEENKAMP V. STEENKAMP.

This was an application in connection with an action to be instituted by the wife for restitution of conjugal rights.

Mr. Schreiner, Q.C., appeared for the applicant, and asked that service might be effected by the publication in a paper in Holland, in case it were found impossible to effect personal service. He also asked that the attachment of certain property be confirmed.

An order was granted as prayed, personal service to be effected if possible, failing which, one publication in a newspaper in Holland. The citation to be returnable on January 2. The attachment was formally confirmed.

CLINGEN V. CLINGEN.

This was an action for restitution of conjugal rights, failing which for divorce, forfeiture of benefits in community of marriage, and custody of the minor children of the marriage.

Mr. Gardiner appeared on behalf of the applicant; the respondent was in default.

F. H. le Sueur, clerk in the Colonial Office in charge of the marriage registers in the Colonial Office, produced the registers and the certificate of marriage of the applicant and the respondent.

Mrs. Ellen J. Clingen deposed to her marriage to respondent in August, 1884. In 1894 he left her, and had not contributed to her support since May, 1899. There were three children of the marriage.

The Court granted an order calling upon respondent to restore to plaintiff her conjugal rights by January 31, 1901, failing which to show cause on February 15 why a decree of divorce should not be granted, with forfeiture of the benefits of community of marriage, applicant to have the custody of minor children.

VAN NIEKERK'S TRUSTEE V. } 1900.
VAN NIEKERK. } Nov. 2nd.
 " 12th.
 " 27th.

Husband and wife—*Donatio*—Insolvent—Creditors.

Creditors of an insolvent held entitled to a sum of £250 which the Court found on the evidence had been given by the insolvent to the defendant, his wife, without consideration.

The fact that the defendant, who had obtained a decree of judicial separation, returned to live and cohabit with her husband was not a sufficient consideration to support the gift as against the claim of the creditors.

The plaintiff's declaration alleged that the plaintiff was E. R. Syfret, trustee in the insolvent estate of M. C. van Niekerk, and was suing the insolvent's wife, who was married to the insolvent by ante-nuptial contract on 17th November, 1890. The estate of Van Niekerk was sequestered on 29th September, 1899. That the insolvent carried on business as a butcher at Claremont, and that when he married the defendant she was possessed of no property. Since the marriage, however, the insolvent had handed over to her sums of money out of the said business, and of these sums the trustee could obtain no account. That on May 2, 1898, the defendant purchased some land at Newlands from one J. F. Heyns

for £180, transfer of which was passed to her on June 28, 1898; again, that on May 4, 1899, she purchased another piece of land from Frances J. Beeby for £630, and had obtained transfer of this on June 2, 1899, when she passed a bond for £1,250 in favour of the estate of W. Freeman, mortgaging both the properties. That houses were erected on these properties, the costs and expenses in connection with the purchase of the land, and the erection of the houses being borne by the insolvent. That at the time of the above-mentioned purchases the insolvent's liabilities exceeded his assets, and the landed property was transferred into the defendant's name fraudulently and with intent to defeat his creditors.

The plaintiff claimed:

1. A declaration that the aforesaid properties belonged to the insolvent estate.

2. An order on the defendant to pass transfer of these properties to the plaintiff, or an order that the properties be sold by public auction, and the balance of the purchase price be paid to the plaintiff after satisfying the bond.

3. An order on the defendant to frame an account of all moneys received by her from the insolvent between January 1, 1895, and September 1, 1899, and to pay over such sums as may be due on the said account.

As an alternative claim, the plaintiff stated that the properties were purchased and the houses erected with money belonging to the insolvent, and given by him to the defendant (his wife) without just and valuable consideration, and in pursuance of a fraudulent and collusive arrangement between the insolvent and defendant to defeat the just claims of the insolvent's creditors, and that the gift was null and void as against the creditors. He claimed as before.

The plea denied that at the time of the marriage the defendant had no money of her own, and that her husband, the insolvent, made any advances to her, and consequently asserted that no account between the insolvent and the defendant was due. The defendant further stated that she had no knowledge that her husband's liabilities exceeded his assets, and that, whether that was so or not, it was immaterial to her, because the properties were purchased and the houses erected with her own private money. Therefore she claims that the plaintiff's claim be dismissed.

Issue was joined by the plaintiff in his replication.

Mr. Searle, Q.C. (with him Mr. Close), appeared for the plaintiff.

Mr. Buchanan appeared for the defendant.

Robert Edward Fall stated that there were only two creditors who had proved claims against the estate, which had been voluntarily surrendered after these two creditors had taken out judgments for their claims, which were for £99 9s. 9d. and £123 18s. 6d., making, together with costs, £236 9s. 2d. The assets amounted to £9 13s. 1d.; there was also a debt on a promissory note for £40 due to the estate, but the debtor could not be found. One of the creditors had been pressing for his money since 1895. The insolvent sold some property at Claremont in March, 1898, for £1,550, and after paying off a bond for £750, received the balance. Soon after this the property at Newlands was purchased, in the defendant's name, for £180. Two houses had been since erected on the ground, and the land and houses were worth about £1,200. A bond for £400 was given on the property, but in June, 1899, that was cancelled and another bond passed on this and property at Rondebosch for £1,200. This latter property was bought in June, 1899, and was now, in witness's opinion, worth about £750. A further bond of £75 was passed on both properties, and if these properties were sold, there would be ample left after the bonds had been paid for payment of the creditors.

Further evidence was led to show that the defendant had no money and property, except some furniture, valued at about £75, in 1897. That in 1898 the insolvent had purchased a quantity of building material to the value of £254 from a builder, Withinshaw, and that in the following year the defendant had also purchased some material, which was used in the erection of the houses. A mason deposed to having been employed on this building, and received orders and payment from both the insolvent and the defendant. The account for the building material had been rendered to the insolvent, but in the books of the builder the money was debited to the defendant.

Johan F. Heyns deposed to having been approached by the insolvent with regard to the sale of the land on May 2, and thought that the insolvent was the purchaser of the land, the property having been paid for by money which the insolvent said he had over from the sale of certain property in Claremont. Only twelve months after the sale did he find out that the defendant had bought the land. In cross-examination, he admitted that he had signed the declaration of seller to the defendant, but did not know what was in the document.

Mrs. Van Niekerk, the defendant, stated that she was married to her husband in 1890. Before their marriage witness had been engaged for six years at Stuttaford's as a milliner. She received £5 per month, and as she lived with her aunt and did not pay for board and lodging, she had saved about £100 before she was married. She also had some furniture she had inherited from her uncle, and some other furniture, to the value of about £140, which her husband had given her two months before their marriage. Before their marriage they entered into an antenuptial contract. Witness remembered her husband buying a property about a year after their marriage. Witness lent him a £100 to go towards that purchase with the understanding that she was to get half the profits when he sold it. Her husband put in a £100 of his own, and the rest of the money was raised on mortgage. Disagreements arose between witness and her husband in 1896, and early in 1897 she left him, and carried on a millinery, drapery, and general business in her own name. She carried on the business for about fourteen months. She sold a portion of her furniture for about £70, and that money she put into the business. She also received assistance from her brother-in-law. She returned to her husband in March, 1898, and two months before that she began selling off her stock, disposing of what remained by public auction. She made from £10 to £15 profit per month, and when she finished selling off her stock she had £225. She told her husband she would not go back to him unless he gave her half the profits of the sale of the property in accordance with the agreement made. The property was sold about the time she went back. He gave her £300 as her share of the profits. She intended to buy a cottage with her money, and ultimately came into communication with Mr. Haines, who came personally to see her about the sale of his land. It was not true that her husband bought the property, and then made it over to her. Her husband bought the property for her. She gave him the money to do so. Witness had then over £500 of her own, and she raised £400 more on mortgage, and built these houses. Her husband did a lot of work to the building, and supervised it on witness's account. She had often given instructions to the mason, Gilfillan Adams, on the work. As to Withinshaw's account, she gave her husband the money to pay it.

Cross-examined: In June, 1896, witness presented a petition to the Court asking for

a sum of £35 from her husband in order to prosecute her suit for judicial separation against him. She did not in that mention the £100 she lent to her husband or the arrangement about a half share in the profits belonging to her. She did not mention it because she had no proof, and she knew he would deny it. Witness never kept a banking account, but had always kept the money in her cash-box.

The insolvent and the defendant's aunt corroborated the defendant's statements, and the attorney who drew up the declarations of purchaser and seller stated that the declarations were read to Heyns and the insolvent when the land was sold in May, 1898.

Mr. Searle, Q.C., was not called upon.

Mr. Buchanan was heard on the question of the validity of the handing over of the £300 by the insolvent to the defendant.

Maasdorp, J.: For the purposes of this case it will only be necessary to make reference to that paragraph of the declaration in which it is alleged that certain properties were bought and certain houses erected with money which the insolvent gave his wife without just and valuable consideration. The paragraph proceeds further to say that that was done in pursuance of a fraudulent and collusive arrangement between the insolvent and the defendant to defeat the just claims of the insolvent's creditors, but for the purposes of this case I do not think it will be necessary for the Court to decide whether any transaction that took place between the insolvent and his wife was fraudulent. There is clear authority for saying that if during marriage the husband gives a sum of money or other property to his wife, such money or such property cannot vest in the wife as her property, and the husband can reclaim it at any time, or in case of insolvency the creditors can reclaim it from his wife. The authorities go so far as to show that even if delivery has been made of the property, it does not vest in the wife. The question that now arises is whether during the marriage the insolvent gave to his wife any sum of money without receiving consideration for that money. The plaintiff's declaration states that all moneys with which the purchase price of the land was paid was given to the wife by her husband, and that consequently the plaintiff is entitled to reclaim that property or all moneys that have been invested in it. The plaintiff has to prove his case in that respect; he has to prove clearly that the money was given by the husband to the wife. There is

evidence that this property was bought by the insolvent, and that the insolvent paid from time to time certain sums of money in respect of this property, and in respect of improvements done to the property, but what those moneys were or what the amounts were does not seem to be clear, nor is it clearly proved that the money so paid was his property, and not his wife's. Relying upon the documents in the case, it is clear that all through the defendant was treated as the purchaser, the accounts being sent in to her and the receipts being given in her name. With regard to the £300 received by defendant from her husband, however, the burden of proof is thrown upon her to show that there she gave consideration for the £300. The defendant states that the money was really hers under a certain agreement by which she advanced to her husband some money for the purchase of a property some time after their marriage, on the understanding that she was to receive one-half of the profits of the sale of that property when that took place, but in view of the proceedings for divorce, in connection with which a separation was granted, I am of opinion that there was no such arrangement, the wife having in the proceedings in that case made no claim for the half of the profits, or prospective profits, from the sale of that property, her claim only mentioning some £55 which she alleged she had advanced him. Now it has been said that after the parties had been separated the wife refused to return to her husband unless he gave her the £300. It is not now necessary to consider the question as to how far such a return was consideration. I go so far as to say I doubt whether such a return was any consideration at all, because the wife said she refused to return unless the husband paid her the sums due on that agreement, and as she has failed to prove that agreement under all the circumstances of the case I have come to the conclusion that there was no consideration for that £300, which therefore remained the property of the husband, and can now be reclaimed by the husband's creditors on his insolvency. It appears, however, that the husband was indebted to the wife in the sum of some £50, and under the circumstances I think that judgment should be for the plaintiffs for the sum of £250, which will more than cover the debts in the estate and costs of liquidation, and whatever is over the insolvent himself or his wife will be entitled to. For the present the Court finds that the sum of £250 was given by the husband to the wife without consideration, and

that £250 the plaintiff will be entitled to recover. Judgment will therefore be given in these terms, with costs. The plaintiff will pay the costs occasioned by the postponement from November 12, which was caused by one of plaintiff's witnesses being unable to attend that day.

Solomon, J., concurred.

[Plaintiff's Attorney, Gus Trollip; Defendant's Attorneys, Messrs. Dempers and Van Ryneveld.]

CRAFFORD V. DU TOIT. { 1900.
Nov. 2nd.
" 16th.

De lunatico inquirendo.

These were proceedings by way of a summons issued by Elsie Magdalena Crafford (born Du Toit) calling upon Pieter Cornelis du Toit and his *curator ad litem* to show cause why a curator should not be appointed to Du Toit for the purpose of transferring certain property, and more particularly to protect his interests generally, it being alleged that he was of weak mind, and unable to manage his own affairs. The parties were two of three children of the late P. C. du Toit, who, with his wife, had made a mutual will leaving the bulk of the immovable property, valued at some £20,000, to the three children, burdened with a strict *fidei commissum*, binding to the sixth generation, and bequeathing to the defendant certain erven situate in the village of Ladismith, for the sum of £300. The movable property, valued at £10,000, had not been disposed of by the survivor, to whom it had been left absolutely, according to the terms of the mutual will, and it was specially with regard to the defendants' share of this that the plaintiff thought it necessary to have a curator appointed.

Mr. Schreiner, Q.C. (with him Mr. Joubert), appeared for the plaintiff; Mr. Molteno appeared for the defendant.

Mr. Schreiner, Q.C.: I understand that the defendant and his *curator ad litem* are not present. I would urge that it is absolutely necessary that they should be present. There are, however, several witnesses present whose evidence can be taken, and then the Court can decide whether a commission should issue to take evidence of certain medical men on behalf of the defendant, for which I understand my learned friend is going to apply.

The evidence of the plaintiff, the executrix, and sister of the defendant, went to

show that the defendant, who was 27 years of age, was unlike an ordinary person in his manners and actions, had never done any farming, although he always lived on a farm, used to laugh on the most solemn occasions, and *vice versa*, had a very violent temper, and was never allowed much money by his parents. When his mother died he showed no natural grief, but made disturbances about money. He wanted to marry his niece, a little girl of thirteen, and evinced great grief when told that he could not. He was strongly addicted to drink.

In the codicil to the mutual will the testators had expressed a wish that the defendant should be placed under someone's protection. His mother had also verbally expressed a wish that the plaintiff should look after the defendant. A sister of the defendant had died in an unsound state of mind, as did his grandmother.

Defendant's brother stated that the defendant used to eat forage, and had been very carefully watched by his father and mother. He had also assaulted his mother and cursed his father without cause.

The further hearing of the case was then postponed until November 16, the Court refusing to grant a commission to take the evidence of the defendant and two medical practitioners, stating that it was necessary for the defendant and his *curator ad litem* to appear personally.

Postea (November 16).

Mr. Schreiner, Q.C., mentioned to the Court before closing his case that the plaintiff had endeavoured to have the defendant examined by one Dr. Dorner, but the defendant's legal advisers had refused to allow him to submit to this.

The defendant appeared, and stated that the statements that he was a drunkard were false, that he thoroughly understood farming, and was quite fit and capable of undertaking the management of a farm. He was a registered voter, and had voted at the last election, was admitted as a member of the Dutch Reformed Church, and had been entrusted by his father during his lifetime with the supervision of the farm. He denied all the allegations made by the plaintiff, and in answer to the Court, explained how he intended managing his own affairs, and generally showed a fair knowledge of current family matters.

Medical evidence was led to show that the defendant was in possession of his intellectual faculties and a shrewd man of business. That he had leased certain property, and

when discussing the position with his tenant, showed a thorough grasp of the situation.

After hearing Mr. Schreiner, and without calling on Mr. Molteno,

Maasdorp, J., said: The summons calls upon the defendant to show cause why he should not by the judgment of the Court be found insane, and a curator appointed over him. The summons was issued at the instance of the defendant's sister, who as his near relative, brought the proceedings into court ostensibly—it might be in reality—for the protection of the defendant's interests. She has a perfect right to believe that it is necessary to protect her brother in this way, and that she has good grounds for bringing the matter before the Court. After hearing the evidence, it was no longer urged by counsel for the plaintiff that, in the terms of the summons, defendant should be declared of unsound mind or any curator appointed to take care of his person. But it is still insisted that there is sufficient evidence to prove that he is unable to manage his affairs, and that a curator should be appointed to manage his estate. Cases have been before the Court in which the Court has not found that it was absolutely necessary to declare a person insane, but in which if there were sufficient grounds for coming to the conclusion that the alleged lunatic was not capable of managing his affairs, and a curator has been appointed in his interests to administer his affairs. The Court therefore has to find whether, in this case, the defendant is, through some weakness or feebleness of mind, or imbecility, incapable of managing his own affairs. Such incapability can not be based on the ground that the defendant has not sufficient business capacity to look after an estate of value. Upon such grounds alone the Court will not declare a person incapable of managing his affairs. It must be on the ground of weakness of intellect. In this case we have had evidence for the plaintiff, which placed before the Court a certain state of affairs which seemed to point to there being something wrong with the mental condition of the defendant. The witnesses for the plaintiff consisted mainly of relations and of the two attorneys who acted for her in this matter, and it seems from the evidence—if it is true—that the defendant has been treated by his parents as if he had never been able to take care of himself, and had been kept under their

immediate control and supervision. It is also said that whenever he had possession of a small sum of money he immediately invested it in drink, and that this habit had grown upon him. It has been said that he proposed marriage to his niece; that he was incapable of understanding that this was made impossible by the law, and was reduced to a state of grief because of the objection. If that was clearly proved, it would be a certain sign that he was of weak intellect. Other instances have been given the Court in support of the allegation that he is a man of unsound mind. The question is whether there in any change in the aspect of the case made by the evidence for the defence. If it were true that the defendant had contracted habits of drunkenness, the knowledge would not be confined to members of the family, but would be known outside. Now we have had evidence on this point from a number of witnesses of undoubted respectability, and the utmost that was said was that the defendant been seen drunk on two occasions. It has been said by a number of other witnesses that the defendant is a man of the greatest sobriety. One very important circumstance is the appearance of the defendant himself. At one stage of the proceedings we had reason to think that there was a reason why the defendant was not allowed to come and give evidence in the first instance. He has now been put in the witness-box, and although it might have at first appeared that when he entered the box he had no fixed idea of what he was going to say, that doubt has been altogether dispelled when the cross-examination took place. He then seemed to have a clear recollection of transactions that took place some considerable time ago, and when certain puzzling questions were put to him, he took some time to reflect and consider before expressing an opinion, and generally showed that he had fair reasoning power. There is proof that the evidence for the plaintiff was certainly exaggerated, if not wholly untrue. I cannot conceive that defendant was a man of the habits they had described, and the evidence for the plaintiff is tainted in every respect by exaggeration. It appears to me that they have moved in this matter with too much zeal. The only medical evidence led in the case is that of Dr. Moss, which is in favour of the view that the man is not suffering from such weakness of mind as to render him incapable of managing his own affairs. The father in

the will took no steps to protect the defendant in the way that a person of weak mind should be protected, but in the codicil there seems to be some proof that the father thought that the son should be under the protection of someone. I will say nothing as to that transaction, but if that were an expression of opinion, it was given at a time when the father was not perhaps himself in a state of mind to give assistance in discovering the real mental condition of his son. I think that the evidence for the defence has explained away that given for the plaintiff, and that it is so positive that the Court must accept it as conclusive that the defendant, so far as his state of mind is concerned, is able to manage his affairs. The Court will therefore refuse the decree, and give judgment for the defendant.

Solomon, J., concurred.

The costs were ordered to be paid out of the estate.

[Plaintiff's Attorney, Mr. C. W. Herold;
Defendant's Attorneys, Messrs. Sauer and Standen.]

CAPE OF GOOD HOPE PERMANENT BUILDING, LAND AND INVESTMENT SOCIETY V. THE BANK OF AFRICA. { 1900,
Nov. 7th.
" 10th.
" 27th.
Dec. 5th.

Building Society—Bank—Misappropriation by secretary—Defective title—Holder in due course—Notice and knowledge—Act 19 of 1893, section 27.

H., the secretary of the plaintiff society, misappropriated the proceeds of certain cheques drawn by customers of the society, some being in favour of the society and others in favour of the secretary of the society. These cheques were deposited by him to the credit of his private account with the defendant bank. The majority of the cheques were endorsed by H. himself as secretary before being so deposited to the credit of his private account, but three of them were endorsed during his absence by M., the acting secretary, and by him deposited to the credit of H.'s account with the defendant bank. Some of the cheques were upon the defendant

bank, and some upon other banks, but it was admitted that the proceeds of them all came into the hands of the defendant bank, and were drawn by H. in the usual course in his individual capacity. The liquidators of the society sought to recover the proceeds of the cheques on the ground that the bank, when it received the cheques, had notice that H. and M. were secretary and acting secretary respectively of the society, and that there was no title in H. to any of the cheques in his private capacity or in M. as to the cheques deposited by him.

The defence was, in substance, that the defendant bank became the holder in due course of the cheques within the meaning of the 27th section of Act 19 of 1893, having taken the cheques in good faith, and for value and without notice of any defect in the title of the persons negotiating the same, and that it was therefore not liable.

Held, that this was a good defence.

This was an action for the recovery of £7,614 13s. 7d.

The plaintiffs' declaration was as follows:

1. The plaintiffs are George William Steytler and Harry Gibson, who sue in their capacity as the official liquidators of the Cape of Good Hope Permanent Building, Land, and Investment Society. The defendant is a joint stock company, duly registered with limited liability, and lawfully carrying on the business of bankers at Cape Town and elsewhere.

2. The said society was a registered association of persons subscribing to a common fund to be employed in making advances to members upon security of landed property, receiving money on deposit at interest, and doing the business of a building society generally.

3. The said society carried on business as aforesaid until on or about the 21st July, 1898, but was thereafter placed under liquidation by this Honourable Court, the plaintiffs being appointed liquidators.

4. The affairs of the said society were conducted by a Board of Management appointed under its rules, and during the years 1896, 1897, and 1898, one William John Hancock was its secretary, until April, 1898, when one John William Moore was appointed to act as secretary, and so acted until July, 1898.

5. The said Hancock and thereafter the said Moore from time to time during the aforesaid years received on behalf of the said society divers cheques drawn in favour of such society or its secretary on the Standard Bank, the African Banking Corporation, and the defendant bank respectively, which cheques became and were the property of such society, which was entitled to the proceeds thereof as their lawful property, and it became and was the duty of the said Hancock and Moore respectively to deposit the amount of the said cheques to the credit of the said society in account with the Standard Bank.

6. During the said years the said Standard Bank, and no other banking institution, was and acted as the society's bankers, as the defendant well knew. During the same years the defendant acted as bankers to the said Hancock.

7. The plaintiffs annex hereto a memorandum marked "A," setting forth certain cheques so received by the said Hancock and Moore, the exhibit number of each cheque, its date, the name of its drawer and of the person on whose account it was received, the bank on which it was drawn, the endorsement, the date of the paid-in slip, and the amount in each case.

8. The aforesaid cheques, other than those numbered 116, 165, and 166, were in the custody of the said Hancock on behalf of the said society, and were by him feloniously stolen or otherwise fraudulently misappropriated; and similarly the cheques numbered 116, 165, and 166 were so stolen or misappropriated by the said Moore, in whose custody they were on behalf of the said society.

9. The said cheques were in each case, wrongfully and fraudulently, from time to time deposited with the defendant bank by the said Hancock and the said Moore respectively, with the direction in each case, wrongfully and fraudulently given to the said bank, to credit the private account of the said Hancock with the amount of such cheques.

10. The said bank, when it so received the said cheques as aforesaid, had notice that the said Hancock and the said Moore were secretary or acting secretary respectively of the

said society, and that there was no title in the said Hancock to any of the said cheques in his private capacity, or in the said Moore as to the three cheques aforesaid, and it thereupon became and was the duty of such bank, upon receiving such direction, to make inquiry as to such title; but, not regarding its duty in that behalf, the defendant negligently and wrongfully and without any such inquiry received and held the said cheques, and acted on the directions given by the said Hancock and Moore respectively, and placed to the credit of the said Hancock's private account the amounts of the said cheques, and recovered the proceeds thereof from the several drawers.

11. It became and was the duty of the defendant to hold for account of and to pay over to the said society the amounts so received as money received to and for the use of such society from the several drawers of the said cheques; but the defendant at no time before the liquidation of the said society paid over to it any portion of the said amounts.

12. By reason of the premises the plaintiffs are entitled to claim payment by the defendant of the said amount, that is to say the sum of £7,614 13s. 7d., together with interest *a tempore morae*, but though all things have happened, all times elapsed, and all conditions been fulfilled, the defendant refuses to pay the said sum or any part thereof.

Wherefore the plaintiffs pray: (a) Judgment for the sum of £7,614 13s. 7d., together with interest *a tempore morae*; (b) alternative relief; (c) costs of suit.

13. In the alternative, the plaintiffs crave leave to refer to the several matters and things hereinbefore set forth.

14. By the failure and neglect of the defendant to make such inquiry as aforesaid, and by their wrongfully and unlawfully placing the amounts of the said cheques to the credit of the private account of the said Hancock, the defendant has caused damage to the said society, and to the plaintiffs as liquidators thereof, in the sum of £7,614 13s. 7d., which sum, together with interest *a tempore morae*, the plaintiffs are entitled to recover from the defendant. Wherefore the plaintiffs again as above pray for judgment with costs.

DEFENDANT'S PLEA.

For a plea to the declaration the defendant Bank says:

1. It admits the first four paragraphs.

2. With regard to paragraph 5, it does not admit the same, but refers this Honourable Court to such proof of the statements therein as plaintiffs may produce.

3. As to paragraph 6, it is and is not aware that the Standard Bank and no other banking institution acted as the society's bankers; on the contrary, the defendant bank acted as such during portion of the year 1898. It admits that it acted as banker to the said Hancock.

4. As to paragraphs 7 and 8, it was and is unaware of the manner in which the cheques set forth in the annexure to the declaration were received by the said Hancock and Moore, or that the said cheques were stolen or misappropriated as alleged, and it refers this Honourable Court to such proof thereof as plaintiffs may produce.

5. As to paragraph 9, it admits that the said cheques were from time to time deposited with it by the said Hancock and Moore with the direction to credit the private account of the said Hancock with the amount thereof. It denies the other allegations therein.

6. As to paragraph 10, it admits that it was aware that the said Hancock and the said Moore were secretary and acting secretary respectively of the said society, and that it acted on the directions given by them with regard to the said cheques, and placed the amounts thereof to the credit of the said Hancock's private account, and recovered the proceeds thereof from the several drawers. It says that in so doing it acted in accordance with the practice of bankers, and in the ordinary course of business, and without negligence, and it denies all the other allegations in the said paragraph.

7. As to paragraph 11, it admits that it did not at any time before the liquidation of the said society pay over to the said society any portion of the amounts of the said cheques. It denies all the other allegations in the said paragraph, and says that it was unaware that the funds paid in to the credit of the said Hancock or any portion of them belonged to the said society.

8. As to paragraph 12, it admits that it refuses to pay the plaintiffs the sum of £7,614 13s 7d., or any portion thereof, and denies the other allegations in the said paragraph.

Wherefore it prays that the plaintiffs' claim may be dismissed with costs.

And for a plea to the alternative claim the defendant bank says:

9. As to paragraph 13, it craves leave to refer to the matters above pleaded.

10. As to paragraph 14, it denies that it was guilty of any failure or neglect of duty or of any wrongful act as alleged, or that the plaintiffs have sustained any damage by reason of any act or neglect of it, the defendant bank, and denies the allegations in the said paragraph. Wherefore it again prays that the plaintiffs' claim may be dismissed with costs.

As an amendment to the plea, the defendant bank put in the following alternative plea:

1. It craves leave to refer to the allegations in paragraphs 1, 2, 3, and 4 of the above plea.

2. It admits that the said cheques were from time to time paid in by the said Hancock and Moore to the credit of the said Hancock's private account, but it denies the other allegations in paragraph 9.

3. It admits that it was aware that the said Hancock and the said Moore were secretary and acting secretary respectively of the said society, and that it placed the amounts of the said cheques to the credit of the said Hancock's private account, and recovered the proceeds from the several drawers: it says that it became a holder in due course of the said cheques within the meaning of the 27th section of Act No. 19, 1893, having taken the said cheques in good faith and for value, and without notice of any defect in the title of the persons negotiating the same, at the time when the same were negotiated to it, and that it is therefore protected from all liability; save as above it denies the allegations in paragraph 10.

3a. As to paragraph 11, it admits that it did not at any time before the liquidation of the said society pay over to the said society any portion of the amounts of the said cheques; it denies all the other allegations in the said paragraph, and says that it was unaware that the funds paid in to the credit of the said Hancock or any portion of them belonged to the said society.

4. As to paragraph 12, it admits that it refuses to pay the plaintiffs the sum of £7,614 or any portion thereof, and denies the other allegations in the said paragraph. Wherefore it prays that plaintiffs' claim may be dismissed with costs.

And to add after the plea to the alternative count the following: And for a further plea to the alternative count the defendant bank says: It craves leave to refer to the terms of the further plea to the first count, and craves leave that the same may be considered as herein inserted. Wherefore it prays that the said claim may be dismissed with costs.

Mr. Schreiner, Q.C. (with whom was Mr. McGregor), appeared for the plaintiffs, and Mr. Searle, Q.C. (with whom was Mr. Close), appeared for the defendant.

The first witness called was

William John Hancock, who said that he took office as secretary of the Cape of Good Hope Building Society in January, 1895, and about the same time he opened a private account with the Bank of Africa. The account was small at first, but after the first few months it grew considerably, and in 1898 witness had a considerable account. He speculated very much in differences from time to time, and had to pay cheques of a considerable amount for losses on this form of speculation. He was prosecuted in 1898 for theft and embezzlement of cheques belonging to the society, and was now serving a sentence for that. He had gone over the schedule which had been annexed to the declaration setting forth certain cheques which had been paid in. Of these twenty-three had been endorsed by witness and three by Moore. These twenty-three cheques were the property of the society. As regarded the three cheques endorsed by Moore, these so far as witness was aware were also the property of the society. Witness left for England on a holiday on April 20, 1898, and Moore took his place as acting secretary. On April 23, 1898, T. J. J. Beachy gave a cheque for £500, which was paid into witness's private account on April 25, 1898. That was done by Moore on instructions given by witness before he left for England. Witness had no right to that cheque, and so far as he was aware it was the society's cheque. Moore was aware of what witness was doing, and had also been prosecuted. Moore knew that it was the society's money that he was telling him to pay into his (witness's) own account. Witness remembered one Hendricks, who was a collector of rents for the society. Hendricks frequently paid in to witness cheques for rents he had collected, and witness paid them in to his private account. There were many thousands of pounds beyond the £7,600 now sued for of the society's money paid into the same bank by witness to his own private account. For instance, there was one item alone of £2,300, being an amount paid into the society by Rees Williams, and which witness paid in to his own account. Frequently witness would pay in to his credit a cheque drawn by the society itself in favour of somebody else per witness. Witness would pay all the persons cash against their endorsement of the cheque, so that the society lost

twice. With regard to the cheques of Laing and White, for £358 13s 4d. and £471 6s 6d. respectively, they were drawn up by F. B. Steer, who had struck out the words "or bearer," but had not written in the words "or order." Witness dealt with these cheques in the ordinary way, endorsing them as usual, "W. J. Hancock, secretary," putting on the society's stamp, and then he deposited them to his own credit. Esdon's cheques, for £300 and £150 respectively, were also the property of the society. Many of the cheques which were paid into witness's own account did not on the face of them purport to be the society's cheques, although they were really the society's cheques.

Buchanan, J.: I understand, Mr. Schreiner, that you only sue on those cheques which on the face of them gave notice that they were the society's cheques?

Mr. Schreiner said that was so.

Further examined, witness said the amount of the society's money he had paid in to his private account might be as much as £21,000. When he opened his private account he saw Mr. McPhail, the manager of the bank. Among his first transactions was a promissory note for £500. Witness was careful never to have his account overdrawn. At first witness tried to finance himself with a bill, and afterwards he took the society's money. As a rule witness paid in those cheques by the office messenger, but sometimes he paid them in himself, and the bank had never in regard to anyone of those cheques asked his title to them. Witness's salary at first was £25 a month, and afterwards it was increased to £30 a month. This was paid him by the society's cheque in his favour, and he almost invariably paid these cheques, which were always on the Standard Bank, in to his credit, so that the Bank of Africa knew that witness was paid his salary by cheque. The wording of the cheque was: "Pay W. J. Hancock or order," and they would be signed by witness himself and two directors. He had never made good to the liquidators that £7,614. He did not know what became of his private estate, which was made insolvent. It consisted of property to the value of £8,000 or £9,000.

Cross-examined by Mr. Searle: Witness came out to this country in 1891 or 1892, and shortly after that he took up the position of secretary of the Young Men's Christian Association, and he occupied that position up to the time he was appointed secretary to the Building Society, when he resigned. He believed he then had a good

reputation in Cape Town. The Y.M.C.A. banked with the Bank of Africa. Witness opened his private account in the Bank of Africa in April, 1895, and there were no defalcations for some time after that. He first began taking money belonging to the society in September, 1895. On two occasions he had asked the bank for special facilities, and got them, Mr. Ball signing the guarantee on the first occasion and Mr. H. Beard on the second occasion. The directors of the Building Society had very great confidence in witness, and left things very much in his hands. People generally had very much confidence in him. Mr. Rees Williams, inspector of the Standard Bank, gave witness a bearer cheque for £2,300 for the society.

Re-examined: He was concerned in a grocery business at Observatory carried on under the style of Hartley and Co., and had another account for this in the Bank of Africa.

Harry Gibson, liquidator of the Building Society, said he had gone carefully through the banking account of Hancock with the defendant company, and had selected the cheques before the Court to the amount of £7,600, which were paid in to Hancock's account, and which were the society's property. The total amount of the society's money paid in to Hancock's account was many thousands more than was claimed now, but the cheques produced were selected on the basis that on the face of them they showed no title of Hancock's, and the bank was therefore responsible. The depositors had been paid a dividend, but if the amount now in question were recovered they would be still unable to pay the depositors 20s. in the £. The society had lost every penny of the amount belonging to it paid in by Hancock to his account in the bank.

Cross-examined: They only sued for the amounts which on the face of the cheques apparently belonged to the society. The Standard Bank had cashed two cheques made by a Mr. and Mrs. Wilson belonging to the society, which were paid over the counter. He could not say in whose favour these were drawn. He could not say whether they were cheques on other banks in the same form as those produced. There might have been. Witness knew Hancock, and was aware that he enjoyed the confidence of the community. A sum of £500 had been paid in to the society in respect of Moore's indebtedness to it.

Re-examined: Hancock's total defalcations were nearly £60,000, and £1,000 had been paid in connection with this, as fidelity guarantee.

Paul de Villiers, attorney, said he was one of the directors of the society when Hancock was secretary. The latter had no special authority to deal with the cheques. He had the general secretary's authority with regard to a cheque. He had no authority to deal with a cheque otherwise than through the society's bankers.

Cross-examined: There was no special resolution with regard to Hancock's authority.

Mr. Edward Moore, one of the society's directors, and chairman for a time, gave similar evidence.

George William Steytler, secretary of the Colonial Orphan Trust Company, said that he was co-liquidator of the society with Mr. Gibson, and was the trustee in Hancock's insolvent estate. He was also executor of the will of the late Hendricks referred to in the schedule produced. From his knowledge of Hendricks's affairs, witness knew that certain cheques referred to in the schedule drawn in favour of Hendricks were the property of the Building Society. The total amount of Hancock's defalcations was £59,018 9s. 10d.

W. J. Hancock, recalled, said in answer to Mr. Schreiner, that he had no authority to deal with any cheque in any other way than by paying it to the credit of the society at their bankers. Replying to Mr. Searle, he said that there was no rule giving him such authority.

Robert Eswin, one of the depositors of the Building Society, deposed to having in 1897 paid two cheques, one for £300 and the other for £150, drawn in favour of the society or order.

F. B. Steer gave evidence as to the cheque on which he had struck out the words "or bearer." He meant to write in the words "or order."

J. W. Harsant, the manager of the local branch of the Standard Bank, said that he had had thirty-seven years' experience of banking in this colony, and for a considerable number of years he had been managing branches. The rule in the Standard Bank was that where cheques were drawn in favour of a society they would not allow them to be placed to the credit of a private individual without careful inquiry, and that inquiry would be directed to the responsible directors or Board of Management of the society.

Cross-examined: These cheques were passed through the Standard Bank without inquiry because it was not their duty to make such inquiry, the cheques being sent through another bank. There were private written instructions to the bank officials with regard to inquiries being made as to cheques in favour of societies or companies being presented by officials to be placed to their private accounts. He could not say whether those instructions were given before or after the case of the Building Society's cheques. The tellers were well aware of the rules of the bank. Special attention would be called to any cheques presenting exceptional features, and the attention of the manager would be called to them. No inquiry would be made as to cheques coming through the Bank of Africa and bearing their stamp as a guarantee. The tellers would understand their duty too well to pay out Treasury drafts drawn in favour of the society to Hancock across the counter. They made no inquiries in regard to cheques coming through the clearances. Such cheques as these, if presented at the counter, even with the other bank's endorsement, would not be paid.

Re-examined: Witness would never pay over the counter a cheque drawn on another bank, or his own bank, and in favour of the society, when produced by an official of a society, nor would he place it to an official's credit without inquiry.

By the Court: Witness did not know anything of the practices of other banks, but thought this ought to be the practice of all well-conducted banks. He believed it to be a principle adopted by all bankers.

Mr. Schreiner then closed the case for the plaintiffs.

Charles Steward McPhail, manager of the Bank of Africa for the last twenty years, said he had known Hancock as secretary of the Y.M.C.A. for a number of years before the account was opened. He had an excellent reputation, and witness knew that he had been connected with many charitable and benevolent objects. His account was opened in April, 1895, and continued up till 1898, and witness put in a correct copy of the account. The cheques now sued upon were paid into the bank from time to time, and the account was occasionally overdrawn for a day or two for small amounts. Witness never had the slightest suspicion that Hancock was speculating; he never knew that he had a share. On two occasions facilities were given to Hancock. In April, 1895, Mr. Ball, the ex-Mayor, gave a promissory note

for him for £200, and in July, 1896, Mr. Henry Beard gave his personal guarantee for £500. These sums were, witness was told, in connection with landed property, and in the latter instance the bank held the title deed. Witness dealt with cheques entirely in the ordinary way of business. Witness considered that if Hancock came to the bank with the cheques they could not have refused to pay them. Witness referred to the Bank of Africa cheques. It was not unusual for agents, secretaries, or representatives of firms or companies to place cheques to accounts in their own individual name, though the cheques were drawn in favour of their firms or companies. Witness's bank had no trust accounts. He knew Hancock had landed property in the suburbs, and had not the slightest shadow of a suspicion that Hancock was embezzling until after he went to England and some irregularities were reported. Witness considered the bank was acting in accordance with what he understood was the practice of banks. All the cheques were placed to Hancock's credit, and passed on to the bank on which they were drawn, and no objection was taken by these banks, viz., the Standard and the African Banking Corporation.

Cross-examined: The cheques handed in by Hancock did not probably come before him personally. They would not in the ordinary course, unless there was something special in connection with them. Witness could not say which of the tellers passed the cheques. According to the account, Hancock paid in and drew out between £14,000 and £15,000 during a period of six months. Witness knew Hancock had transactions in landed property. He could not tell the value of the land. There was nothing on the cheques to show the Standard Bank that the society did not have a banking account with the Bank of Africa. There would be nothing unusual in the society having an account with them as well as with the Standard Bank. When a cheque properly endorsed was presented then they regarded it as the property of the holder. They had nothing to do with the society, but with Hancock, who was their customer. Witness did not consider he was justified in inquiring as to a cheque drawn in favour of a society, and placed to account of an official. He would in such a case draw no distinction between a cheque drawn on his own bank and a cheque drawn on another bank. He would not pay across the counter cheques on another bank, because that was a thing that

was never done. Witness knew throughout that the society banked with the Standard Bank, and the bank knew that Hancock paid in his salary cheque, signed by two directors, to his private account. At that time they did not have the arrangement whereby certain tellers transacted the business of customers according to the letters commencing their names, so that probably one teller would have to do with Hancock's account one day and another teller the next day. There were no crossed cheques among these, but a crossed cheque would only mean that the cheque must pass through a bank account, and there would be no inquiry made to him with regard to it.

Re-examined: The amount of Hancock's account was nothing unusual, because he knew of accounts amounting to ten times as much where the people were not people of great means.

By the Court: Witness meant that the amount of Hancock's accounts would not concern the bank so long as he did not require an advance from the bank.

J. W. Harsant, recalled, said that the instructions with regard to not placing to an official's private account cheques drawn in favour of a society without inquiry was dated April, 1900, but it had always been a recognised banking practice not to do so. There was no inquiry with regard to the cheques in question, although they were in favour of the society, because they bore the stamp of the other bank as a guarantee.

Buchanan, J., pointed out that the guarantee was only as to the genuineness of the endorsement, about which there was no question.

Witness said that, coming through another bank, they had nothing to do with it at all.

Buchanan, J., pointed out that the witness was not consistent, because the case was really the same whether the cheques came through another bank or were presented by the official.

James Simpson, the general manager of the Bank of Africa, said that he had occupied that position since the establishment of the bank—a period of twenty years. As a matter of fact, he had been in charge of banks for over thirty-five years, and he believed his experience as a banker was longer than that of any other person in South Africa. He had seen the cheques upon which the Bank of Africa had been sued, although they would not have come before him in any special way. In his opinion it was not in accordance with banking practice to make inquiries when an official presented a cheque

in favour of his society and asked it to be placed to his private account. Each bank in this country seemed to have its own practice. With regard to his practice, it would be in accordance with it for the Bank of Africa to do as it had done in this case. He would consider that if cash had been asked for on one of those cheques he would have been bound to pay. If a properly endorsed cheque was presented to his bank and cash asked he would pay. He had never in his experience heard of any limited authority given to secretaries of societies authorising them to pay in only to their societies' accounts. Some companies filed powers of attorney for their secretaries and others did not.

In answer to the Court as to whether when he saw an official habitually having cheques in favour of his society placed to his private account he would not make some inquiry, witness said there was nothing here to show that there was anything wrong, and they did not profess to be inquisitorial.

In reply to Maasdorp, J., witness said that supposing there were suspicious circumstances then they would not shut their eyes but would move in the matter, but he pointed out that they did not open accounts with everybody, but made proper inquiries before doing so. In reply to further questions, witness said they had no regulation as to inquiry being made when cheques in favour of a society were presented by officials to be placed to their private accounts.

Postea (November 10).

At this stage De Villiers, C.J., took his seat on the bench for the first time in this case.

Mr. Schreiner put in a complete schedule of the cheques.

Mr. Gibson (recalled) stated that the total defalcations amounted to £59,018 9s. 10d., of which £1,686 had been received.

Mr. Schreiner, Q.C. (with him Mr. McGregor): This case depends largely on the Bill of Exchange Act, No. 19, of 1893, and this being almost identical with the English Act, decided English cases will be of great assistance to the Court. Now, in the first place, Hancock's title to these 28 cheques was defective, and this was not denied. The defence set up by the bank is that they had no notice of such defective title. My submission is that these cheques, on the face of them, show that they were not Hancock's property, but were the property of the society. It being admitted that these cheques were the property of the society, the bank must show that the society

had been divested of the ownership, and that Hancock had authority to endorse them as his own property. He only had authority to endorse them for paying them in to the society's account. He had no authority to endorse them and make delivery to anyone but the society. Hancock signed these cheques *q.q.*, and by so signing them, clearly handed them in on behalf of the society. By section 23, of Act 19, of 1893, a signature per procuration was a notice that the person so endorsing had only a limited authority. Now I don't deny that the bank had authority to, and is properly justified in paying these cheques drawn on itself across the counter, but it is clear that it has no justification for placing the amounts mentioned on them to Hancock's account. In this case there has been no legal delivery; now, by sub-section 2 of section 19 of Act 19 of 1893, delivery means change of possession, but here there has been no change of possession. The mere fact of a secretary of a society going to a bank and depositing on his own account cheques which, on the face of them, show that they are the property of the society is a suspicious circumstance, and one which ought to call for inquiry from the bank officials. There is no necessity for us to prove *mala fides* when the instrument, even though negotiable, has been stolen, and is, on the face of it, irregular. There being on the face of the instruments nothing of defect in title, the responsibility falls on the bank. Here good faith on the part of the bank will not shift this responsibility, which has been loaded on to the bank through its negligence in not making inquiries when the circumstances were so suspicious. See section 89 of Act 19 of 1893. My contention is that Hancock, the secretary, could not make delivery to Hancock the private individual. If there had been someone else assisting him in the matter to whose account he had placed these amounts, then it would be extremely difficult to fix the bank with the liability. The bank must have known that Hancock had no title to these cheques. They should have made a searching inquiry, and, according to law, could have demanded time within which to make this inquiry. *Morse on Banking*, Vol. I., section 363, sub-section C. *Viser and Co. v. Fox Bros* (51, "Law Times" Reports, p. 663) is a case in regard to the crossing by an employee of such a cheque. With regard to notice of defective titles see sections 23 and 27 of Act 19 of 1893. It is contrary to the ordinary course of busi-

ness to pay the cheques of other banks across the counter. The bank should have made inquiries before placing the cheques of other banks to Hancock's account. In *Hannan's Lake View Central v. Armstrong* (16 Times Law Reports, p. 236) it was held that a bank would be liable if it cashed a cheque crossed generally to a company's secretary. See also *Bessell and Co. v. Fox Bros.* (53 Law Times Reports, p. 193), where a bank was held to be liable for the amounts of cheques cashed by the bank in favour of a company's secretary. On appeal, however, this decision was not upheld with regard to cheques drawn on the bank which cashed them, but was sustained with regard to cheques drawn on other banks. The transactions in the present case were not in the ordinary course of business.

Mr. Searle, Q.C. (with him Mr. Close): The plaintiff's case is founded on the ground that the bank had notice that the cheques were not the property of Hancock, and that the bank was guilty of negligence in not making full inquiry into the matter. A further point taken in the course of argument was that no delivery had been made to Hancock. If that argument were allowed to stand, a serious blow would be struck at the law of negotiable instruments. The result would be that a bank could never go the little length of paying a cheque over the counter to a secretary of any institution. The bank was of opinion that Hancock was a man of estimable character, and held a responsible position, and they had no reason for being shaken in their opinion. With regard to the delivery, the bank seeks protection, under section 39 of Act 19 of 1893, and is safe under that section. The endorsement being in order, no imputation of *mala fides* can be made against the bank. It could not even be said that the absence of inquiry laid the bank open to a charge of negligence. These cheques were paid in the ordinary course of business. See *Thomson v. Clydesdale Bank* (3 Appeal Cases, p. 222, 1893); *London Joint Stock Bank v. Simmonds* (3 Appeal Cases, p. 201, 1892); *Lord Sheffield v. London Joint Stock Bank* (13 Appeal Cases, p. 333); *Woodhead, Plant and Co. v. Gunn* (11 S.C.R., p. 4); *Smith's Mercantile Law* (p. 217); *Jones v. Gordon* (2 Appeal Cases, p. 625); *Gorges v. Neville* (3 Barnwell, p. 335); *Ex parte Richdale* (19 Chancery Reports, p. 409).

Postea (November 27).

Mr. Searle, Q.C. (continuing): There was nothing informal in connection with the endorsement of these cheques. Any cheque bearing Hancock's endorsement and the stamp of the society was a negotiable instrument. There was no defect at all. See sections 27 and 39 of Act 19 of 1893. By section 27, the bank had become the holder in due course of these cheques.

[De Villiers, C.J.: It is not Hancock the secretary who comes to deposit; it is Hancock the individual. What title has the individual to come to deposit?]

The mere fact of Hancock paying the money into his own private account showed no defect in title. The circumstances imposed no duty of inquiry on the bank. The only circumstances under which the responsibility would be thrown on the bank in a case of this sort was when they had wilfully closed their eyes to the form of the cheque. (*Lord Sheffield's case*, per Lord Herschel.) The whole question comes round to one of how far the bank was bound to make an inquiry. See also *Rapnael v. Bank of England* (17 C.B., 161), as to "notice and knowledge."

Mr. Schreiner, Q.C., in reply.

Curia ad vult.

Postea (December 5).

De Villiers, C.J.: The main facts in this case are undisputed. Hancock was the secretary of the Building Society, and appropriated to his own use large sums of money which he had received as such secretary. Among the sums thus misappropriated were the proceeds of certain cheques drawn by customers of the society, some being in favour of the society and others in favour of the secretary of the society. These cheques were deposited by the secretary to the credit of his private account with the defendant bank. The majority of the cheques were endorsed by Hancock himself as secretary before being so deposited to the credit of his private account, but three of them were endorsed during Hancock's absence by the acting secretary and by him deposited to the credit of Hancock's account with the defendant bank. Some of the cheques were upon the defendant bank, and some upon other banks, but it is admitted that the proceeds of them all came into the hands of the defendant bank, and were drawn by Hancock in the usual course in his individual capacity. The plaintiffs, as liquidators of the society, now seek to recover the proceeds of the cheques on the ground that the bank, when it received the cheques, had notice

that Hancock and Moore were secretary and acting secretary respectively of the society, and that there was no title in Hancock to any of the cheques in his private capacity or in Moore as to the cheques deposited by him. The defence is, in substance, that the defendant bank became the holder in due course of the cheques within the meaning of the 27th section of Act 19 of 1893, having taken the cheques in good faith and for value and without notice of any defect in the title of the persons negotiating the same, and that it is therefore protected from all liability. This Court had occasion, in the case of *Woodhead, Plant & Co. v. Gunn* (11 S.C.C., p. 4) to consider the question whether, under our law, the owner of a negotiable instrument from whom it has been stolen can recover the proceeds from a third person who had received it for value from the thief. The conclusion arrived at was that if the instrument was on the face of it in such a state that the maker could be sued thereon by a *bona fide* holder and had been received by such third person honestly and for value he was not liable. That conclusion was based upon the Roman-Dutch law quite independently of the terms of the Act of 1893, which had already passed, but was not cited in argument. The decision was also in accordance with the English cases, several of which were cited. In the case of *Rapnael v. Bank of England* (17 C.B., 161), which was an action upon a bank-note which had been stolen, the jury found that the plaintiffs had given full value for the note, that they had taken it *bona fide*, and that they had no knowledge at the time they took the note that it had been stolen, but had the means of knowledge if they had taken proper care. It was held by the Court of Common Pleas that the plaintiffs in the finding were entitled to the verdict, Willes, J., concurring in the opinion expressed by Parke, B., in a previous case, that "notice and knowledge" means not merely express notice, but knowledge or the means of knowledge to which the party wilfully shuts his eyes—a suspicion in the mind of the party, and the means of knowledge in his power wilfully disregarded. In the case of *Jones v. Gordon* (2 A.C., 616), Lord Blackburn said: "I think it is right to say that I consider it to be fully and thoroughly established that if value be given for a bill of exchange, it is not enough to show that there was carelessness, negligence, or foolishness in not suspecting that the bill was wrong, when there were circumstances which

might have led a man to suspect that. All these are matters which tend to show that there was dishonesty in not doing it, but they do not in themselves make a defence to an action upon a bill of exchange. . . . But if the facts and circumstances are such that the jury, or whoever has to try the question, came to the conclusion that he was not honestly blundering and careless, but that he must have had a suspicion that there was something wrong, and that he refrained from asking questions, not because he was an honest blunderer or a stupid man, but because he thought in his own secret mind—I suspect there is something wrong, and if I ask questions and make further inquiry, it will no longer be my suspecting it, but my knowing it, and I shall then not be able to recover—I think that is dishonesty." The case which at first sight would seem to favour the present plaintiffs' claim is *Lord Sheffield's case* (13 A.C., 333). It was there held by the House of Lords that, as certain banks in receiving negotiable securities from a money dealer as security for large loan accounts running between him and them, either actually knew or had reason to believe that the securities did or might not belong to the money dealer, but to his customers, the banks were not purchasers for value without notice, but ought to have inquired into the extent of the money dealer's authority. In the subsequent case, however, of *Joint Stock Bank v. Simmons* (A.C. for 1892, p. 201), it was pointed out by two of the learned lords who had taken part in the previous decision that it turned entirely upon the special facts of that case, and was not intended to extend the doctrine of constructive notice beyond the limits which the Courts had previously imposed on it. "The only question of law," said Lord Halsbury, L.C., "decided in *Lord Sheffield's case* was that a purchaser even for value, cannot insist on his purchase if he knows that the person from whom he purchases has no right to sell." Lord Watson remarked: "I was satisfied, upon the evidence before us, that the banks concerned had such notice and knowledge of the limited title of their pledgor as made it inconsistent with fair mercantile dealing that they should retain Lord Sheffield's securities for any sum beyond the extent of the pledgor's interest." And Lord Macnaghten said: "There was no want of good faith on the part of the bank in taking the securities to the extent of their money dealer's pledgeable

interest. But there was, as it seems to me, a want of good faith in claiming to retain them for more than that limited interest, whatever it might turn out to be." Lord Herschell, who had taken no part in the decision of the previous case, held it to be undoubted law that negligence does not invalidate the title of a person taking a negotiable instrument in good faith, and for value. He also agreed with Parker, B., in deprecating the introduction of a condition "that due care and caution should have been exercised by the taker of the securities." He adds: "*Lord Sheffield's case* may perhaps be a binding authority as to the conclusions of fact arrived at, where the facts are identical, but not otherwise. In any other case the tribunal must investigate the facts for itself, and determine whether those who claim to hold a negotiable instrument have made out that they took it in good faith and for value. One word I would say upon the question of notice and being put upon inquiry. I should be very sorry to see the doctrine of constructive notice introduced into the law of negotiable instruments. But regard to the facts of which the taker of such instruments had notice is most material in considering whether he took it in good faith. If there be anything which excites the suspicion that there is something wrong in the transaction, the taker of the instrument is not acting in good faith if he shuts his eyes to the facts presented to him, and puts the suspicions aside without further inquiry. I take it, however, that in Lord Herschell's opinion it was not enough that there ought to have been a suspicion, but that such suspicion must have actually existed, and that the taker of the instrument wilfully shut his eyes to the facts. In the subsequent case of *Thomson v. Clydesdale Bank* (A.C. for 1893, p. 282) the broker employed by the appellants to sell certain shares had deposited the cheque received by him for the shares to the credit of his account with the respondent bank. The bank knew that the cheque had been given for the shares, but did not know and had made no inquiry whether the money paid in was in the broker's hands as agent or otherwise. It was held that the bank was entitled to retain the money in discharge *pro tanto* of the debt due to them from the broker. "The onus," said Lord Watson, "of proving that the respondents acted *mala fide* rests with the appellants. It is not enough for them to prove that the respondents acted negligently; in order to succeed, they must

establish that the respondents knew, not only that the money represented by the cheque did not belong to the broker, but that he had no authority from the true owner to pay it into his bank account." It is clear from these authorities that under our law, as well as under the law of England—independently of the Bills of Exchange Act to which I shall presently refer—the defendant bank is not liable in respect of the proceeds of the cheques now in question if the bank was a *bona fide* holder for value, and the cheques were in such a condition that the drawer could be sued by a *bona fide* holder for value. The plaintiffs do not deny that the bank, having allowed Hancock to draw the proceeds, gave value for the cheques, nor do they contend that the bank had any knowledge of the fact that the cheques had been misappropriated by Hancock. In regard to the form of the cheques the majority of them were in favour of the secretary or order, and could only be made negotiable by means of his endorsement. As to the other cheques it is not denied that for the purpose, at all events, of depositing the proceeds with the society's bankers, Hancock had authority to endorse cheques drawn in favour of the society. If once, however, it is admitted that the endorsement of cheques was permitted to Hancock, although with instructions to hand them in to the society's bankers, it is difficult to avoid the conclusion that when so endorsed the cheques were in such a condition that a *bona fide* holder could sue the drawers thereon. It would follow that the defendant bank having given value for the cheques without notice of Hancock's dishonesty, cannot be held liable—apart from the provisions of the Statute Law—to repay the amount of the proceeds to the plaintiffs. The plaintiffs, however, rely upon the provisions of the 27th section of the Bills of Exchange Act as entitling them to relief, and it is this section upon which the defendant bank relies as protecting it from liability. A holder in due course of a bill of exchange is there defined as "a holder who has taken a bill, complete and regular on the face of it, under the following conditions, namely: (a) That he became the holder of it before it was overdue and without notice that it had been previously dishonoured, if such was the fact; (b) that he took the bill in good faith and for value, and that at the time the bill was negotiated to him he had no notice of any defect in the title of the person who negotiated it." The plaintiff's counsel contended

with great force and much ability that there was a defect in the title of Hancock who negotiated the cheques to the bank, and that the Bank had notice of such defect. The alleged defect consisted in this, that although he had authority as secretary to endorse cheques for the purpose of paying the proceeds to the society's bankers he could not, by virtue of that authority, transfer to himself in his individual character any right or title to the cheques. The alleged notice to the defendant bank consisted in this, that it appeared from the cheques themselves that they belonged to the society, and that as Hancock endorsed them in a representative character the bank must be deemed to have had notice of the limited powers conferred upon him. The bank's honesty in the transaction is not sought to be impeached. The cheques were received without any suspicion—whatever suspicions the bank ought to have entertained—that Hancock's title was deficient by reason of his negotiating them in bad faith. The conduct of the bank officials may have been imprudent or even negligent, but there was no such wilful shutting of the eyes as to amount to bad faith. The cheques were in proper order, being endorsed by the only official who was in the habit of endorsing or could endorse cheques drawn in favour of the society or its secretary or order. If the cheques so endorsed had been delivered by Hancock as secretary to any other *bona fide* holder for value, such holder would have acquired a good title to them. It follows that Hancock himself, in his individual character, could have acquired a good title to them if he received them *bona fide* and for value. It was in his individual character that Hancock deposited the cheques with the bank, and there was no actual notice to the bank that he had no right so to deal with the cheques. Was there then constructive notice of the defect in his title? It is contended that as the cheques were endorsed by Hancock in his representative character, the bank must be deemed to have had notice of his limited authority, but this contention could not have been raised by the directors of the society who clothed him with the authority to endorse cheques on their behalf. The objection cannot, therefore, be raised by the plaintiffs as liquidators of the society. At first sight it would seem to be supported by the remarks of Kennedy, J., in the case of *Hannan's Lake View Central v. Armstrong* (16 "Law Times," 236), but in that case the articles of association make special pro-

vision for the authorisation by the Board of Directors of two or more directors and secretary to endorse any negotiable instrument in order to complete the negotiation or transfer thereof. In the present case the rules of the society are silent as to the endorsement of such instruments. The directors therefore had full power to authorise the secretary to endorse cheques made in favour of the society or its secretary or order. They did so authorise him, but they instructed him to pay cheques thus endorsed to the bankers of the society. These instructions never came to the notice of the bank, and unless the bank was legally bound to make further inquiries as to the authority of the secretary, the bank cannot be held to have had constructive notice of the private instructions given to the secretary. The case of endorsements made by procuration is not exactly in point. The 23rd section of the Act enacts that "a signature by procuration operates as notice that the agent has but a limited authority to sign, and the principal is only bound by such signature if the agent in so signing was acting within the actual limits of his authority." That section merely declares the law as it stood before the passing of the Act, and as recognised by this Court in several decided cases. It would not, however, justify the Court in holding that where the secretary of a company is legally authorised to endorse cheques with instructions to pay the proceeds to the company's bankers, a *bona fide* holder of such cheques is fixed with notice of such instructions. Even in the case where an agent endorses a bill by procuration, it has been held by the Judicial Committee of the Privy Council in *Bryant v. Quebec Bank* (A.C., 1893, p. 179) that the abuse by the agent of his authority does not affect a *bona fide* holder for value. Lord Macnaghten, in delivering the judgment of their lordships, quoted with approval the following passage from the judgment of an American Court: "Whenever the very act of the agent is authorised by the terms of the power, that is, whenever by comparing the act done by the agent with the words of the power, the act itself is warranted by the terms used, such act is binding on the constituent, as to all persons dealing in good faith with the agent; such persons are not bound to inquire into facts *aliunde*. The apparent authority is the real authority." In the present case the apparent authority of Hancock to endorse bills must, as between the society and the bank,

be held to be his real authority, and, in the absence of notice to the bank of the defect in his title, no liability attaches to the bank under the 27th section of the Act.

The plaintiffs' counsel has not contended that any liability attaches to the bank, independently of the 27th section of the Act, for neglect of some special duty, which in its character as a banker, it owes to the society as the original owners of the cheques. If this contention had been raised it might have been necessary to inquire whether the 80th section of the Act can be considered as an authority for the previous existence of such a liability. That section was not intended to impose on bankers a liability which did not previously exist, but to protect them from liability under certain special circumstances. It enacts that "where a banker in good faith, and without negligence, receives payment for a customer of a cheque crossed generally or specially to himself, and the customer has no title or a defective title thereto, the banker shall not incur any liability to the true owner of the cheque by reason of having received such payment." In the case of *Bessel & Co. v. Fox Brothers* (53 L.T., p. 193) the Court of Appeal held that an exactly similar section in the English Act did not protect bankers who had received as a deposit from a customer cheques made in favour of B. and Co., and endorsed by such customer "per pro B. and Co.," and had negligently received payment of the cheques for the customer. It appeared, however, that the customer had no authority whatever from B. and Co. to endorse cheques made in their favour or order, and of course such endorsement could transfer no title even to a *bona fide* holder for value. Some of the cheques in that case were crossed and others uncrossed, and the Court held that even as to the crossed cheques the bankers were not protected by the section, as they had been guilty of negligence. The subsequent case of *Hannam's Lake View Central v. Armstrong* (16 Times, L.R., p. 236), was one in which the cheque received by the banker had been crossed, but in other respects the case was very similar to the present. The section of the English Act corresponding to the 27th section of our Act appears not to have been relied upon, and the judgment of Kennedy, J., proceeded upon the assumption that the bankers, in receiving from a customer cheques made in favour of a company and endorsed by the secretary in favour of the company, incurred a liability to such company, although the secretary

had been permitted by the company to endorse cheques for the purpose of paying the same to the company's bankers. The cheques had been crossed, but as the bankers had been guilty of negligence in receiving payment of the same, they were held not to be protected. The articles of association, however, in that case, as I have already pointed out, differed from the rules of the society in the present case, and the cheque in that case had been drawn in favour of the company or order, and not, as in the case of the majority of cheques in the present case, in favour of the secretary or order. This last distinction, however, does not in my opinion affect the present case. For the reasons which I have already stated, the defendant bank, as the *bona fide* holder for value of the cheques in question, incurred no liability to the plaintiffs, nor is any special liability relied upon as attaching to the defendant bank for the manner in which, as a banker, it has dealt with the cheques in question. The judgment of the Court must therefore be for the defendant, with costs.

Buchanan, J.: I concur generally in the judgment just delivered by his lordship. In view of the importance of the question raised, I wish to indicate briefly the grounds on which I base my decision. The plaintiffs in their declaration allege that the defendant bank had notice of the official capacity of Hancock and Moore, and that there was no title in Hancock in his private capacity to the cheques in suit. They allege that it became the duty of the bank, upon receiving the direction to credit the private account of Hancock, to make inquiry as to his title; and that the bank, negligently and wrongfully and without such inquiry, placed the cheques to the credit of Hancock's private account. The bank pleaded that though aware of their official capacity they denied any knowledge of want of title or of misconduct on the part of Hancock or Moore; that the bank acted on their directions in accordance with the practice of bankers, and in the ordinary course of business and without negligence. In its amended plea the bank also set up the defence that it became holder in due course of the cheques within the meaning of the 27th section of the Bills of Exchange Act, No. 19, 1893, having taken the cheques in good faith and for value, and without notice of any defect in the title of the persons negotiating the same, at the time when the same were negotiated. So that even if negligence is established, the further question has been raised

whether on that ground alone the defendant would be liable in this case. The evidence of the alleged negligence of the bank is to be found solely in the cheques themselves. These cheques are nearly all *ex facie* made payable to the secretary of the Building Society, or order, and are endorsed by Hancock or by Moore as such secretary, with the stamp of the society attached. The plaintiff's contention is, that the mention of the Building Society on the face of the cheques constituted notice of the true ownership, and ought to have put the bank upon inquiry, and that the absence of such inquiry constituted negligence. It is not disputed that the endorsements, *qua* endorsements, were made by the proper official of the society and were duly authorised, but it is urged that there was a limited authority in the secretary to make the endorsements only for the purpose of depositing the cheques to the credit of the society with their bankers. The cheques *per se*, when endorsed as stated, were in proper order and were negotiable instruments, passing on delivery, and they were delivered to the defendant bank for value. The plaintiffs say that this delivery, not being authorised by the true owners, passed no property. It must be borne in mind, however, that this is not a question of title to a chattel, which is governed by different principles to those which affect the transfer of negotiable documents. As to the facts of the case, in the first place it must be noticed that at the time of these transactions the secretary of the Building Society was of unblemished repute. Hancock enjoyed the unbounded confidence of the directors, in whose place plaintiffs now stand. That the secretary abused that confidence is now clear, and the question is whether the society, whose servant he was, should suffer the consequences, or whether the loss should fall on the bank. It is admitted that the bank gave value for the cheques, and I think it proved that it took them in good faith. The bank does not open accounts with anyone without inquiry, and having made inquiry in this case, it was satisfied with Hancock's character, and consequently accepted him as a customer. Hancock did not get special advances against those documents. They were simply placed to his current account with the bank, and he only twice required temporary assistance, on both of which occasions he supplied the bank with guarantees from gentlemen of high standing in the city quite unconnected with the

Building Society, which guarantees he duly redeemed. The manner in which Hancock dealt with the cheques raised no suspicions in the minds of the officials of the bank, to whom they were paid, and no reference thereon was made by them to the managers of the bank. The cheques were sent for deposit openly to the bank, frequently by the servants of the society, and though these deposits were made at different times, running over a considerable period, the directors of the society did not discover they were being defrauded, and raised no question as to the manner in which their cheques were being disposed of. It was probably the high repute of their secretary which lulled the directors into a confidence the want of which their successors, the present plaintiffs, urge should have been felt by the bank. There has not been any wilful closing of their eyes by the bank officials to any doubt or suspicion of the regularity of Hancock's dealings. It is not suggested that the bank had any other notice of the defect in the title of the person who negotiated the cheques, other than what might be inferred from the documents themselves. It is the naming on the cheques of the society as the payee which plaintiffs contend imposed the duty of inquiry into title upon the bank. It is not so much notice that is relied upon, as the failure to perform a duty which might have led to notice of want of title. When otherwise there is good faith, this omission to inquire may be negligence, but is it necessarily notice? The case of *Hannam's Lake View Central v. Armstrong and Co.*, cited by Mr. Schreiner, is certainly very similar to the present action in many of its facts, but it is not conclusive, as it was decided partly upon the defect of authority in the person who endorsed the instrument, and also upon the construction of the 82nd section of the English Bills of Exchange Act, 1882, which, like the 78th section of our Act, deals with the crossing of cheques, and which protects the bankers when acting in good faith and without negligence. The 27th section of our Act which applies to this case does not specify negligence, but only good faith, value, and want of notice; and the 89th section enacts that "a thing is deemed to be done in good faith, within the meaning of this Act, when it is in fact done honestly, whether it is done negligently or not." The English authorities are averse to introducing restrictions which would hamper commercial transactions, and Lord Herschell, in the case of the *Joint Stock Bank v.*

Simmons (Ap. Cas., 1892, p. 221), remarked: "I should be very sorry to see the doctrine of constructive notice introduced into the law of negotiable instruments." As to the duty to make inquiry, his lordship said (p. 223): "I do not think the law lays upon him (the banker) the obligation of making any inquiry into the title of the person whom he finds in possession of negotiable securities. Of course if there is anything to arouse suspicion to lead to a doubt whether the persons purporting to transfer them is justified in entering into the contemplated transaction, the case would be different, the existence of such suspicion or doubt would be inconsistent with good faith." We are agreed that the good faith of the bank cannot in this case be questioned. There was no suspicion or doubt raised. If this case depended on negligence apart from good faith, I am bound to say I would entertain grave doubt as to the non-liability of the bank. But I am not prepared to hold that under our Act want of inquiry alone invalidates the title of a person taking a negotiable instrument in good faith for value, without notice of defective title. After consideration of the English cases which have been cited, I am not prepared to find that the wording of the cheques themselves must be held to be actual notice of want of title; and in the absence of such actual notice want of inquiry ought not, in my opinion, to be construed into constructive notice so as to prevent the defendants from having the protection of the Bills of Exchange Act. Judgment ought therefore to be given for the defendants with costs.

Maasdorp, J.: In this case it appears that Hancock, who had himself no title to the cheques in question, passed them to the defendant bank, and the question is whether the bank acquired a good title to them as a holder in due course within the meaning of section 27 of Act 19 of 1893. Section 19 of that Act enacts that if a bill be in the hands of a holder in due course a valid delivery of the bill by all parties prior to him so as to make them liable to him is conclusively presumed. And section 27 defines a holder in due course to be a holder who has taken a bill complete and regular on the face of it in good faith and for value, and who at the time the bill was negotiated to him had no notice of any defect in the title of the person who negotiated it. That Hancock's title at the time he negotiated the cheques was defective is beyond dispute. As secretary of the plaintiff society he had

authority to endorse the cheques and stamp them with the society's stamp for the purpose of placing them with the Standard Bank, which was at that time the bank of the society, but in breach of trust he appropriated the cheques and negotiated them with the defendant bank. Now it seems to me the cheques when taken by the bank were complete and regular on their face. That is proved by the fact that they could in that condition have been negotiated with the Standard Bank, and were intended by the society to be transferred to the Standard Bank in that shape. I take it to be proved that the bank acted in good faith. In no part of the evidence or of the argument at the bar was any doubt cast upon the good faith of the bank. It is admitted that the defendants gave value for the cheques. The only question that remains open for consideration is whether the bank had no notice of any defect in Hancock's title. This is the point upon which the whole case really turns. If notice in this connection is synonymous with knowledge, there would be little difficulty in the matter, for there seems to me to be no doubt that the defendants had no actual knowledge of any defect in Hancock's title. If they had there would in the circumstances be a distinct want of good faith on their part. But I think notice signifies here something more than actual knowledge of defective title. There might under certain circumstances be notice or knowledge of facts which point to possible defect in title, and raise reasonable suspicion that the title is defective, and it may, notwithstanding, upon inquiry be found that the title is in reality good. Such notice or knowledge of suspicious circumstances, and circumstances exciting suspicion, is a different thing from actual knowledge of defective title. For instance, when an endorsement is made "per procuration," that very fact is in terms of the Act made notice of a state of circumstances, necessitating further inquiry, and such further inquiry may or may not establish good title. I think the result of all the authorities is that notice is either actual knowledge of defect in title, or knowledge of facts from which it might reasonably be inferred that the title is defective. In the latter case, if it should turn out that the title in consequence of the known facts was in reality defective, such knowledge would be taken as notice. Such knowledge is said to put the transferee of a negotiable instrument upon inquiry, and if he does not inquire he is taken to have wilfully shut his

eyes to facts he might have ascertained. And here again it seems the element of want of good faith crops up. It is necessary to guard against the intrusion into this case of what is called constructive notice. Such constructive notice is not countenanced in the authorities in respect of negotiable instrument. It includes knowledge which the law implies a person to have whether he actually had it or not, such knowledge as a person would have acquired if such inquiries and inspections had been made as ought reasonably to have been made. That would introduce the idea of negligence which is material under other sections of the Act, but is excluded from consideration under sections 27 and 89. The question therefore arises whether the defendants had notice or knowledge of facts indicating or giving rise to the suspicion that Hancock's title was defective, so as to put them upon inquiry to ascertain the real facts of the case. They knew that he was secretary of the plaintiff society, and they knew that he bore a very high reputation for honesty. They knew that he had endorsed the cheques on behalf of the society, that many of the cheques were made payable to the secretary of the society, and bore the secretary's endorsement accompanied with the stamp of the society. The question is was there anything to lead the bank to the conclusion that anything more was required to pass title in the cheques to bearer even if that bearer should happen to be the secretary himself? The secretary might or might not have authority to endorse cheques, but in this case he actually possessed the authority. His endorsement was not an endorsement "per proc." which under the Act calls for inquiry. Lord Justice Field, in the case of the *London Joint Stock Bank v. Simmons*, said he could not accede to the doctrine that the mere fact that the transferor of a negotiable instrument was dealing as an agent was sufficient to set the transferee upon inquiry, the absence of which, if a defect was in fact found to exist, would be fatal to his title. If the fact that Hancock was acting as agent was not sufficient in itself to set the bank upon inquiry, then no other circumstances within their knowledge necessarily called for inquiry, unless it was the large amount of some of the cheques and the frequency with which they were negotiated. But then again this very circumstance might have led the bank to conclude that such transactions, if fraudu-

lent, could not possibly escape the vigilance of the society. This question is not free from doubt and difficulty, but on the whole I come to the conclusion that the bank had no notice or knowledge of defect in Hancock's title, nor had they knowledge of any facts of such a nature as should have put them upon inquiry. That being so, they must be regarded as holders in due course of the cheques, and their title as valid against all parties to the bill. I may state briefly that I am of opinion that in respect of the cheques drawn upon the defendant bank, the bank would have been protected under section 58 of the Act. The proviso does not, it seems to me, take this case from under the section, the society, whose endorsement purports to appear on the cheques, not being customers of the bank. This view, if it were necessary now to discuss that first, would, I think, be found to be in accord with the letter and spirit of the section. But it is needless to pursue this matter further in this case. I am of opinion judgment should be for the defendants.

[Plaintiff's Attorneys, Messrs. Sauer and Standen; Defendant's Attorneys, Messrs. Tredgold, McIntyre and Bisset.]

CORLETT V. GOURLAY AND CO. { 1900.
Nov. 6th.

The declaration set forth that on April 8, 1899, the plaintiff Corlett hired a hotel called the Princess Royal Hotel from one Martienssen at a rental of £30 per month for five years, with a right to renew for a further period of five years. The goodwill was valued at £1,250, and of this amount plaintiff paid £400 in cash, leaving a balance of £850 due in respect of the purchase price. In April, 1899, Martienssen ceded and made over to the South African Breweries (Limited), the right, title, and interest to the premises, which were let, together with other premises, this taking effect from June 1, 1899. On November 1, 1899, Corlett assigned to the defendant all his rights under the lease of the Princess Royal Hotel, in consideration of which defendant took over certain liabilities due by Corlett. These debts included £750 due to Martienssen, being balance of the purchase price of the goodwill of the hotel. £318 due to the South African Breweries, £208 due to Isaacs for furniture, and £500 due by plaintiff to defendant. This assignment was made with the knowledge and consent of the South African Breweries. The defendant had satisfied the debts due by

plaintiff to the South African Breweries and Isaacs and Co., but he had not satisfied the debt of £750 due to Martienssen, and Martienssen had summoned plaintiff for that amount. Wherefore the plaintiff now prayed for the recovery of the £750.

The defendant in his plea admitted the parties, but with regard to the balance of the purchase price due by the plaintiff to Martienssen, said that he did not know there was any such amount due. He admitted the lease from Martienssen to Corlett, but did not admit that the cession by Martienssen to the Breweries was made after the premises were hired, although he admitted there was a cession. He further said that on November 1, 1899, the plaintiff assigned to the defendant all his right, title, and interest in this hotel; that this assignment was approved by the Breweries; and that in consideration of this cession the defendant was to pay £318 due to the Breweries and release plaintiff from a debt of £500 due by him to the defendant; but the defendant did not at any time agree to pay the balance of the purchase price of the goodwill, and was not at the time of the assignment, nor was he now, aware that such an amount was due.

On these pleadings issue was joined.

Mr. Searle, Q.C. (with him Mr. Close), appeared for the plaintiff.

Mr. Schreiner, Q.C. (with him Mr. Gardiner), appeared for the defendant.

The first witness called was the plaintiff Charles William Corlett, who said he lived in Cape Town, and had the lease of the Princess Royal Hotel, in Cape Town, from Martienssen. This lease was in the terms stated in the declaration. Witness entered into possession, but did not carry on business to advantage. He did not manage the business himself, but had a manager, and he lost money in the business. The first instalment (£400) of the £1,250, purchase price, was paid, and promissory notes given for the others. The first promissory note was partly met, but the others were not. Witness entered into an agreement with Gourlay and Co., under which they agreed to supply him with liquors on certain conditions. Gourlay advanced witness £300 of the £400 which witness paid for the goodwill, and afterwards supplied witness with liquors, so that his total indebtedness, including the £300, was nearly £500. Witness was unable to pay the debt, and two letters were written by Gourlay, in August and September, demanding immediate payment. Witness did not reply to those letters, but afterwards met Mr. Gourlay at the office of Messrs. Van Zyl and

Buissinné. There were then present Messrs. Van Zyl, Kayser, Hackblock (manager of the Breweries), and witness. The debts were put before witness, and it was pointed out that he had really broken the contract of lease, and Mr. Hackblock said that he was willing if witness made the assignment that Gourlay should take his place under the lease. A document was then drawn up addressed to witness, and signed by Gourlay, in which he said that witness might take the premises back or dispose of them to the satisfaction of the lessor at any time within two months from that date upon repayment to Gourlay of what he owed him, and also the sums for which he had made himself responsible. That was the only document then written. The debts mentioned were those of Gourlay, the Breweries, and Isaacs and Co. for furniture. Mr. Hackblock said: "Of course you are aware there is a certain amount unpaid of the purchase price," and when asked witness said that that amounted to £750. Witness afterwards signed the assignment of the lease, and left the place. He next met Gourlay about January or February this year, and the latter said to him that the time for witness retaking over the place had expired, and that he would now try to find another tenant, but that he would require £1,800 or £1,850 to get his money back. Witness had spent over £100 on the place, and Gourlay took over that as well. About four months ago Martienssen summoned witness for £750.

Cross-examined: When witness borrowed the £300 from Gourlay he did not say that it was to go along with the proceeds of the sale of the goodwill of the Foresters' Arms in payment of the purchase price of the Princess Royal Hotel. He could never have said such a thing. Later on witness borrowed £300 from Bosman, Powis and Co., telling them that was to go towards paying off the purchase price of the Princess Royal Hotel, but Gourlay never came to him afterwards and asked for an explanation of his conduct in borrowing again when the purchase price was paid off. Witness remembered no such conversation. Witness did not remember any other document beyond the letter already read being drawn up at the meeting where the assignment of the lease was made. Gourlay did not know on what terms witness took the hotel from Martienssen. At the meeting in Mr. Van Zyl's office Gourlay said that he did not believe witness would get more than £1,000 for the goodwill of the Princess Hotel. Witness knew the business was run at a loss,

and that Gourlay got a reduction of rent owing to that, and was now making a small profit.

The Chief Justice: Supposing that agreement of November 1 was considered cancelled on the ground that there was a misunderstanding between you, would you be in a position to pay the debt to Gourlay and put him in the position he was before the assignment?

Witness: No, my lord.

What do you consider was a fair value of the hotel on November 1?—With the idea that I was to get a canteen licence for one of the rooms at the back, it was fully worth £1,250.

But the debts were £1,500, and it was a losing concern?—I think it was the fault of my manager.

Hamilton John Hodson deposed that he was manager of Martienssen's Brewery last year at the time the goodwill of the Princess Royal Hotel was sold to plaintiff. Martienssen's Brewery and all properties connected with it were ceded to the South African Breweries in March, 1899. Witness went to England in August, 1899, and when he came back this assignment of the Princess Royal Hotel to Gourlay had taken place. In consequence of what Corlett told him, witness and Martienssen went to see Mr. Kayser about the assignment, and the latter said it was a matter of congratulation to Mr. Martienssen, as Mr. Gourlay was a much better man than Corlett. Witness and Mr. Martienssen then went to see Gourlay and mentioned that Corlett was owing some £900 on the purchase price. Gourlay turned round and said that so far as he knew it was only a matter of £750, but he did not remember whether he was told of it before or after the assignment. Gourlay then said that with the £750 the hotel was actually owing him £1,850, and he wanted to know whether Mr. Martienssen could not reduce the amount of his indebtedness against the hotel. Mr. Martienssen eventually decided to reduce the £900 to £500, so as to make the goodwill come within its marketable value, while Gourlay said he also would knock off £160 from his goods account. Gourlay was then trying to dispose of the place, and said that on the sale of the goodwill he would pay the £500. Gourlay made no attempt to dispose of the goodwill, and as Mr. Martienssen still held the promissory notes he summoned Corlett, in consequence of which this action was brought. Witness considered that the amount was due to Martienssen, and not the Breweries.

James Scott, land and estate agent, said he valued the goodwill of the Princess Royal Hotel at £1,450 at the present time, and a year ago it would have been worth from £1,200 to £1,400.

William Gourlay, the defendant, said that when he advanced the £300 to plaintiff he had no knowledge that a large portion of the purchase price was not to be paid then. Plaintiff said that with the £300 borrowed and the money he already had he would be enabled to purchase the goodwill for £1,250. Plaintiff also referred to his disposal of the Forester's Arms Hotel. Afterwards, in consequence of what Bosman and Powis's traveller told him, witness asked plaintiff why he had not mentioned to him that he had borrowed £300 from that firm to pay the purchase price of the goodwill. Even then plaintiff did not give witness to understand that there was anything outstanding between plaintiff and Martienssen. On November 1, witness had a summons out against defendant, and on that day went down to see his attorneys. Plaintiff came in shortly afterwards, and they discussed the matter, and Mr. Hackblock was sent for by Mr. Kayser. Witness understood that Mr. Kayser was attorney for the South African Breweries. Corlett's position was discussed and it was suggested by Mr. Kayser that plaintiff should make a cession of his lease to witness and come to an arrangement, so that if he could pay witness he should get his lease back again. Not a word was then said about something being still due to Martienssen. Witness had no knowledge of anything being due. Witness told plaintiff that he would be lucky if he got £1,000 for the goodwill. The letter referred to in plaintiff's evidence was then drawn up, and witness also signed the letter to the Breweries. After that witness carried on the hotel for some time at a loss, and later on he got a reduction of rent, amounting to about £8 per month. Witness had tried to get a purchaser for the hotel at a price sufficient to pay the amount witness had put in it, but he failed. He had never agreed to pay Mr. Martienssen £500 in settlement of the balance of the purchase price. Mr. Martienssen had asked whether, if he made a considerable reduction, witness would pay the balance of the purchase price of the goodwill, and £500 was mentioned, but witness simply repudiated that, and said that whatever could be got for the business over and above witness's liability they could have. Witness had tried to realise, but had only had one genuine offer, and that was of a little over £1,000 for everything.

The Chief Justice: I think that whatever your intentions may have been, the plaintiff must have intended that you should be liable for this £750?

Witness: If that had been understood I would not have entertained the idea of a compromise at all, and would have gone on with my summons.

Cross-examined: If witness did not have to pay this £750, he would be getting the hotel for something like £800.

Herbert Charles Hackblock, the manager of the South African Breweries, said that when the Breweries took over Martienssen's business they had no knowledge of anything due by plaintiff to Martienssen. At the meeting on November 1 witness had no knowledge of the debt, but after the meeting he went back to his office and discovered that a part of the purchase price was still due. There was nothing in the books of the Breweries Company to show that that amount was due. Witness at the meeting made no statement about anything being due to Martienssen, and nothing was said which would lead Gourlay to believe that £750 of the purchase price was still due. There was nothing in the books of the Breweries Company to show that that amount was due.

By the Chief Justice: After witness discovered the debt he wrote to Mr. Gourlay mentioning it.

Examination continued: Witness got his information as to plaintiff's indebtedness from a clerk who had been in the employ of Martienssen previous to the cession.

The Chief Justice pointed out that in a letter written by witness on the same day as the cession of the lease took place, he said that he was not sure he had made it clear that there was a debt of £750 outstanding on the goodwill, and that therefore witness must have known something before. The inference from witness's letter was that he knew of it at the meeting, but was not sure whether he had made it clear. The letter further said that he presumed that defendant recognised the balance of the purchase price as part of the Breweries' claim, as successors to Martienssen.

Cross-examined: Witness could not say where he got the information as to the amount being £750 unless he heard it at the meeting. The name of the clerk who gave witness the information as to something being outstanding was Kearn. Witness understood that Corlett thought he was clearing himself of all liability. When witness later on wrote to Martienssen asking

him whether he would accept £350 in settlement of the amount, which he believed would be paid at once, he had in his mind that Gourlay would pay the £350.

John B. Kayser, an attorney of the Court, said he practised in connection with the firm of Van Zyl and Buissonne. He had control of the proceedings in connection with the matter of Gourlay and Corlett. On the morning a summons was to be heard the plaintiff and defendant appeared before him, and in consequence of what took place the summons was withdrawn. At the meeting witness thought the suggestion came from him as to an arrangement for the assignment of the lease being made. Corlett never in witness's hearing said that £750 or any sum was due by him to Martienssen. The sum mentioned was that due to the South African Breweries, viz., £318, and there was some question as to the amount. Nothing was said as to the purchase price. There was a sum of £460 odd due to Gourlay, but nothing was said as to the furniture. Afterwards an agreement was come to, and witness dictated both the letters put in. Corlett was present when both the letters were dictated. The assignment was then endorsed upon the lease. Mr. Hackblock sent a letter to witness, which was received on November 2. Up to that time witness had no knowledge that anything was unpaid on the purchase price. Witness did not see Gourlay, but sent the letter in an envelope to Gourlay, he thought, the same day, but it might have been that afternoon or the next morning.

Cross-examined: The value of the goodwill was discussed at the time, £1,500 and £1,200 being mentioned, but he was sure nothing was said about the £750 due on the purchase price. He thought the letter written by Mr. Hackblock as to his not having made it clear was an afterthought.

Mr. Justice Buchanan pointed out that that could not be so, as the letter was written the same day as the meeting, November 1.

Witness said that he thought Mr. Hackblock wanted to draw in that £750.

The Chief Justice: You must have understood that Corlett understood that Mr. Gourlay should pay all his liabilities in connection with the business?

Witness: I understood that the Breweries were the only persons interested in this agreement, and that if there was anything due to Martienssen it must have been paid, because Mr. Hackblock, who represented the Breweries, the only persons entitled to the

money should anything be due, made no mention of any balance of purchase price.

W. Gourlay, recalled by the Court, said that the moment he received the letter on the morning of November 3, 1899, he went to plaintiff's office, but could not see him. He called several times, but did not see plaintiff until the afternoon, when the latter came to his office. When questioned as to the £750, plaintiff twisted about, and said it was all right. Witness told plaintiff that if that amount was claimed he would throw the whole thing over, as he certainly would not pay. He also saw Mr. Hackblock the same day, and said that if the £750 was to be claimed he would rather throw the whole thing over, and take action again.

H. C. Hackblock was also recalled by the Court, and said that in a conversation, he thought it was after November 3, defendant said he had received that letter, but so far as witness remembered he said nothing else. He could not recollect whether defendant repudiated liability for the £750.

C. W. Corlett, recalled, said defendant had told him about the letter, but he believed it was in the street they met, and after November 3. Defendant never intimated to witness that he would not pay the £750. Witness denied that it was clearly understood that defendant should not pay it.

This concluded the evidence.

After argument,

De Villiers, C.J., said: I confess I would have had some difficulty in giving judgment in this case if I had to rely on the oral evidence alone. I am satisfied that as far as the plaintiff himself was concerned, he intended by the agreement that was entered into that the £750, which he knew was owing by him to the lessor, should be paid by the purchaser, Gourlay, and it made no difference to him whether Martienssen was to be treated as the lessor or the South African Breweries, or whoever was entitled to this £750. This money was due, only £500 of the £1,250 for the goodwill having been paid, and plaintiff's intention was that the balance of £750 due was to be paid by Gourlay either to Martienssen or the South African Breweries. But there seems to be some difficulty, independent of the written testimony, as to what defendant's intentions were. His evidence as to the £750 not having been mentioned at the meeting on November 1 was corroborated by Mr. Kayser, but it is quite possible that it might have been mentioned without Kayser, who was very busy attending to the dictation of letters, hearing it. However, as I said before, if

this case had to depend entirely upon the oral evidence, I confess I should have come to the conclusion that there was no binding contract, and that the parties should be placed in the position in which they were before this alleged contract was entered into, but when one comes to look at the documents, contemporaneous and subsequent, it will be found that they are entirely in favour of the version given by the plaintiff. On the very day on which this contract was entered into, Mr. Hackblock, who was present at the conversation, addressed a letter to Messrs. Van Zyl and Buissinne, the attorneys in the matter, in which he said he was not quite sure whether he had made it clear at the meeting that there was a debt of £750 outstanding on the goodwill, and that he presumed the defendant recognised the balance of the purchase price as part of the Breweries' claim as successors to Martienssen. Now if the defendant had not intended that that £750 should be paid by himself, he would have at once gone to plaintiff and repudiated the claim altogether. The defendant said that he had gone to the plaintiff. Mr. Hackblock could only remember that defendant had said something to him about receiving the letter, and had no recollection of anything being said about repudiation, while the plaintiff also said that the defendant never repudiated the contract to him. In my opinion the conduct of the defendant in this matter and in respect to other matters, shows that he must have believed at the time this contract was entered into that he was to be liable for all the debts incurred by plaintiff in respect of the goodwill, and if that is so, the plaintiff's case is proved. I think that it would have been better if the declaration had been in another form, and had been based upon breach of contract, when the measure of damages would undoubtedly have been the £750, which there is no doubt whatever the plaintiff owed, but that after all is a very technical objection. That being so, the plaintiff is entitled to recover this amount of £750 with costs. The £750 will, however, be paid into court until a further order of the Court, because at the present stage it would be better to give an opportunity for some arrangement being come to between Martienssen and the South African Breweries. If no arrangement is come to, the present holder of the promissory note will be the person entitled to the money.

Buchanan and Maasdorp, J.J., concurred.

[Plaintiff's Attorney, D. Tennant, jun.; Defendants' Attorneys, Messrs. Van Zyl and Buissinne.]

[Before the Hon. Mr. Justice BUCHANAN and the Hon. Mr. Justice MAASDORP.]

RIDDELL V. SHERWOOD. { 1900.
Nov. 7th.

This was an action instituted for the purpose of recovering the sums of £101 10s. and £282 11s. 11d. due on two bills of exchange. The declaration alleged that on the 16th of February, 1899, the defendant drew a bill of exchange for the sum of £101 10s. in favour of the plaintiff upon the African Banking Corporation for value received and payable three months after date. On the due date, the 16th of May, 1899, the bill was presented, dishonoured, and notice of the dishonour was served on the defendant. On the 16th of February, 1899, the defendant drew another bill of exchange for £282 11s. 11d. under the same circumstances, except that it became payable four months after date. On the due date this was also presented, dishonoured, and noted. The plaintiff had made a demand, and the amounts not being paid, he claimed judgment therefor with costs.

The defendant in his plea admitted the first bill, but set off against the amount thereof the sum of £69 11s., which the plaintiff owed him for professional services rendered, and annexed an account containing two items of £56 15s. and £12 16s. He tendered the difference between his claim and the amount of the note, viz., £31 19s. With regard to the bill for £282 11s. 11d., he said that that arose from a transaction between the plaintiff and one Henry Carter. Carter being indebted to the plaintiff in that amount, and being unable to pay, he (the defendant) signed the bill as an accommodation note, having received no consideration therefor. At the same date Carter had a share in certain letters patent, and a syndicate was formed to work the same for the purpose of producing artificial stone, and the plaintiff, to secure himself against Carter, agreed with the defendant that the plaintiff should receive payment of the said £282 11s. 11d. out of moneys coming to Carter for his interest in the patent.

Sir Henry Juta, Q.C. (with whom was Mr. Buchanan), appeared for the plaintiff, and Mr. Searle, Q.C. (with whom was Mr. Close), appeared for the defendant.

The onus of proof being on the defendant, the first witness called was

Edwin James Sherwood, architect and quantity surveyor, who said he had been practising in Cape Town for nine or ten years. The plaintiff was a builder, and there had been many contracts between plaintiff and witness with reference to taking out quantities. He had been concerned in the Valkenberg Asylum contract and the Wale-street Police-station as surveyor of quantities. Plaintiff had rendered him certain accounts in connection with the first bill, which he received about a fortnight or three weeks ago. They were served on him in connection with this case, and he had not received any accounts before. With the exception of three items the accounts were correct. Witness said that his commission on the Valkenberg and Wale-street contracts was £66 15s. When he signed the promissory note he had seen no bills. Riddell told him that witness owed him about £100, and witness gave him the bill for £101 10s. Plaintiff said something about deductions, but witness was quite sure he had received no accounts before that. They were very intimate, and witness trusted Riddell. With regard to the second bill, witness was interested with a man named Carter in the making of artificial stone. Carter had taken out a patent, and witness purchased a half-share. Colonel De Villiers had a third share, and Carter the balance. Riddell became interested with witness in the affair. He took an interest in witness's half-share, and witness told Riddell that if he could get the thing floated into a company he would give him 200 £1 shares. Witness and Riddell worked to bring this about, but the company was not started. They decided to build a house for Carter, who was to manage the business at Maitland. They were putting up a wood and iron house when it was stopped, being against the regulations of the Municipality. The value of the material used in the construction up to then was about £25, and he told Riddell they would either cart the stuff back and pay him for it, or take the material and use it. The building was afterwards completed, but witness had nothing to do with it. After something had been told him by Carter, he told Riddell that it was foolish to go on with the place when the authorities would not pass the plan. The building was included in the sale of the patent rights. He had the matter of the building put in the agreement to protect

Riddell. Witness had brought an action against Carter for money expended in the working, but before this came on Carter went to England. Witness had never been inside the house. Of the £282 on the second bill, £235 17s. was in connection with this building. Witness first saw the details with the attorney. The remainder, £46 14s 11d., was for moulds supplied to the syndicate. These were now on the place at Maitland. As soon as the company went through witness would see that Riddell should have his 200 shares. Riddell told witness that he wanted the money, saying that he could not get it from Carter, and witness gave him a bill (the second one in the action) to accommodate him. He had nothing to do with that bill other than to have given it to Riddell to accommodate him as a friend. He never had a particle of consideration of it, and Riddell knew this was so. The bill was not given to Riddell as payment for the erection of the cottage. Witness accepted Riddell's account with the exception of 10 guineas for Valkenberg, and two items for Wale-street. This was a deduction for an alleged error in measurements; but there was no error, and the measurements were taken by a Mr. Wood. Furthermore, the claims were covered by a £30 contingency in the contract. There was also a charge of £12 for putting in windows in Wale-street. This was an improper deduction, and there was also the contingency in the bills of quantities to cover it. There was another charge for £55 for vulcanite roofing, but witness did not know why the charge was made, except that Riddell had said that witness had told him wrong prices. Witness did not guarantee prices.

Cross-examined: Witness knew about the vulcanite roofing before he signed the bill for £101, Riddell having complained to him about the prices. The question of the windows cropped up when the bill was signed. There were no accounts before witness when he gave the bill. He did not know how Riddell arrived at £101 10s. which was the amount of the accounts. Accounts were discussed, but when witness signed the bill it was with the understanding that the accounts should be gone into afterwards. The moulds and the building had been sold, and witness's share was £500 and 500 fully paid up £1 shares. He had not received the money. If he had this would have been settled, and Riddell would have had the money for the building, and his 200 shares. It was not true that he offered Riddell shares in lieu

of money, and that Riddell refused. He was to give financial assistance in consideration of these shares.

Re-examined: The building of the house was a matter between Riddell and Carter. At first the former was instructed by the syndicate to build a house for Carter, but this was stopped, and witness had nothing further to do with it. Witness had never gone into details until these accounts were presented in connection with this action. Riddell said the £101 was a bill on general accounts, and the details were not gone into.

By the Court: Witness sued Carter for half the expenses he had paid in connection with the patent. The account for the building was not included in this. He never mentioned the building to Carter.

Richard E. Wood, a quantity surveyor, said he was called in in connection with some dispute about the Valkenberg Asylum building. He measured the slating up, and found on examination now that they were very nearly the same quantities.

Cross-examined: The quantities were supposed to be wrong, and an arrangement was made that McLaughlan (the sub-contractor), Riddell, and Sherwood should divide the loss caused by the difference.

Re-examined: There was a difference of about £21, according to the quantities now produced, between the quantities and witness's measurements.

This closed the case for Sherwood.

Thomas Riddell, the plaintiff, said that before Sherwood gave the note for £101 10s. there was a discussion about the account and the disputed items. After the discussion Sherwood gave the note, and the same day he signed another bill for £282, the amount for the building of the house and for certain moulds. He wanted witness to tender. Witness had no business dealings with Carter. Defendant told witness he need not be afraid, as he would see that he was paid. It was done at Sherwood's instructions, and witness did not look to the company for the money. The charges were fair and reasonable. Witness started with the building, and when it was two-thirds finished Sherwood asked witness to stop, which witness did for a day or two. Then Carter came along and said that if he did not go on with the building it would blow down, as it was in an unsafe condition. Witness went on with the work, and Sherwood knew that he was doing so. Afterwards Sherwood promised witness shares, but witness did not want

these, and did not accept them. Witness was pressing for the money, and Sherwood signed the bill. He gave the bill to witness in settlement of the account, and not to oblige witness as a friend. It was not just the loan of his name to a promissory note. Witness certainly reckoned Sherwood would pay the one bill, but the other bill he said was the company's concern. Witness, however, had nothing to do with the company, and had told him he would not do the work unless defendant saw him paid. Witness took up the bill because Sherwood had practically assigned his estate, and witness knew that certainly the bill would not be taken up by Sherwood. The items as to the slating, windows, and vulcanite roofs were Sherwood's errors, and witness would not pay them, and therefore the arrangement mentioned was come to.

Cross-examined: Witness sent in all the accounts before Sherwood passed the promissory note. The account was addressed to the company, but witness gave it to Sherwood, who had made himself responsible to witness for the amount. Witness knew it was work for the company, but he did it for Sherwood. Witness was not interested in the company, although Sherwood had voluntarily offered him 200 shares, but he had never accepted them, and had not received them. He had never agreed with Sherwood that something should be put in the agreement with Wernher, Beit and Co., who bought the property of the syndicate, as to witness receiving certain shares. Witness had owed money to Sherwood, and had advanced money to him up to the time when he found he was overpaying him. Witness gave Sherwood the full statement before he signed the promissory notes. The only dispute was the three items. With regard to the £55, there was no mistake in the quantities, but Sherwood gave witness the price, 4s. 6d. a yard, when he was filling up the quantities. Witness went on that, and found afterwards that the price was 9s. per yard. If Sherwood did not guarantee that price then Sherwood would be entitled to that £55 on his commission. When witness told Sherwood about the mistake the latter said 4s. 6d. was a fair charge, and demurred about paying the difference. If Sherwood had not told witness that 4s. 6d. was the price witness would have gone and inquired from Allen, from whom it was said in the specifications particulars could be obtained. As to the windows, witness said the plans gave Sherwood sufficient information. Some allow-

ance would have to be made for the brick-work, but witness had not worked it out himself. The contingencies allowance was not made for errors in the specifications, but for other things that might crop up. As to the bills, witness thought that Sherwood would take up the first one, but was not so sure about the second one. He knew it was the company's concern, but he had Sherwood's word that he would be paid. At the meeting of Sherwood's creditors witness put in the claim for £101, as that was a personal thing, but he was not sure about the £282 bill. He did not think it was then due. Witness had never asked Carter to pay that latter amount, but one day when he met Carter in the street the latter said that if Sherwood would not pay the money he would see it paid.

After argument,

Buchanan, J., delivered judgment as follows: The plaintiff in this case is a builder and contractor, and the defendant has been employed by him as a quantity surveyor in connection with various contracts undertaken by him. These contracts apparently go as far back as 1895, and run over several years. During the course of these contracts money was advanced, and in the beginning of 1899 the parties came to a settlement of accounts as between themselves with reference to quantities taken out, and the commission due thereupon, and on February 16 the defendant gave the plaintiff a promissory note for £101 10s., which plaintiff alleges was in settlement of accounts to that date. There are several items in dispute, and it is alleged that all these items were discussed, and objections taken, and ultimately after all these points had been brought before the notice of the defendant he gave the promissory note for £101 10s., and this note became due, but has not been paid. The defendant says that there were certain items not settled, but looking at the position of the parties, the transactions between them, the signing of the promissory note, and the discussion that took place on these disputes, the Court thinks that it must be held that there was a concluded settlement of accounts between the parties, and that therefore the defendant cannot re-open the account which he had acknowledged to be correct by giving the promissory note for £101 10s. The second promissory note was for £282 11s. 11d., and was given by the defendant to the plaintiff for value received. The defendant pleads that this was an accommodation note given by him to plaintiff, and that he received no

value for it, and therefore is not liable on it. The plea states that there were transactions between the plaintiff and one Carter, and that it was for an amount due by Carter to plaintiff that this note was given, but from the evidence it appears that the defendant, Carter, and a third party were interested in a patent for the manufacture of artificial stone, the defendant having a half-share in the patent, and the other two parties the other half between them. The defendant, acting for the syndicate, wrote to the plaintiff asking him upon what terms and for what amount he would erect a certain building which was required for the purposes of this syndicate. The plaintiff said that he would not tender and that he would not undertake the work unless defendant made himself responsible for the debt. This work was for the benefit of the defendant himself, at any rate he was interested in the syndicate to the extent of one-half, but that was not sufficient for plaintiff, who would not undertake the work unless defendant made himself responsible for the whole amount. This was apparently agreed to, and certain buildings were erected and certain moulds made. The patent was sold by defendant and his co-proprietors, and defendant distinctly said that if he had got the money he would have paid the debt due to plaintiff, but unfortunately for him, the money for the sale of the patent had not yet come in, and defendant has not been able to pay the amount. The defendant gave the promissory note for the amount due for plaintiff's work, and he now pleads that there was no consideration, but from the evidence it is clear that the plea of want of consideration totally fails, and that there was consideration—good consideration—given by the plaintiff for the note. Besides this, there is the fact that defendant himself in his transactions with Carter had actually sued Carter for amounts which were included in this note, and he could only have sued Carter if he was satisfied that there was liability. It is true that at the time the bill was given the plaintiff knew of the syndicate, and knew that from the sale of the patent the money would be paid, and the defendant said that there was an understanding that if they did not receive that money the bill would be taken up by plaintiff when it became due, but that simply amounted to this, that there was a promise on the part of the person receiving the note to assist the other party, and give him time to pay his liability. It is unfortunate for Mr. Sherwood that he has not received the

money for the patent, because he said that he was quite willing to pay the amount when he received that money, but in the meantime judgment must be for the plaintiff in terms of the declaration with costs.

Maasdorp, J., concurred.

[Plaintiff's Attorney, A. W. Steer; Defendant's Attorneys, Messrs. Tredgold, McIntyre, and Bisset.]

SUPREME COURT

[Before Mr. Justice BUCHANAN and Mr. Justice LANGE.]

IN THE MATTER OF THE PETITION OF FREDERICK WILLIAM BAYNES WILLMOT, AS EXECUTOR DATIVE OF THE ESTATE OF THE LATE THOMAS THORP. } 1900.
Nov. 8th.

Mr. Buchanan moved for a rule nisi under the Derelict Lands Act to be made absolute. Granted.

Ex parte VAN HEERDEN.

Mr. Buchanan moved for leave to the petitioner to transfer certain property without the assistance of her husband, whose whereabouts are unknown, and also a general order to transfer any other property of hers which she might sell. The parties were married by ante-nuptial contract, excluding community of property, but not the marital power. The petitioner's husband had left her to go to Johannesburg, and his present whereabouts were unknown. The property was the wife's, and a portion thereof had been sold to a Mr. Keyter. When last heard of the husband was in Johannesburg, from where he had some time before signified by telegram that he had no objection to the sale to Keyter.

Buchanan, J.: Leave to transfer to Mr. Keyter will be granted, as the husband has consented to this. As to the other property, we cannot take away the husband's rights without giving him notice. The Court will grant a rule nisi, to be published in a Johannesburg paper, calling upon the respondent to show cause on the 1st February why the leave should not be granted in regard to the remaining property.
Postea (February 1, 1901).

Rule made absolute.

SMIT V. SMIT.

Mr. Gardiner moved for a decree of divorce. Defendant, he stated, had been ordered to rejoin his wife on or before October 15 last, which he had not done.

The rule was made absolute.

CABLE COMPANY V. TRAMWAY COMPANY.

Mr. McGregor applied for an order authorising the Registrar to transmit certain original exhibits to the Privy Council.

Granted, on condition that the Registrar may use his discretion.

IN THE INSOLVENT ESTATE OF TJAART K. J. VAN DER WALT.

Mr. Buchanan moved for an order authorising the Master to call a meeting for the proof of debts and for the election of a trustee. Two meetings had been held by a Resident Magistrate, at the second of which an agreement had been come to between the creditors and the insolvent, and it was decided to elect no trustee. There was now nobody who had authority to deal with certain money, which by the agreement had been handed to Attorney Van Coller for the benefit of the creditors, Van Coller having since handed it to the Master.

Granted.

IN THE ESTATES OF THE LATE ALETTA MARIA AND JACOBUS FRANCOIS CONRADIE.

Mr. Buchanan applied for confirmation of sale to one of the executors. The Registrar of Deeds reported that the matter was quite *bona fide*, but had refused to transfer, because there was no signed consent from the heirs.

Order granted.

IN THE MATTER OF THE PETITION OF BERNARDUS PETRUS REES.

Mr. Nathan moved for a rule nisi under the Derelict Lands Act to be made absolute. Granted.

IN THE ESTATE OF THE LATE MAGDALENA M. W. DE VILLIERS.

Mr. Buchanan moved for an order authorising the investment of certain moneys on certain property purchased by one of the executors.

Order granted.

MUSGRAVE V. MUSGRAVE.

Mr. Buchanan moved for leave to sue for restitution of conjugal rights by edictal citation. He read an affidavit to the effect that in February, 1893, petitioner contracted a marriage in London with Beatrice Margaret Crawhaw, who was considerably older than petitioner. The marriage was a very ill-advised one, and the petitioner's parents were strongly opposed to it. In a few days after the marriage they separated, and since that time had had no intercourse whatever. The petitioner thereafter left England, and had lived in Cape Town for the last seven years. The petitioner's wife was now resident in Newcastle with her mother, and was in comfortable circumstances. Petitioner therefore asked for an order.

Leave was granted to sue by edictal citation, personal service to be effected, returnable by February 1, 1901.

IN THE MATTER OF THE PETITION OF THE KERKERAAD OF THE DUTCH REFORMED CHURCH AT RIVERSDALE.

Mr. P. S. Jones applied for rule nisi under the Derelict Lands Act to be made absolute. Granted.

IN THE ESTATE OF THE LATE PIETER ADRIANUS SCHAAP.

Mr. Gardiner moved for leave to mortgage certain property. Granted.

IN THE ESTATE OF THE LATE WILLIAM ALEXANDER RENNIE.

Mr. P. S. Jones moved for leave to mortgage certain property. Granted.

GREENFIELD V. FRIESLAAR.

Mr. Gardiner moved for the appointment of a *curator ad litem* to sue for damages for injuries caused to Arthur Greenfield by alleged negligent driving.

The matter was referred to Mr. Gardiner to certify as to *probabilis causa*.

IN THE ESTATE OF THE LATE ALETTA MARGARETHA VAN HEEDEN.

Mr. Buchanan moved for leave to sell certain property and to purchase certain other property. Granted.

IN THE ESTATE OF THE LATE HENDRIK COENRAAD KRUGER.

Mr. Gardiner moved for leave to exchange certain property, to authorise certain payments, and to pass a bond.

Granted.

IN THE ESTATE OF THE LATE JOHN RAVENHILL HOWSE.

Mr. Buchanan moved for an order authorising the transfer of certain property by one of the executors in the estate, the whereabouts of his co-executor being unknown. The petitioner held the general power of attorney of his co-executor, but had mislaid it.

Granted.

IN THE ESTATE OF THE LATE CATHARINA MARIA VENTER.

Mr. McGregor moved for leave to transfer certain property.

Granted.

SCHMAL V. JACOBSON.

Mr. Gardiner applied for a joint commission *de bene esse* and for postponement of trial.

Mr. Burton appeared for the respondent to consent.

The application was granted, the Resident Magistrate of Upington being appointed to act as commissioner.

NEW ZEALAND NATIONAL MORTGAGE AND AGENCY COMPANY V. WATERSTON.

Mr. P. S. Jones applied for a joint commission to examine certain witnesses in connection with the above suit, which was pending in New Zealand.

Mr. Schreiner, Q.C., appeared for respondent and consented.

The application was granted, and Mr. Howel Jones appointed to act as commissioner.

IN THE ESTATE OF THE LATE DOBOTHEA CHRISTINA MALHERBE.

Mr. Currey moved for an order authorising the surviving spouse to take over certain property.

An order was granted in terms of the Master's report.

IN THE ESTATE OF THE LATE WILLIAM PARKIN.

Mr. Gardiner moved for a rule nisi under the Derelict Lands Act to be made absolute. Granted.

IN THE MATTER OF THE MINOR SMITH.

Mr. Nathan moved for leave to exchange certain property.

Granted.

IN THE ESTATE OF THE LATE HELENA MARGARETHA KRUGER.

Mr. Buchanan moved for the cancellation of a certain mortgage bond in favour of J. H. Badenhorst.

Rule *nisi* granted, on the condition that the order be not given out before the 22nd instant, notice to be served on J. H. Badenhorst, the holder of the bond, the bond to be cancelled on receipt of the order.

IN THE ESTATE OF THE LATE OCKERT JACOBUS JOH. OOSTHUIZEN.

Mr. Buchanan moved for removal of one of the executors from his office.

An affidavit was filed by the petitioners, the three other executors, stating that the executor in question was one Jotham Joubert, a member of the Cape House of Assembly, who was believed to have joined the forces of the enemy, and had taken office under the Free State Government. Petitioners believed that Joubert was now in Holland.

A rule *nisi* was granted calling upon the respondent to show cause why he should not be removed from his office, the rule to be published in a local paper circulating in Steynsburg or the district of Albert, and in the "Government Gazette," returnable by January 12.

IN THE MATTER OF THE PETITION OF PIETER HENDRIK HAYLETT.

In connection with a motion for a rule *nisi* under the Derelict Lands Act to be made absolute, Mr. Solomon asked for an extension of the return day, and this was granted.

IN THE MATTER OF THE PETITION OF HENDRIK NIEKERK.

Mr. Maskew moved for a rule *nisi* under the Derelict Lands Act to be made absolute.

Granted.

IN THE INSOLVENT ESTATE OF MARTIN alias MARTHINUS BEYERS.

Mr. De Waal moved for a commission to examine certain witnesses.

Granted, Mr. Jones being appointed commissioner.

SAMUEL MARKS V. MITCHELL. { 1900.
Nov. 8th.

This was an application for an order of ejectment against the respondent, who was in default. The affidavit of Johan Jansen, the agent of the applicant, stated that the premises in question had been let on February 25, 1898, to one Pratt by a lease of which only a copy was attached, the original having been mislaid. On December 17, 1899, the premises were almost wholly destroyed by fire. Pratt nevertheless declined to vacate the premises, and tendered as rent what he considered sufficient for the undestroyed portion. This was not accepted. No rent had been received; but no action was taken for payment of the rent or ejectment as the applicant was resident in Pretoria. In October Pratt left the Colony, making no provision for the payment of the rent, but sub-let the premises to the respondent without the applicant's leave.

Mr. Gardiner appeared for the applicant.

No order was made, presumably because on the same day judgment had already been taken out against Pratt for the rent due.

SCOTT V. SCOTT. { 1900.
Nov. 8th.

Deed of transfer—Unlawful detention.

This was an application for an order upon the respondent to deliver to the applicant a certain deed of transfer in his possession. The applicant stated in his affidavit that the respondent had no lien on the deed nor any right of pledge thereon. The respondent stated in his affidavit that the applicant, who was his brother, had been assisted by him in the purchase of the property mentioned in the deed, and had advanced £50 to the applicant towards the payment of the purchase price. He further stated that he had in many ways assisted the applicant in obtaining work and labour for him, and had rendered an account amounting to £569 15s., being money owed to him by the applicant. A summons for the payment of this amount had been issued, and an action was now pending in respect thereof. He retained the deed, because it was closely connected with the said account, the subject matter of the action. He held no other security for this amount, and would have no security at all "unless the said deed constitutes such a security." The applicant denied that the £50 advanced towards the

purchase price was still due, the respondent having been paid that amount.

Mr. Schreiner, Q.C., appeared for the applicant.

Mr. McGregor appeared for the respondent.

After argument,

The Court granted the order as prayed, the respondent to pay the costs.

INDUSTRIAL LIFE ASSURANCE { 1900.
SOCIETY V. CRAWFORD. { Nov. 8th.

Book — Insurance Society - Policy-holders—Employee.

C., a former employee of an Insurance Society, with the consent of his employers, substituted a book which he had specially designed and printed at his own cost for certain returns which had previously been used by the Society in its business.

The book contained the names of policy-holders and the amount of premiums paid by them to C.

Held, that the Society, which was about to institute an action against C. for an account of moneys received by him on its behalf, was entitled to delivery of the book.

This was an application on notice calling upon the respondent to show cause why he should not deliver to the applicant a certain book which he (the respondent) had used when conducting the business of the society, for the purposes of such business. The applicant's affidavits showed that the book which was claimed contained the names of policy holders, and the amounts received by the respondent on account of premiums on behalf of the company. The company usually gave its employees form sheets on which to make their returns in regard to policies effected, but the respondent had thought fit to have the book printed for his own use in this respect. This was the book claimed. A similar book used by the respondent had been handed in by him some time previously, and the company being satisfied that the book was as useful as the form sheets allowed the respondent to again make use of such a book. The respondent had been dismissed from the society's employ, and there was an action pending against him for certain sums due by him in respect of policies effected.

The respondent claimed that the book being printed for him at his own expense was his property, and it was of the greatest importance that he should retain the book in the face of the statements that the applicants intended suing him for certain moneys alleged to be owing by him. He was quite ready and willing to give the applicants all reasonable access to the book, and to allow them to make extracts under his supervision.

The applicants, in reply, claimed to be absolute owners of the book in question.

Mr. McGregor for the applicants.

Mr. Buchanan for the respondents.

Buchanan, J. : It is most material that the applicants should have the information which the book contains. The respondent has substituted a book purchased by himself for the forms provided by the society. That book having taken the place of the forms so supplied, belongs to the company, and must be given up. An order for the delivery of the book will be made, with costs.

IN THE MATTER OF THE BOR- } 1900.
DER PRINTING AND PUB- } Nov. 8th.
LISHING COMPANY.

Mr. Molteno moved for an order placing the said company in liquidation. A syndicate had been formed at Aliwal North to publish the "Eastern Echo," and to carry on a general printing business. It was formed into a company, and the petitioners were shareholders. The liabilities exceeded the assets by £425 5s. 2d. Five out of fifteen shareholders were in gaol on charges of high treason, and two others were believed to be with the enemy's forces. The company did not carry on business after the 15th November, 1899, and on the 20th July last a special meeting of shareholders was held, and it was then decided upon the casting vote of the chairman to wind up the company, as under the circumstances it could not be carried on without loss. The company could not be wound up voluntarily. Counsel asked for an order to wind up the company, and that Mr. Richard Booth Walker, attorney, Aliwal North, should be appointed liquidator with powers under the 216th section of the Companies Act, No. 25 of 1892.

An order was granted as asked, the liquidator to give security in the sum of £500.

AHLBOM V. LITHMAN AND CO.

Mr. Buchanan moved for judgment in terms of referee's report.

Mr. Graham, who appeared for respondents, consented.

Granted, costs to include the costs of the referee.

IN THE MATTER OF THE ROCKLAND SEMINARY.

Mr. Schreiner, Q.C., moved to confirm a certain agreement entered into by the trustees appointed by the Court with the Kerkeraad of the Dutch Reformed Church at Cradock.

Mr. Howel Jones appeared for the Superintendent-General to consent.

Granted.

BADENHORST V. BADENHORST.

This was an application to have a rule *nisi* granted by the Supreme Court calling upon the respondent to show cause why an order should not be granted authorising the Sheriff to pass transfer of certain property sold to the applicant by the respondent.

Mr. P. S. Jones applied for an extension of the return day until February 1, 1901. Personal service of the rule had been ordered, but that was impossible. It was asked that service by publication in a paper at Burgersdorp and the "Government Gazette" be allowed.

Granted.

COMBRINCK AND CO. V. BRITISH SOUTH AFRICA COMPANY.

Mr. Buchanan applied for postponement of the trial of the above case, and for a joint commission *de bene eare*.

Mr. Burton, for the respondents, consented.

Granted.

VAN RYNEVELD V. VAN DER RIET.

Mr. Buchanan moved for an order for the personal attachment or the respondent for contempt of court, in that he had failed to file an account, supported by vouchers, of the amount received by him from the South African Association on October 18, 1898, on behalf of the applicant's wife, being a legacy due to her in the estate of the late Elizabeth de Jongh. He had been ordered by the Supreme Court on April 12, 1900, to do so.

Granted.

SOLOMON V. PFUHL. { 1900.
 { Nov. 8th.

Arbitration—Award.

This was an application on notice calling upon the respondent to show cause why an

award of an arbitration appointed by the parties in connection with the dissolution of a partnership between them should not be made a rule of Court.

The agreement to arbitrate set out that the parties entered into partnership in August, 1899, and agreed to dissolve from the 11th August, 1900; that they agreed that the respondent continue the business on his own account, and that the applicant furnish all details necessary to enable the respondent so to do, and to secure to himself the goodwill. Thomas Masterton was appointed to make up a balance-sheet with a view to a final liquidation of the business. The respondent was to have possession of all the assets and to pay out to the applicant whatever was found to be due as his share of the partnership. Any dispute as to the amounts due on the value of the various agencies and their commissions was to be decided by the arbitrator, A. W. Karstel.

The arbitrator awarded the applicant the sum of £300 as his share of the goodwill, the applicant to give a guarantee that he will in no way interfere with the business. The respondent denied that the goodwill had ever been submitted to the arbitrator, and stated that the arbitrator took evidence on other matters connected with the award in his absence, and that he (respondent) had not received a copy of the balance-sheet drawn up by Masterton. He further stated that the award was uncertain, and conditional, and that several matters submitted verbally by the parties had not been dealt with.

Mr. Gardiner appeared for the applicant.

Mr. Schreiner, Q.C., for the respondent.

Buchanan, J.: The great difficulty is to find out what specific matters were referred to arbitration. The whole award is irregular, the procedure irregular, and the points submitted so uncertain and indefinite that it is impossible for the Court to ascertain what points the arbitrator was authorised to decide. The application must be refused with costs.

THE PETITION OF SAREL JACOBUS DU PLESSIS AND OTHERS.

Mr. Schreiner, Q.C., moved for leave to mortgage certain property in the estate of the petitioner's parents, who by their last will had left this property to the petitioners, subject to a usufruct for life in favour of the survivor of the testators, and also subject to the condition that during the lifetime of

the survivor such property shall not be mortgaged. The survivor renounced and waived her rights.

Order granted.

EAYES'S TRUSTEE V. MUIR AND CO.

Mr. Gardiner moved for a joint commission *de bene esse*. There was an action pending between the trustees in the insolvent estate and Muir and Co., the present applicants. Muir and Co. had taken possession of certain boots with the leave of the insolvent a few days before his insolvency, at a time when his liabilities were considerably greater than his assets, and had removed these boots to England, from where they had been originally consigned to the insolvent. The trustees were about to sue for the value of these boots, which at the time of their removal were pledged to one Heydenrych, the principal creditor in the estate. Application was accordingly made on behalf of Muir and Co. for a joint commission to be held in England, to take evidence as to the value placed on the boots in England.

Mr. Schreiner, Q.C., objected to the appointment of the commission on the ground that there was no necessity for it, stating the original invoices would show value of value of the boots.

A commission was granted, Mr. Leonard being appointed commissioner.

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), the Hon. Mr. Justice MAASDORP, and the Hon. Mr. Justice SOLOMON.]

PROVISIONAL CASES.

BAUERLANDER AND KRUGER V. } 1900.
A. W. F. LINDEMANN. { Nov. 8th.

Mr. Close moved for final adjudication of defendant's estate as insolvent, the provisional order having been granted by Mr. Justice Maasdorp on November 2.
Granted.

W. A. VISSER V. A. W. H. LOUW.

Mr. S. Solomon moved for provisional sentence on a promissory note for £53.
Granted.

COURT CROWN ORDER OF FORESTERS V.
H. CLEMENT.

Mr. Joubert moved for provisional sentence on a judgment of the Queen's Bench

Division of the High Court of Justice, England, for £87 1s. 5d., and £8 15s. 6d., taxed costs.

The defendant appeared in person, and denied the debt. He stated that he did not appear before the Court in England because he did not receive the writ in time.

[De Villiers, C.J.: The writ was served on you on the 23rd December, and called on you to answer it 60 days after it was served.]

The defendant said he proposed reopening the case in England.

[De Villiers, C.T.: Yes, but meanwhile you must pay the amount here.]

The Court granted provisional sentence as prayed, the Chief Justice pointing out that it was only provisional sentence that was asked for, and defendant could reopen the case in England, in which case, if successful, he would recover any sum he might now have to pay.

MERCER AND ANOTHER V. PARAZA.

Mr. Close moved for confirmation of the arrest of the defendant Paraza, which had been effected under the 8th Rule of Court. The defendant owed the plaintiffs the sum of £122 10s., being money lent and money due on a partnership account. He had taken his passage in a ship bound for Teneriffe, advertised to sail on November 8.

The defendant appeared personally, denied the debt, and stated that he wished to defend the action, but he could not find security.

Mr. Close: The plaintiffs are prepared to accept £87 in full settlement, and forego the balance of £35 10s., which was half the partnership profits.

The defendant said that he had no money, but would try to get security.

[De Villiers, C.J.: This is rather a hard case. If the defendant is sent to gaol, he will have to stay there until February, because the case cannot be heard until then.]

Mr. Close: The defendant must have some means. I have a witness in court who can prove having a few days ago handed the defendant £125.

The Court confirmed the arrest, at the same time suggesting to counsel for the plaintiffs that a settlement should be, if possible, arrived at, as the defendant might again apply for his release when he had consulted his legal advisers, and then might possibly be released on his own recognisances.

BLANCKENBERG V. H. O. OWEN.

Mr. Close moved for judgment under Rule 329d, for £100, with interest at the rate of 12 per cent. from October, 1898, or in the alternative for the delivery of certain mules, oxen, and wagon, and also for £10 10s. fees for services performed.

Judgment was granted for the sum of £100, with interest, as asked.

MARKS V. C. F. PRATT.

Mr. Searle, Q.C., moved for judgment under Rule 329d, for £780, rent due for premises in Lelie-street and Plein-street, from September 1, 1899, to October 31, 1900, and also in terms of the lease for cancellation of the lease of the premises.

The clause of the lease was that if the defendant (lessee) sub-let without the consent of the lessor (plaintiff), the lessor could immediately cancel the lease. This the lessor had done.

Order granted as prayed.

**COLONIAL GOVERNMENT V. { 1900.
STEPHAN BROS. { Nov. 8th.
Dec. 6th.**

1. John Cradock's Proclamation of August 6, 1813, section 5—Re-assumption — Transfer — Public purposes.

The Government is entitled to claim transfer of land reassumed under section 5 of Sir John Cradock's Proclamation of August 6, 1813, provided the purposes for which the Government requires the land are public purposes.

The following were held to be public purposes under the fifth section of the Proclamation :

1. Landing and shipping goods imported or exported by the Government or the public.

2. The erection of buildings for the transaction of business connected with the landing or shipping of such goods and for the temporary storage of such goods.

3. The excavation of quarries to be used for the construction of wharves for landing and shipping goods and for the erection of buildings for the accommodation of Her Majesty's officials.

4. The construction of wharves and the erection of buildings referred to in the preceding subdivision.

5. The erection and construction of buildings, sheds, and yards for the curing and temporary storage of fish by the public.

6. The erection of stables for the housing of animals used in the conveyance of persons and goods.

7. The erection of buildings for the accommodation of persons having business to transact at Lambert's Bay and for the purposes of a public market.

This was an action for the transfer of certain land at Lambert's Bay reassumed by the Government under Sir John Cradock's Proclamation of August 6, 1813.

The plaintiff's declaration was as follows:

1. The plaintiff is the Hon. Sir Pieter Hendrik Faure, in his capacity as Secretary for Agriculture, and as such representing the Colonial Government. The defendants are Hendrik Rudolph Stephan and the secretary for the time being of the Cape Town Board of Executors, in their capacity as executors testamentary of the estate of the late John Carel Stephan, and the said Hendrik Rudolph Stephan in his individual capacity.

2. The said Hendrik Rudolph Stephan and the said late Johan Carel Stephan are the registered owners of the farm Otterdam, situated at Lambert's Bay, in the division of Clanwilliam.

3. The said farm was granted to the defendants' predecessors in title on December 31, 1831, on perpetual quitrent title subject to the provisions of Sir John Cradock's proclamation of August 6, 1813.

4. It was provided by the fifth section of the said proclamation that on all places adjoining to the sea or communicating with the sea by inlets therefrom the rights of the Crown are reserved with the power of re-assumption of any quantity of land not exceeding twenty morgen, paying the proprietor for such buildings as he may have erected according to a fair valuation, provided such ground be wanted for public purposes; and if given up by the Crown it shall not be transferred to another individual, but shall revert to the proprietor or his representatives.

5. Acting under the above provisions by proclamations dated June 6, 1849, and November 18, 1899, issued by the Governor of the Colony, the Colonial Government has resumed twenty morgen of the said farm as being required for public purposes.

6. The said twenty morgen have been duly surveyed, and the plaintiff has called upon the defendants to sign all necessary documents and to do all things necessary to pass transfer of the said twenty morgen to the Colonial Government, the said Government undertaking to pay such reasonable compensation, if any, as may be payable for buildings erected, and to satisfy all costs incidental to transfer, but the defendants refuse to give transfer of the said land.

7. All things have happened, all times have elapsed, and all conditions have been fulfilled necessary to entitle the plaintiff to demand transfer of the said land from the defendants.

The plaintiff claims (a) that the defendants be ordered to do all things necessary to pass transfer of the said twenty morgen of land, the plaintiff undertaking to pay compensation for any buildings erected and to satisfy costs of transfer; (b) alternative relief; (c) costs of suit.

The defendants' plea was as follows:

1. They admit paragraphs 1, 2, 3, and 4 of the declaration.

2. They say that on the 6th June, 1849, the then Governor of the Colony, acting under and by virtue of the powers conferred by Sir John Cradock's proclamation of 1813, issued a proclamation declaring that twenty morgen of the said place Otterdam or such portion of twenty morgen as may be hereafter inspected and surveyed by a duly qualified surveyor and certified by the Civil Commissioner of Clanwilliam as sufficient for a public landing place with access thereto as aforesaid, shall be and is hereby reassumed by the Crown, but not, however, so as to be hereafter transferred to any individual other than the proprietor or proprietors of the said place Otterdam for the time being, to whom the same shall in terms of the said proclamation of the 6th of August, 1813, revert in case it should at any time be no longer needed for public purposes.

3. The said land so reassumed was used for a landing place with access thereto, but the defendants say that prior to the 18th of November, 1899, the said land had ceased to be used or needed by the Crown for such landing with access thereto or for any other

public purpose whatsoever, and had consequently reverted to the owners of the place Otterdam.

4. On the 18th of November, 1899, the Governor of the Colony issued a proclamation purporting to alter and amend the proclamation of 1849 so far as the purposes of the reassumption were concerned, and altering the purpose of a landing place for which the aforesaid twenty morgen had been reassumed into public purposes. The defendants contend that by virtue of the premises the said proclamation was of no force or effect. Save as aforesaid the defendants deny paragraphs 5, 6, and 7 of the declaration, except that they admit that they refuse to give transfer.

Or otherwise the defendants say in case the Honourable Court should hold against the defendant's contention:

5. That they deny that the Crown wants or needs the said land for public purposes.

6. That on the 5th of January, 1900, the plaintiff instituted an action against the defendants for a declaration of rights with regard to the user of the said land and the defendants beg to refer this Honourable Court to the pleadings filed of record in that case.

7. That the objects and purposes for which the Crown requires the said land are not public purposes, but purposes which are private, and not within the meaning of the proclamation of 1813, and that since the date of the proclamation of 1899 the plaintiff has not used or made any attempt to use the said land for any public purposes whatsoever.

Or otherwise the defendants say in case this Honourable Court should hold that the plaintiff does want the said land for a public purpose:

8. That the extent of twenty morgen is far beyond and in excess of the legitimate requirements of the Crown for public purposes.

9. That the plaintiff in reassuming the land is bound to reassume such portion of the place Otterdam as will cause least injury and inconvenience to the defendants, and that the land of which transfer is claimed is such portion of such place as will cause the greatest inconvenience and irreparable loss and damage to the defendants.

10. That the plaintiff can reassume such land as is wanted for public purposes without transfer thereof being passed, and that the plaintiff is not entitled to claim that transfer should be passed.

Wherefore the defendants pray that the plaintiff's claim may be dismissed with costs.

For a replication to the defendant's plea the plaintiff said that save that he admitted that he commenced an action against the defendants for a declaration of rights on January 5, 1900, and save in so far as the plea admitted any of the allegations in the declaration he denied all and singular the allegations of fact and conclusions of law in the said plea, and joined issue thereon, and prayed for judgment with costs of suit.

The public purposes for which it was claimed the land was required were those stated in the former action, viz.:

1. Landing and shipping goods imported or exported by the Government or the public.

2. The erection of buildings for the transaction of business connected with the landing or shipping of such goods, and for the temporary storage of such goods.

3. The excavation of quarries to be used for the construction of wharves for landing and shipping goods and for the erection of buildings for the accommodation of Her Majesty's Customs officials.

4. The construction of wharves and the erection of buildings referred to in the preceding sub-division.

5. The erection and construction of buildings, sheds, and yards for the curing and temporary storage of fish by the public.

6. The erection of bathing-houses for the use of the public, and of stables for the housing of animals used in the conveyance of persons or goods.

7. The erection of buildings for the accommodation of persons having business to transact at Lambert's Bay.

Mr. Searle, Q.C. (with whom was Mr. Ward), appeared for the Government, and Sir Henry Juta, Q.C. (with whom was Mr. Rubie), appeared for the defendants.

The first witness called was

Rainier Johannes Moll, a Government Land Surveyor, who deposed as to the correctness of the plan put in showing the different surveys of the twenty morgen in question. These surveys included the original one in connection with the resumption of land at Otterdam, made by Mr. Noble in 1849.

Dirk Jacobus Albertus van Zyl, member of the Legislative Assembly for the division of Clanwilliam, said he had lived in the division since his childhood, and had known Lambert's Bay for the last thirty years. He knew, generally speaking, the position of

the ground that was reassumed in the various surveys. That portion taken in Mr. Noble's survey was suitable for a landing place. With regard to Mr. Moll's survey, he thought the land had been added in the best manner possible. There was no other landing place for the division than this particular landing place. At present there was a large quantity of grain coming down to the coast to be exported, and this was the only outlet for the district. Wagon transport by road to the nearest station was too far, and a *ex* up all the profit, consequently the whole of the export for the district came through Lambert's Bay. Mr. Stephan had a store on his property, and stored grain sent down, but this was the only store there. It would be very advantageous to the public to have a store in which they could store their grain for shipment. Messrs. Engelbrecht used to have a store there ~~and~~ this was taken away, and sometimes grain had to be stored outside, as there was no room in defendants' store. Witness had gone down with Mr. Moll to inspect the locality. He thought it highly necessary that a wharf or a jetty should be constructed there. At present there was only a small private jetty there. With regard to fish-curing in former years people used to cure fish along the beach, on the portion of ground reserved by Noble's survey. Before Messrs. Stephan the farm had belonged to Shaw, then to Van Wyk, and then to Van Zyl. The last named went insolvent in 1885, and the farm was bought at the sale of the insolvent estate by Messrs. Stephan. During the time of Van Wyk and Van Zyl the place was used for fish-curing by the farmers, who had boats there, and cured fish in small sheds. Great numbers of farmers used to go down to Lambert's Bay in the season, and while there outspanned their wagons and cured fish on the beach. The fish-curing by the public was stopped in 1896 or 1897, Messrs. Stephan having objected to the people curing fish on the beach, and since then there had been no fish-curing except with the consent of Messrs. Stephan. It would be to the advantage of the public to be allowed to cure fish there, and to have sheds on which to do so. They did not want free trading on the beach. It would be sufficient in the interests of the public to have a store there for the storing of grain and all produce—wool and skins and so on—and to have leave to cure fish and take them away from the beach. He suggested that the Government should have sheds put up in

which the fish could be cured, or the Government might license sheds. It was a good fishing place. There was sufficient stone on the beach to build. Bathing houses for the public were needed, and stabling for their animals. People came there for the summer season, and they needed stabling for their animals. By bathing houses, residences for these people was meant, not hotels. Mr. Stephan had agreed to that when giving his evidence before a Select Committee. It would be an advantage to have places where the people could stay. Messrs. Stephan had put up a lot of new buildings, but these were always crowded during the season. Witness went there every year in January. Witness thought that if public purposes included the putting up permanent buildings for summer visitors it would be necessary to have grazing for the animals they would bring with them, and the whole twenty morgen would be required. There was a public outspan, but on this animals could only remain twenty-four hours. Even for the cattle required in the Government work at the port there would have to be grazing ground. So far as witness could see it would not damage Stephan's property by the erection of these buildings, and the cutting off of this land, as none of the ground was at present cultivated, and it was just waste land.

Cross-examined: At the time Stephan Bros. bought the ground it had been for some time in the market, and nobody would buy it. The people were then trying to get the Government to take over the land, and a commission inquired into the matter. Witness could not say that a number of other storekeepers had been pretty active in this agitation since Stephan took over the ground. Before the Select Committee of 1893 Mr. Engelbrecht was called as a witness, and said that besides fishing it was necessary that there should be the right to trade in grain and Colonial produce there, and that if they had the right to keep their men at the bay they would have no difficulty in competing with Stephan Bros. They wanted to carry on fishing, but were not particular about selling fish. He admitted, however, that the witnesses he called before the Select Committee said they wanted to cure and trade in fish. He did not expect the Government to put up the summer residences mentioned, but to grant licences or something of that kind, so that the people could do so. Messrs. Stephan had a wharf at which all the landing and shipping was carried on. Up to last year and for the previous three

years Lambert's Bay had been entirely in Stephan's hands, and the public had not used that land for any purpose whatever except with Stephan's permission. Since 1849 the Government had not constructed any wharves, stores, etc.

The Chief Justice asked if there was a Customs officer at Lambert's Bay.

Sir Henry Juta said he understood that there was not.

The Chief Justice asked what there was to prevent a cutter or other vessel bringing in goods that ought to pay duty.

Sir Henry Juta said there was nothing to prevent that, but pointed out that it was the same all along that coast. Lambert's Bay had never been declared a port.

The Chief Justice: Anyhow you say that the Government has not used this ground for public purposes for years.

Sir Henry Juta: No, my lord, and whatever public purposes there were the Government stopped them several years before 1899.

Was it stopped at Stephan Brothers' request?—Yes, my lord, probably on the ground that they had no right to use the ground as they were doing.

Examination continued: The first movement on the part of the public was in 1891 or 1892, owing to the low price Messrs. Stephan Brothers were paying for wheat and rye compared with the high prices which could be obtained in town. This led to petitions to Parliament that the monopoly might be taken away. Lambert's Bay was different from St. Helena Bay and other places, because there was no competition at it. Witness also gave an instance where he could not get a skipper to take wagonwood from Knysna to Lambert's Bay, because the skipper said he could not land the wood at the latter place as the jetty there belonged to Messrs. Stephan.

Johannes Abraham Engelbrecht deposed to formerly having a store at Lambert's Bay, which he had to take down because Messrs. Stephan objected. People used to fish there, and would do so again if they could. Last April witness himself had sent a large quantity of grain to the bay to await shipment, but owing to there being no storage there his grain had to be stored in the open, and thirteen or fourteen muids were destroyed. He considered that it was to the interest of the public that stores should be erected there. He also agreed with Mr. Van Zyl as to the necessity for wharves, bathing houses, etc., being erected there.

Cross-examined: In 1896 they had to stop using this ground, on orders from the Government owing to representations made by Stephan Brothers. In his evidence before the Select Committee in 1893 witness said that he wanted the right to carry on business at the Bay in grain and Colonial produce. The farmers did not all come past his farm as there was another road, and he wanted to be able to carry on business and fishing at the bay, as he had always done. He could not say whether in 1893 all the Government was prepared to do was to give them ground for landing and shipping there.

Petrus Jacobus Slabbert said he now lived at Woodstock and had done so for the last three years. Previous to that he had been a farmer at Lambert's Bay for thirty-five years. He was then in the habit of buying fish and salting them. Some years after Stephan came to Lambert's Bay objection was taken to this practice. Witness agreed with the previous witness that it would be in the public interests to erect a store for the storage of grain, to erect a wharf, etc., and also that the public should have the right to buy fish there.

Cross-examined: Witness was stopped by Stephan Brothers from salting fish on the beach.

William Petrus Burger, a farmer residing close to Lambert's Bay, said his father had a fishing boat there. Witness was now thirty-eight years old, and had lived there all his life. On his father's death witness took over his business. Up to 1897 they always fished at Lambert's Bay. The fish they cured and used on their farm. Stephan Brothers came and stopped them from curing fish on the beach. He offered them another site, but it was unsuitable, and in consequence of that they gave up the fishing. It would be useful to the public to have a store for grain at the Bay, and also to have the right to catch and cure fish. A great many people would avail themselves of that right.

Charles Currey, the Under Secretary for Agriculture, deposed to the correspondence between his department and Stephan Brothers. The position of the Government with regard to this matter he took to be that they were awaiting the results of this action, because before they could do anything they must know what their rights were. When these were decided they would have to go to Parliament before further steps were taken.

Cross-examined: The Government wanted this land so that goods could be shipped and for general public purposes. They had from time to time during the negotiations been

stopped by Stephan Brothers from exercising the right of landing and shipping. Witness had been consulted on the formulation of these claims, and with regard to the erection of these seaside residences he considered that it would enable the public to enjoy the rights they had, but he could not say whether the Government had any scheme for the erection of such buildings.

Henry Rudolph Stephan, one of the defendants, and a member of the firm of Stephan Bros., said they bought the whole of the farm in question in 1877. The former owner had become insolvent, and the farm was hawked about, and nobody would buy it. It was offered to the Government for £3,000, but they would not buy it. Witness's firm bought the farm, and worked up the business there. All the landing and shipping that had been done at Lambert's Bay of late years was done at the wharf erected on their own ground by witness's firm. They had also erected large stores, and he considered it scandalous that the Government should want to go and erect buildings right in front of their property, which would be the result if they built on the ground surveyed. As far as his recollection went, he was not aware when the farm was bought that a portion of the land had been surveyed for resumption by the Government, although, of course, they heard of the restrictions afterwards. Witness had never stopped anyone from landing and shipping goods. There were two stores erected by the public, and the use of these was stopped by the Government, as had the use of the beach for fishing and curing. Since then all public use of that place had been stopped. The buildings it was proposed to take away had been standing for some years; witness could not say how long, as he had only been at Lambert's Bay eight or ten times in his life.

In answer to the Chief Justice, witness said he bought the farm for £2,600.

Examination continued: If this land was taken away, and the Government did what was proposed, it would take away three-fourths of witness's profit. If buildings were allowed to be put up for the storage of grain it would mean that a farmer coming there with grain would take away with him goods, and a business would be set up at once. Witness made his profit on the selling of goods, not the buying of the grain. If the Government put a store there he would have no objection, but it would be trading if they sold out of that store,

The Chief Justice: Of course the result is that at present the farmers must sell their grain to you for whatever you choose to give?

Witness said that his landing and shipping charges were so reasonable that they did not need to do so. Proceeding, witness said he had at one time made a proposal that the Government should take a certain piece of land for landing and shipping goods and the erection of a store by Government, but not for trading. He did not see why his valuable property should be injured for the sake of Mr. Engelbrecht and a few others.

The Chief Justice: You object also to the seaside residences?

Witness: Of course; we are building houses there, and the public will be served by us.

Examination continued: Up to the time of this plea that the Government had abandoned the ground witness had never objected to Government erecting stores or people curing fish there, but he objected to trading.

Cross-examined: Witness more or less took up the same position now as he had done before the Select Committee in 1893. The point he had stuck to was that they would not allow private trade.

Charles Montagu Fryer, secretary of the Divisional Council of Clanwilliam, said he had known Lambert's Bay all his life. Since Stephan Brothers put up the wharf witness had ever known of any ships coming there except Stephan's. The farmers used to catch fish there, and cure their fish, and take it home, he supposed for home consumption. Witness was aware of Noble's survey. It was made during the time witness's father had the farm. Of late years the land had not been used for public purposes.

Cross-examined: Witness now lived at Clanwilliam, and was the local agent for Stephan Brothers. He visited Lambert's Bay once or twice a year. Witness lived at Lambert's Bay until 1862. In the time of Griesel, who had the farm after witness's father, some small vessels used to come there, but Griesel did the landing and shipping for them. The resumption of the piece of ground in 1849 was owing to witness's father having objected to people who came down to the beach outspanning at a place called Brakfontein, on the extreme east of the farm Otterdam. The people claimed the right to land and ship at Lambert's Bay, and the land

was resumed by the proclamation of 1899. After that the people used to outspan at the beach.

Re-examined: Witness was not the local agent in this case, and had nothing to do with it.

By the Court: Lambert's Bay was the only port for Clanwilliam. It would be a public advantage for the Government to have a store there for the purposes of landing and shipping all kinds of produce. It would bring a lot of skins and wool and all sorts of things down. Formerly many ships came to the Bay. Witness himself had formerly had one.

This concluded the evidence in the case,

Mr. Searle, Q.C.: The Crown never gave up its rights to this property. Eight morgen were taken by the Government in 1849, and in 1897 a surveyor was sent to Lambert's Bay to survey additional land. The Government had asserted its rights by turning away people who had taken upon themselves to cure fish and erect stores on the land. The proclamation of 1899 was not null and void. The Government, by taking land as a public landing-place, had not exhausted its rights under Sir John Cradock's proclamation. The land is clearly required for public purposes, the seven purposes stated being public, and not private. For instance, the curing of fish and the erection of buildings are public purposes. A store for grain was admitted to be a public purpose; if that was so, a shed for curing fish was clearly one also. I do not press that the Government be allowed to erect sea-side residences, but stables for draught animals and buildings for the accommodation of business persons are necessary. With regard to the rights of the Government over land granted, see *De Villiers v. Cape Divisional Council* (Buchanan, 1875, p. 50); *Stellenbosch Divisional Council v. Myburgh* (5 Juta, p. 8); *Landmark v. Van der Walt* (3 Juta, 300).

The Government will require the full 20 morgen, a large portion being necessary for building purposes. The Government is under no obligation to take such land as would cause the least inconvenience to the defendants. They can take what they wish. The purposes mentioned are public; in the event of the Government making any other use than those specified of the property, the defendants could come to the Court and apply for an interdict. With regard to number seven, I would ask the words "and for the purposes of a public market" to be inserted.

Sir Henry Juta, Q.C., objected.

[De Villiers, C.J.: It is a pity that more public purposes were not stated, such as the erection of buildings for other official purposes, *e.g.*, the holding of a Periodical Court. The amendment will be allowed, as the defendants will in no way be prejudiced.]

Sir Henry Juta, Q.C.: I wish the Court to note my objection to the amendment.

Sir Henry Juta, Q.C.: The defendants are the registered owners, and rely on Sir John Cradock's proclamation. The Government must prove, before the defendants are called upon to set up any defence, that they require the land for public purposes now, and each specified purpose must be proved. The Government cannot come into court and say they want transfer of the land because they might want the land at some future time. They must claim such ground as they require from time to time for a definite purpose, but they cannot come and ask for transfer of the whole 20 morgen if they cannot show that they want it all at the present time for specific purposes. What evidence is there that they require this land for any public purpose at all? No money has been voted by Parliament; they are not prepared to build a pier or anything else. The Government clearly gave this land up. In 1849 they took 8 morgen, and had made no use of it at all for ten or twelve years, and consequently the land reverted to the defendants. The building of seaside residences is one of the purposes mentioned. That is clearly not a public purpose. The true object of the Government is to obtain this land for private trading purposes, and that is not *bona fide*. None of the purposes are *bona fide*, and were clearly not intended by the proclamation. The only purpose that might be said to be public is the construction of a wharf, and for that there is no necessity, there being no trade but that of Stephan Bros. The whole object of this "re-assumption" is to introduce rival trade, to the prejudice of the defendants, who are the present owners.

De Villiers, C.J.: The plaintiff asks for transfer of land belonging to the defendants under the 5th section of Sir John Cradock's proclamation of 6th August, 1813, which provides . . . His Lordship cited the section, and continued: The question is whether the purposes for which the plaintiff requires the land are public purposes. That the first purpose specified is such the defendants do not deny. The second is, in my opinion, a perfectly legitimate public purpose, as also is the third, but I will not confine it to

buildings for the accommodation of the Customs officials, but for Her Majesty's officials, because it may be necessary, for instance, to erect a building for the holding of a Periodical Court. The fourth is also a public purpose, and in regard to the fifth, as a place has been provided for the temporary storing of fish, it would be a benefit to those so storing that they should also do the curing. So this also may be allowed as a public purpose. As to the next, it is going a little too far to say that bathing houses are a public purpose. I do not think they are, but I think that the building of stables is. The last purpose refers to the erection of buildings for the accommodation of persons having business to transact at Lambert's Bay. Now it seems to me that a market would be a perfectly legitimate purpose, and as application has been made for an amendment so as to include a market, and as this will in no way prejudice the case for the defendants, as no fresh evidence need be led as to whether a market would come within the definition of public purposes, the Court allowed the amendment. There is really no injury to the defendants except indirect injury to their trade, and that the Court cannot help. If once the Government has the right to expropriate these 20 morgen of land, it can make no difference to the plaintiff, so far as the land itself is concerned, what buildings are erected upon it, provided such buildings are erected for public purposes. As to compensation, it appears that some buildings had been erected by the defendants, and the Government has consented to pay compensation for that. Transfer will be made on condition that this compensation be paid, and the order therefore will be that the defendants pass transfer to the plaintiff of the land, on condition that the said land shall be used for the purposes mentioned, and on the further condition that it shall not be competent for the plaintiff or his successor in office to pass transfer of the said land, or any portion thereof, to any other person than the defendants or their representatives. The defendants must pay the costs. It is unfortunate that the Crown did not include a good many other purposes for which the ground might be required, but the Court cannot give more than was asked. It must not be taken for granted that this decision will be binding in future cases, which will depend upon the circumstances as to what the words "public purposes" will include.

Maasdorp, J., concurred.

[Solomon, J., who sat on the first day, 8th November, was absent, and so delivered no judgment. Buchanan, J., expressed no opinion, having only sat on the last day of the hearing.]

In reply to Sir Henry Juta, Q.C., De Villiers, C.J., stated that the Government alone, and not private individuals, could erect buildings, but the Government could let these buildings to private individuals for the purposes specified.

BELVLIE PARK ESTATE SYN- { 1900.
DICATE V. MATTHEWS. { Nov. 8th.

Provisional sentence—Cheque —
Building lots.

The B. Syndicate advertised certain building lots for sale and described them as being "most desirable for Villa Residences," inspection of the land by intending purchasers being invited:

M. inspected the land, attended the sale, and purchased a number of the lots in payment of which he drew a cheque in favour of the auctioneers.

Three days after the sale he visited the land and finding some of the lots under water he stopped payment of the cheque.

Held, on a claim for provisional sentence, that in the absence of misrepresentation on the part of the Syndicate they were entitled to judgment for the amount of the cheque.

This was an application for provisional sentence on a cheque for £2,143 3s. 3d., which had been specially endorsed to the plaintiff syndicate by Jones and Co., in whose favour it had been drawn by the defendant. On presentment at the bank at which it was payable it was dishonoured, payment having been stopped.

The defendant, on affidavit, stated that he had attended the sale of building plots on the Belvliet Estate at Observatory-road on October 4, 1900. He went there because he had seen an advertisement giving a plan of the erven in the estate, and which stated that this was to be the sale of the season, the land being most desirable for villa resi-

dences, and that it was a unique opportunity. On the day of the sale the weather was fine, and he had no suspicion that the erven were water-logged. He purchased certain lots, giving in payment his cheque for £2,143 3s. 3d. On October 7 he visited the spot, and found to his surprise that half of the erven of Block A, the most of which he had purchased, were under water, apparently from a vlei on the other side of the 30 feet road. On obtaining expert advice, he was told that the land was quite unsuitable for villa residences, and he stopped his cheque and repudiated the sale so far as concerned the water-logged erven. For four blocks in regard to which he had no complaint he tendered the purchase price, vi., £588.

In an affidavit by a Mr. Reid, it was stated that the lots in question were always covered with water during the wet weather, and that some of the members could not have failed to know this. In his opinion, the land was absolutely unsuitable for the erection of villa residences.

The medical officer of the district said that the lots were water-logged, and were continually fed by water from a neighbouring vlei. It was also stated that it would require an extensive drainage system to drain the lots in question, at a cost of some £1,100.

In reply, the plaintiff syndicate produced affidavits to show that the ground was not water-logged, and that there was a ditch on one side of the block, which would carry off all the overflow water from the vlei. Careful inspection of the property was invited before the sale, which the defendant availed himself of prior to buying the lots.

Mr. Searle, Q.C., moved.

Sir Henry Juta, Q.C., appeared for the defendant.

After argument,

De Villiers, C.J.: Sufficient grounds have not been shown for refusing to grant provisional sentence. In the advertisement there was no warranty that the land as it was at the time of the sale was fit for villa residences, and it is known that many a fine villa stands upon land which was once water-logged, but which has been drained and made suitable, often at a little cost. In the absence of proof that there was any fraudulent misrepresentation on the part of the plaintiffs, I think they are entitled to recover upon the cheque. The defendant might have a good defence, and he can raise that in an action, but *prima facie*

the plaintiffs are entitled to succeed, and provisional sentence will therefore be given with costs.

Maasdorp and Solomon, J.J., concurred.

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., and the Hon. Mr. Justice, BUCHANAN.]

GRIEBELHOEN AND LOUW v. f 1900.
VAN DER SPUY. { Nov. 9th.

This was an action instituted by the plaintiffs, who were builders and contractors at Paarl, to recover a sum of £110 9s. 10d. on a contract entered into between the parties in connection with the erection of a building at Paarl. The declaration set out that the agreement was made verbally in January, 1899, by which the plaintiffs had undertaken to do certain work and labour for the sum of £420, which had been done as agreed. That during the continuance of this work the defendant had specially requested the plaintiffs to do certain work over and beyond the original agreement, which had entailed further labour, extending over a fortnight, and for this the plaintiffs claimed £40 9s. 10d. The defendant had paid £350, leaving a balance of £110 9s. 10d., which the plaintiffs now claimed. The defendant admitted that a contract as stated was entered into, but said that it was agreed that the building was to be completed by March 31, that it was not delivered on that date, and that he did not get possession until the end of April, and consequently suffered damage to the extent of £25. He said that it was further agreed that the work should be done to the satisfaction of one Van der Byl, who should act instead of an architect, and according to Van der Byl's report, work had been left undone to the extent of £12 19s. 6d. He tendered the sum of £94 5s. 10d. As a claim in reconvention, he claimed this amount (£12 19s. 6d.), and £25 as damages aforesaid.

The plaintiffs in their replication denied these statements, and joined issue.

Sir Henry Juta, Q.C. (with him Mr. Close), appeared for the plaintiffs.

Mr. Buchanan for the defendant.

Sir Henry Juta, Q.C., stated that of the £12 19s. 6d. in dispute, the plaintiffs had agreed to the deduction of items amounting to £6 15s. 6d., leaving a balance of £6 4s. in dispute on that point.

Johannes Rudolph Louw, one of the plaintiff in the case, deposed to his firm having contracted to do certain building work for

defendant for £420, and afterwards certain extra work was performed at defendant's request, amounting in value to £40 9s. 10d. The extras entailed certain additional time, at least a couple of weeks, to complete the work. There was no written contract. They had several times tried to get defendant to enter into a written contract, but he would not do so. It was not agreed that the work should be completed by the end of March. They told defendant that they would not sign a contract to complete the work in less than three months, which would have given them until the end of April. Witness never agreed that the work should be done to the satisfaction of a Mr. Van der Byl, a carpenter. He was not a fit and proper person to act as an architect. About a fortnight after witness's firm began the work Van der Byl appeared on the scene. He appeared to witness to be a kind of overseer. He gathered fruit for Mr. Van der Spuy on the property, and sometimes borrowed some of witness's employees to do odd jobs in the yard. After the work was finished accounts were sent in, and a portion of the money was paid. On July 14 they received a report from Van der Byl objecting to certain items, amounting to £12 19s. 6d., and also stating that these charges did not include charges for overtime, for which he considered £1 to be a reasonable indemnity.

Mr. Buchanan pointed out that that was a mistake, £1 per day being meant.

Examination continued: Witness's firm was not bound to allow anything, but, with a view to getting their money, agreed to reduce their account by £6 15s. 6d. Proceeding, witness detailed the various charges objected to, which charges, he said, were fair and reasonable, and further explained as to the things which it was said were left undone.

Cross-examined: While the building was going on they had done over again some work which Mr. Van der Spuy, not Mr. Van der Byl, had objected to, although Mr. Van der Spuy might have made his objections on what Van der Byl told him. They took no notice of Van der Byl.

The Chief Justice suggested that the £6 4s. should be given up, and the case for the plaintiff closed, so that the further evidence could be confined to the damages alleged to have been sustained.

The plaintiffs agreed to this.

H. J. van der Spuy, the defendant, said he was formerly a law agent residing at the Paarl. Witness entered into a contract with plaintiff for the completion of the house by

the end of March, the contract price being £420. The contract was not in writing. It was also agreed that Van der Byl should act instead of an architect. Owing to the place not being finished in time, he suffered great inconvenience and loss, his family having to go elsewhere until the house was ready. If plaintiffs had got the cement and kept their men at the place it could have been finished weeks before. Witness had arranged for plaintiffs to attend and have a written contract drawn up, but they did not do so. The plaintiffs had annoyed witness greatly and given him a lot of trouble. Proceeding, witness said “I would not stand the annoyance for £100, no, not for £500, because my constitution is weak. They worried me more than £500 worth.”

The Chief Justice: Have you ever built before?

Witness: Yes, my lord, once before.

And did the builder finish in time?—No, my lord; I had to stop him and gave the work up.

Melt G. van der Spuy, a son of the defendant, said he was present with his father when he spoke to Mr. Louw, and the latter agreed to finish the house by the end of March. Witness had been at the house during the month of March. On one occasion there were no workmen there, and on the other occasions only three men were there. On another occasion he heard Louw say he would have the work finished by the end of March.

Cross-examined: The conversation between witness's father and Louw took place in a private road and they had no plans or specifications with them.

Johannes J. van der Byl said he was employed to supervise this work. The work could have been finished in two months if plaintiffs had worked as they ought to have done. The men were not kept on the work and there was a delay in obtaining cement. On March 12 witness was present at a conversation between Mr. Louw and Mr. Van der Spuy, when Mr. Louw said he would do his best to finish the work by the end of March, and Mr. Van der Spuy said that if they did not he would charge him £1 per day. The house was finished, with the exception of some trellis work outside, on April 15.

After hearing Mr. Buchanan on the question of damages,

De Villiers, C.J.: If there had been a written contract no dispute would have arisen. Seeing that Mr. Van der Spuy was a law agent at the time it was surprising that he

did not see the necessity, or at least the advisability, of having a proper contract drawn up. He says he made an arrangement for the plaintiffs to call upon him for the purpose of signing a contract, but he did not say that he had the contract written out, and sent to the plaintiffs for signature or kept it in his own office for the plaintiffs' signature. That might easily have been done, but instead of that the whole matter was left in the vaguest possible state. I am satisfied that whatever Mr. Van der Spuy might have understood the plaintiffs did not understand that they were binding themselves down to complete the work by the end of March. It has been said that it was stated afterwards in the presence of Mr. Van der Byl that the work was to be completed within that time, but that probably was also a misunderstanding. At any rate, it does not amount to a binding contract that the work had to be finished by March 31, and that the plaintiffs would be liable in damages for not completing the work in that time. It must also be borne in mind that certain extras were done, and without anything more, that goes a long way to show that the plaintiffs were entitled to some further time, at all events, to complete the work, and the additional time they took does not seem to be unreasonable. However, upon the main point I do not think it was clearly understood, whatever Mr. Van der Spuy might have thought, by the plaintiffs that there was a binding contract to finish the work by March 31. That being the view of the Court, it is unnecessary to go into the question as to whether defendant had suffered any damage. Then there is the claim for £6 4s., which at the suggestion of the Court the plaintiffs agreed to forego, and no evidence had been taken upon that. Deducting this £6 4s., the judgment of the Court will be for £104 5s. 10d. with costs.

Sir Henry Juta pointed out that the question might arise before the Taxing Master as to the expense of some of the witnesses who had been brought there, but after the suggestion of the Court had not been called upon to give evidence. He pointed out that these witnesses were mostly workmen and others who would have given evidence as to the work having been done in a reasonable way, and that the time taken was reasonable, and who were therefore material witnesses. He also asked for the plaintiffs' witnesses' expenses.

The Chief Justice said these expenses would be allowed.

Buchanan, J., concurred.
 [Plaintiffs' Attorneys, Messrs. Tredgold, McIntyre and Bissett; Defendant's Attorneys, Messrs. Silberbauer, Wahl, and Fuller.]

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), and the Hon. Mr. Justice BUCHANAN.]

EDISON BELL COMPANY V. { 1900.
 HASKEN. { Nov. 9th.

Patent right—Interdict.

This was an application for an order to operate as an interdict against the respondent in regard to the manufacture and sale of certain phonographs, until he could show cause why the interdict should not be made permanent. It was also asked that the order should call upon him to submit an account of the profits he had made from the sales of these phonograms, and to pay the costs of the application. The general agent representing the applicant company, Mr. Doyle, in his affidavit stated that the respondent was infringing the company's patent rights, which had been acquired on the 11th June, 1888, in this colony, by selling the articles protected in the protection order in Kimberley. He also gave a detailed description of the phonogram and its appendages.

Sir Henry Juta, Q.C., appeared for the applicant company, and stated that the affidavits had been personally served on the respondent, who was in default.

The Court granted the interdict as prayed.

[Before the Hon. Mr. Justice MAASDORP, the Hon. Mr. Justice SOLOMON and the Hon. Mr. Justice LANGE.]

HAUSSMAN V. HAUSSMAN. { 1900.
 { Nov. 12th.

This was an action for restitution of conjugal rights instituted by the wife against her husband, and failing this, for a decree of divorce. The parties were married on September 14, 1896, at Cape Town, and had had one child, a boy. The plaintiff alleged that the defendant had maliciously deserted her in November, 1897, and had since failed to provide a home for her and her child. She claimed (1) a decree ordering the defendant to restore to her conjugal rights, or failing compliance with such order, a decree of divorce; (2) the forfeiture by the defendant

of any benefits derived by reason of the community of property; (3) the custody of the minor child; and (4) a reasonable sum of money as maintenance.

The defendant was in default.

Mr. Buchanan appeared for the plaintiff.

Eva Sarah Haussman, the plaintiff, bore out the statements in the declaration. When she and her husband were first married she lived with her grandfather, and he with his parents, he, however, visiting her frequently and living with her as his wife. She was not sure of his age. He left her in November, 1897. He had never provided a home for her despite frequent requests on her part. In June, 1898, she had received £1 from him in answer to a lawyer's letter. He also wrote to her then stating that she would regret having sent the lawyer's letter, and also that he was coming to see her, which he never did. They were married secretly. He was now in the Cape Town Highlanders earning 5s. or 6s. per day. She would be content if she got £1 a month and the custody of the child.

The Court granted judgment for the plaintiff for restitution of conjugal rights, and ordered the defendant to return to or receive his wife before the 1st of February, 1901, or failing that, to show cause on the 14th February, 1901, why a decree of divorce should not be granted. The plaintiff was to have the custody of the minor child, and a sum of £1 per month for the child's maintenance until it reached the age of 16 years. On the 12th March, 1901, the decree for divorce was granted, the defendant to forfeit all benefits of the community, and to pay £1 per month towards the maintenance of the child, of whom the plaintiff was to have the custody.

[Plaintiff's Attorney, C. Brady.]

PARAZA V. ALLMAN. { 1900.
 { Nov. 12th.

Writ of arrest—Discharge.

This was an application for the discharge of a writ of arrest, granted and confirmed by the Court (November 8, 1900), in favour of Allman, the plaintiff and respondent, as against Paraza, the defendant and applicant. It was also asked that the plaintiff be ordered to plead within a specified time in regard to any issues between the parties.

Paraza, in his affidavit, stated that he was arrested on the 31st October, 1900, at which time he was only served with a copy of the

writ, but not the affidavit on which the writ was procured. That since seeing the writ, he found it informal and irregular, and that it did not set forth sufficient particulars to warrant the issuing thereof. That the account annexed, which showed that he owed the plaintiff £10 for money lent, and £112 10s. in respect of a partnership between the parties. He denied the debt generally. The respondent stated that the omission of dates in the account in no way prejudiced the applicant, and set out details of some of the items in the account. He also stated that he was prepared to remain in the Colony until the matter of accounts between the parties was decided, and offered his personal security, and also to lodge with the Registrar of the Court the passage tickets he had taken out for Teneriffe for himself and his family.

Mr. Gardiner (for the applicant): The defects in the affidavits on which the writ was originally granted are fatal to the validity of the whole proceedings in the arrest. *Spiegel v. Eisenbach and Co.*, and *Spiegel v. Steyler and Co.* (1 Juta, p. 226).

Mr. Close (for the respondent) agreed to leave the matter in the hands of the Court, seeing that the defendant's (applicant) offer was reasonable.

The Court ordered that the defendant (applicant) be released, upon his giving his personal security for the amount claimed and costs, and upon his depositing with the Registrar of the Court his passage tickets, and that an action be instituted by the plaintiff, to be tried on December 3, 1900.

[Applicant's Attorney, C. Brady; Respondent's Attorney, Messrs. Van Zyl and Buissinné.]

LEONARD V. LEONARD. { 1900.
Nov. 12th.

This was an action for divorce on the ground of adultery brought by the husband against the wife. The declaration set out that the parties were married at St. Mark's Church, Cape Town, on the 25th day of March, 1894, that there was no issue of such marriage, which still subsisted, and that in or about November, 1899, and at Church-street, Cape Town, the defendant committed adultery with one Prince Davis, with whom she was at the time of the action living in adultery. The plaintiff claimed a divorce and forfeiture by the defendant of the benefits of the community existing between the parties. There was no plea, the defendant having been duly barred.

Mr. Gardiner appeared for the plaintiff; the defendant appeared in person.

After proof by F. H. le Sueur of the marriage, the plaintiff stated that the man Davis had lived with the parties in 1899, and that he (plaintiff) had, on becoming suspicious of his wife's conduct, remonstrated with Davis, who admitted the adultery and asked for forgiveness. After he had taxed his wife with her unfaithfulness, she still continued to cook and wash for Davis, so he put her out of the house, when she went to live with Davis in a room, let to them by one Dora Martins, who also gave evidence.

The defendant asked that certain articles in the house should be given to her as they were her own property before marriage.

This the plaintiff undertook to do.

The Court granted a decree of divorce and a forfeiture by the defendant of the benefits of the community.

[Plaintiff's Attorneys, Messrs. Silberbauer, Wahl and Fuller.]

[Before the Hon. Mr. Justice BUCHANAN.]

MEADOWS V. GOURLAY AND CO. { 1900.
Nov. 12th.
Negligence—Cheese—Natural decay.

This was an action for the recovery of the sum of £212 7s. 6d. as and for damages suffered by the plaintiff by the want of care of the defendant in storing and warehousing 42 cases of cheese for the plaintiff.

The declaration set out that the plaintiff, who was an importer of produce, did in the months of January, February, and March, 1899, warehouse with the defendant for the purpose of storage and safe-keeping, and for reward, 42 cases of cheese, the defendant undertaking to take proper care of them, and to re-deliver them to the plaintiff in the proper and sound condition in which he received them. The defendant did not take proper care of them, and they were consequently rendered partly worthless and partly unsaleable. The plaintiff accordingly claimed the sum of £212 7s. 6d. as and for damages.

The defendant in his plea admitted the warehousing of the cheese, and stated that the plaintiff was well acquainted with his bonded warehouse, and specially desired the cases to be placed on the basement of the warehouse, and that he (the defendant) agreed to exercise such due diligence as is required by law, and did exercise such due diligence and care, and was guilty of no negligence. He did not know whether the cheese when delivered to him was in proper

and sound condition, and put the plaintiff to the proof thereof. Further, that if the cheese was damaged in his warehouse (which he did not admit) he said it was due to the exceptionally heavy fall of rain in August, 1899, in consequence of which, without any default on his part, water found its way into the basement. He claimed a dismissal of the plaintiff's claim.

For a claim in reconvention he referred to the matters above pleaded, said he was always ready to redeliver the 42 cases upon payment of the rent due thereon, and claimed the sum of £53 4s. 7d. for the rent of the cheese and other goods, particulars of which he had rendered to the plaintiff.

The plaintiff, in his replication, said that if water found its way into the basement in August, 1899, it was the defendant's duty to have immediately removed the goods. This he did not do.

For a plea in reconvention, he admitted that he agreed to pay rent to the amount of £53 4s. 7d.

Sir Henry Juta, Q.C. (with him Mr. Howel Jones), appeared for the plaintiff; Mr. Schreiner, Q.C. (with him Mr. Gardiner), for the defendant.

Sydney Valentine Meadows said he carried on business as a produce dealer. He arranged for a quantity of cheese imported from Australia to be stored in defendant's warehouse. The cheese, as far as witness knew, was in good saleable condition, and in January and February, 1899, he sold some of the same shipment of cheese. This was not warehoused and was good. In June and July he sold some of the cheese warehoused, and that was all right. After this forty-two cases were left warehoused. Two of the cases were stored on the ground floor above the cellar. He sold these in September, and they were all right. Witness sold some to defendant himself. The cheese was worth 6½d. a lb. Witness went to Australia in March, 1899, and returned in September. When he returned he went to the cellar and found that it contained large "patches" of water, in which the cases were. Witness thereupon wrote to the defendant, stating that the boxes had been saturated, and the contents destroyed by the water. Witness could not recollect having received a reply. On the 18th September witness arranged to consign some cheese to Messrs. Lawrence and Co. These were part of those stocked in the cellar, and were refused by the firm mentioned. Witness's agents—Tunnel and Duncan—took them back and witness then examined the cheese in the cellar and

found some of them unfit for sale. Witness thought he would test some of them, and he therefore sent them to the Parade, where they realised £2 10s. 3d. The proper value was £41 15s. 3d., and witness thought that if the inspector had been there they would have fetched nothing. Other cases of the cheese were subsequently destroyed under the supervision of the Customs House officials. Witness made a further examination of the thirty-two cases remaining, and found that the cheese was rotten with vermin, bred by the fungus caused by the wet. When witness went to the cellar on the 22nd September, he found that planks had been placed under the cases to raise them off the ground. The cheese was quite unfit for sale. Witness saw defendant, who suggested that they should take joint action against Combrinck and Co., the firm from whom he had leased the premises. He also said he had made several complaints to them as to the condition of the cellar, but could get no satisfactory reply. Witness did not agree to do this, and made no reference to the subject afterwards. Witness had been through the defendant's bonded warehouse on several occasions, but did not know it was wet. Had he known so he would not have put the cheese there. Witness did not ask that the cheese should be placed in the warehouse. He would have paid the rent if he thought the contract had been carried out.

Cross-examined: Witness understood that the bonded warehouses were inspected by the Customs House officials to ascertain their condition. Witness did not tell Mr. Shipper that the basement was just the place to store the Australia produce. Before witness left he saw the cheese in the basement, and he then saw nothing wrong. The goods said to have been sold in June and July were sold by witness's representative. The witness denied that Australian cheese would go bad if stocked for more than three months. It had to be sold more quickly than Canadian cheese. The Australian cheese would, however, keep for nine months and still be fit for sale. The defendant did not tell him before he left for Australia that the cheese was showing signs of decay.

Re-examined: The vermit bred by the fungus and found on the cheese was not the product of natural decay. He had had no complaints respecting the cheese sold in July, nor about those which were disposed of in September after having been stored on the ground floor of the cellar.

James Edwin Williams, managing director of Messrs. A. J. Cole, Limited, said that his firm dealt in Australian produce. Witness had had eighteen years' experience of Australian cheese. In September last year witness, with the last witness and a Mr. Hudson, went down to the defendant's warehouse to examine the cheese. About three months before he was sent a sample of the cheese. Witness's firm had kept Australian cheese in the wholesale store for nine and twelve months. When it began to decay it bred minute life, which made it "crumbly." Witness found in the cellar where the cheese was stored in defendant's place pools of water, some of the cases being in the water. The cheese had a life quite foreign to it, and was quite worthless. Fungus was found in the bottom cases. This was not a natural product of cheese, but was caused by the water. The life had gone right up the stack. Witness did not agree that the condition of the cheese was due to it being kept too long.

Cross-examined: Witness remembered the flood of August. It was a very violent and unusual flood. As witness saw the cellar when empty at summer time he thought it was a good place for storing cheese. The fungus had gone up to the third case.

Frank Hudson, importer, said he had had experience of cheese for the last ten years. He knew the store in question, and in 1895 was employed at Messrs. Combrinck's store, which adjoined the defendant's. In Combrinck's place they always used a pump to pump out the water from the basement. It was the same basement as that used by the defendant, who had one portion of it and Combrinck the other. The witness confirmed the last witness's evidence as to the length of time for which Australian cheese could be kept. He attributed the condition of the cheese belonging to plaintiff and stored in defendant's cellar to the cases being in the water.

William Gourlay, the defendant, said he had a licence for a bonded store. Prior to obtaining the licence the place was thoroughly inspected by the Customs officials. This was in 1897, and plaintiff was one of the first customers they had. He stored Australian produce. The goods were received at the store and stacked. They were practically in the custody of the Customs, and nothing could be done to them without the sanction of the Customs authorities. Meadows' goods were, by his express wish, placed in the basement, which was cool and damp. There was a good circulation of air in the basement.

Before Meadows went to Australia witness noticed the dust (the product of decay) coming out of the cases, and he advised Meadows to get rid of the cheese. In August there was a heavy flood, and witness noticed water coming through the walls. He kept men employed catching the water as it came in, and did everything to prevent the goods being touched by the water. The cases were standing on wood from the time they were first stored, and were at the opposite side to where the water was coming in. On one day the men were employed for about three hours in getting the water out, and only an occasional pool was left. The deepest part of the water which collected on the floor was about four inches, and only just touched the bottom of the lowest case. Witness thought Australian cheese perished more quickly than other kinds.

Cross-examined: The statement that the cases were standing in water was wrong. The water barely touched the lower cases. The flood might have damaged these, but did not injure those above. The cheese was naturally bad, and its condition was not attributable to the flood or the store, which was an excellent one. Witness gave instructions that Meadows should be informed of the water having touched the bottom cases. Witness had about 100 tons of goods in the basement when the flood took place. There were passages all along the store, and they baled out the water as it came in. The flood had really not done much damage. Witness complained to his landlords about the percolation of water through the walls, because he wanted it remedied. No one else had complained that water had damaged their goods.

Re-examined: The position witness took up was that he had done all in his power to prevent damage to any of the goods stored, and he held that if any claim could be made his landlords were responsible.

William Hansford, a locker in the Customs employment, said that during the whole period that the defendant had this bonded warehouse he had control of it, as he did of eight others also. The cheese in question was stored in the ordinary way. There was planking on the floor where the cheese was stored. Witness had from his own observation seen Australian cheese go bad very quickly in a warehouse. Witness was at the warehouse every day, and so far as he saw there was no negligence on the part of the defendant, and everything possible was done to get the water out on the occasion of the flood mentioned.

Cross-examined: Witness never saw the cheese standing in water. The floor was damp when Mr. Meadows examined the cheese. There were some pools of water about, but away from the cheese. Witness thought that so long as the cheese was not actually standing in water the damp floor would not do it any harm.

Daniel Hunter Cowle, storeman in the employ of Messrs. Gourlay and Co., said it was his duty to receive the cases of cheese from the plaintiff. When he stacked them he placed them on wood 1½ inches thick. When the flood came the deepest part of the water in the cellar was 4 or 5 inches, and the cheese was on the highest part of the floor. They baled the water out for about two hours on the first day, and by this means kept the water out. The cases were then above the water. There were five men working. On the next day water was still coming in, but the cases were not in the water. When Mr. Hudson and Mr. Williams came in the cases were standing out of water on the boards. Witness saw some dust come out of the boxes but did not know whether Meadows was told this.

Cross-examined: Witness only saw Mr. Meadows there once. It was true that when Messrs. Meadows, Williams, and Hudson came to the cellar there were little pools of water about the cellar. The dust that came out of the boxes was like sand.

Mervin Chase Backwell, examining officer in the Customs office, said that in July last he examined cheese in defendant's warehouse. This was condemned as unfit for human food, and it was destroyed. In some instances the cheese seemed to have crumbled away. The whole lot was bad in both top and bottom cases. Witness had had to destroy other Australian cheese which had gone bad in a similar way.

Cross-examined: Witness had simply to satisfy himself that the cheese was bad. He remembered there were insects, but could not say whether there was a fungus. He would not say it was not there. He did not think he saw it.

Frederick Shipper, manager for defendant, said that the plaintiff was present on many occasions at the store, and had told witness that the cellar was just the place for Australian produce. He seemed very pleased at the cheese being put there. Witness thought it a good place for storing cheese. There was good ventilation, and some damp, but this, in witness's opinion, would do the cheese no harm. Before the flood occurred, witness

saw signs that the cheese was decaying. When the flood came the bottom of the cheese-cases was not under water for more than two hours. They got the water out as quickly as they could. They were surprised to find that water came through the walls. Witness notified the plaintiff's manager of the occurrence. He showed him the cheese the day after, and pointed out that the water had touched the cheese-cases. When the cheese was destroyed witness saw it; it seemed to have rotted.

Cross-examined: The water from the flood just touched the bottom of the cases.

John Louis Mitchell Brown, M.L.A., retired merchant, said he had had experience extending over twenty years of imported cheese, though he had had no knowledge of Australian cheese. In witness's experience Colonial cheese could not be kept long, and was sold with all possible haste. Witness thought that the defendant's cellar was a very suitable place for storing cheese. It was similar to the cellar witness had used for cheese-storing, and was damp. Witness thought it very unlikely that the damp would extend to and affect the top cases.

Cross-examined: He thought the store suitable if the goods were kept away from water.

Gustav Niay, manager of Kamp's cold storage, said he was in Australia for five years, and had had considerable experience of cheese. He had had Australian cheese imported to this colony, and did not think it was safe to keep Australian cheese in this country for more than three months. He had known Australian cheese go bad in a month. Witness had always found the basement of the store suitable.

Cross-examined: Witness claimed to know more of Australian cheese than Mr. Williams.

After hearing Sir Henry Juta, Q.C., in argument, the Court, without calling on Mr. Schreiner, Q.C., to argue, gave judgment for the defendant.

Maaadorp, J.: As has been stated in the declaration it was the duty of the defendant to take care of the cheese, and to give it back to the plaintiff in proper and sound condition, having agreed that he (the defendant) would take such care that no injury would come to the cheese through any negligence on his part. The case for the plaintiff was founded entirely upon the negligence of the defendant, and if negligence had been brought home to him he would have been answerable for this. I believe that the

place where the goods were stored was known to the plaintiff, and that the plaintiff desired that the goods should be stored in the place in which they had been. It is clear that the defendant's liability will not terminate there, but that he will still be liable for any negligence on his part, or any cause over which he had control, on his part, which would cause injury to the goods. The place in which the goods were stored was cool and well ventilated, and I think that on the evidence before the Court the store was properly dunnaged, and had considerable conveniences for the storing of cheese. But while the cases of cheese were there the water made its way into the store. The flood was very unusual and unexpected, and according to the evidence, everything had been done to immediately remove the water from the store. On the evidence it is impossible to come to any conclusion but that it was only the bottom of the lower cases that came into contact with the water. But the evidence shows that, after the first day, during which the lower cases came into contact with the water for a couple of hours, the water did not touch them. On the facts I do not think any jury could come to the conclusion that the injured condition of the cases was caused by water, and that being so, I think the defendant is in this case released from further responsibility. I cannot see that the condition of the goods was caused by any negligence of the defendant. The goods were perishable, and to my mind, it is impossible to find that the defendant is responsible. I do not think that any act or neglect of the defendant caused the injury to the goods, but the injury was due rather to the perishable nature of the cheese, it having been stored for six, seven, or eight months. Under these circumstances judgment will be given for the defendant on the claim in convention, and also for the defendant (plaintiff in reconvention) on the claim in reconvention with costs.

Solomon, J., and Lange, J., concurred.

[Plaintiff's Attorneys, Messrs. Silberbauer, Wahl and Fuller; Defendant's Attorneys, Messrs. Van Zyl and Buissinné.]

[Before the Hon. Mr. Justice MAASDORP and the Hon. Mr. Justice SOLOMON.]

KRAHE'S TRUSTEE V. WALKER { 1900.
A.V.O. CO. { Nov 13th.

Insolvency — Furniture — Hire and purchase system.

This was an action instituted by the trustee of an insolvent estate to set aside an alienation made by the insolvent shortly before his insolvency as being null and void, and for an order on the defendant, to whom the alienation was made, to re-deliver the goods so alienated or pay their value.

The plaintiff's declaration stated that the insolvent's estate was sequestrated on 22nd February, 1900.

That in September, 1899, the insolvent purchased from the defendants furniture to the value of £275 9s. 3d., and on delivery paid £112 9s. 1d. to the defendants, and subsequently from time to time made other payments, the amounts of which were unknown to the plaintiff.

That on November 30 the insolvent and his wife, to whom he was married out of community, acting fraudulently in collusion with the defendants, signed an agreement which stated that the purchase of the furniture was made by the insolvent's wife, and thereafter the defendants fraudulently and collusively removed the furniture, and refused to return it or its value. At that time Krahe was already in insolvent circumstances, and consequently the alienation was fraudulent and to the prejudice of the creditors. The plaintiff therefore claimed an order, declaring the alienation null and void, and compelling the defendants to restore the furniture or pay its value, £275 9s. 3d., the plaintiff tendering to allow the defendants to prove in the insolvent estate for such portion of the price as had not been paid.

Or, in the alternative, he said that in February, 1900, Krahe and his wife, acting fraudulently and in collusion with the defendants, delivered to them the furniture, and that the defendants wrongfully and unlawfully took the same. That this was an alienation made without consideration, and was not *bona fide*, being made at a date when Krahe was in insolvent circumstances, and so null and void, under section 83 of Ordinance 6 of 1843.

He prayed for a similar order as above.

The defendants' plea stated that in September or October, 1899, they agreed to

lease to the insolvent's wife the goods referred to, at a rental of £7 10s. per month, payable in advance, the first payment to be made on the 15th January, 1900.

It was further agreed that the insolvent's wife should deposit with the defendants the sum of £30 on December 12, 1899, £30 on January 12, 1900, and £52 10s. on March 12, 1900, and that she might at any time during the hire of the goods become the owner thereof by paying £275 9s., credit being given her for the deposits made and rent paid.

It was further agreed that until the full amount of £275 9s. was paid, the goods were to remain the property of the defendants, and that if she failed at any time to carry out the conditions of the agreement, the defendants could retake possession of them, and that she would then forfeit any payments made.

The terms were inserted in a written agreement, dated November 30, 1899.

The goods were delivered between September, 1899, and 5th January, 1900. On the 3rd January the insolvent's wife, being unable to continue to make the monthly payments, consented to the removal of the goods by the defendants.

As a plea to the alternative claim, the defendants referred to the matters above pleaded, and denied the allegations made therein.

Mr. Searle, Q.C. (with him Mr. Buchanan), appeared for the plaintiff. Mr. Schreiner, Q.C. (with him Mr. Rubie) appeared for the defendants.

Charles Home, jun., an attorney practising at Worcester, said he was the trustee in the insolvent estate, and anticipated that the deficiency would be £250. On October 9, 1899, the deficiency was £62 10s. 7d. The insolvent had not attended the second meeting of creditors, and he (the trustee) could not obtain a warrant for his arrest, because no notice of the meeting had been served on him, it not being known where he was. In his report the trustee had made no suggestion that the agreement of November 30 was fraudulent. He had seen documents signed by the insolvent and his wife authorising the defendants to take back the furniture because they were unable to make the monthly payments. It was further proved that Walker and Co. had paid one month's rent (£21) for the insolvent in connection with a house hired by him in Cape Town. On the 4th March furniture to the value of £62 was sold to the insolvent, of which his wife knew nothing. The wife

also said that she did not know that she was buying the furniture from Walker and Co., and signed the contract or agreement without reading it, or having it read over to her, and that she also signed the document which allowed the defendants to retake the furniture at her husband's request. She, however, knew that her husband was ordering the furniture for the boarding establishment which she was managing. She claimed that the contract was hers, and the furniture when purchased was to become hers.

John Walker, one of the defendants, denied the alleged fraud, and said that the contract in question was made with the insolvent's wife, because she was the proprietor of the boarding-house. It was the usual kind of contract made by furniture dealers. The firm had made £6 on the transaction. He asked the insolvent and his wife to sign the document authorising him to retake the furniture in consequence of what he heard from a boarder. He knew nothing about the sale of the £50 worth of furniture in September, and did not make the agreement of November. The entries in the books in September were in the name of Krahe, the insolvent, and were later carried over to Mrs. Krahe's name. The goods retaken were sold the next day.

The defendants' bookkeeper said that Krahe made the first purchase of £50 worth of furniture, saying he was about to furnish for Mrs. Krahe, and he also made the first deposit, the agreement being on the hire purchase system. Twenty beds were delivered in November at the request of Mrs. Krahe. It did not matter who bought the goods, Krahe or his wife. There was no fraud, the contract being carefully explained to Mrs. Krahe. Mrs. Krahe had delivered to him a list of furniture required in her handwriting before delivery.

After hearing Mr. Searle, Q.C., for the plaintiff, the Court, without hearing Mr. Schreiner, Q.C., gave judgment.

Maasdorp, J.: The plaintiff alleges in this case that in the month of September, 1899, the insolvent purchased from defendants certain goods to the value of £275, and paid on account £112, and that thereupon the goods became the property of the insolvent, and that thereafter the defendants and insolvent and his wife subsequently entered into a fraudulent contract by which they represented that the goods were the wife's, and that subsequently, acting upon a fraudulent and collusive arrangement, the de-

defendants took back these goods, which belonged to the insolvent, and should have remained in his estate. The plaintiff therefore claims judgment for the goods or otherwise their value. In an alternative claim it is alleged that these goods were subsequently handed back by collusive and fraudulent arrangement between the insolvent and his wife and the defendants, and the prayer for the recovery of the goods or their value is as before stated. The defence is that these goods were purchased by the wife under a contract under the hire system; that the goods became the property of the wife, and were never at any time the property of the husband, and consequently never became portion of his estate, and could not now be claimed by plaintiff. It certainly did appear when the plaintiff closed his case, that the question might arise as to whether, even at that stage, the plaintiff had actually made out upon his evidence that fraud had been brought home to the defendants in this case. There were certainly circumstances which were very suspicious, and upon the whole it appeared better to the Court that some difficulties should be cleared up, and that the question should not then be finally considered. The difficulties that required explanation were the circumstances which gave rise to suspicion that in the month of September goods were actually bought by Krahe, the insolvent, and appeared in the books of the defendants in the name of Krahe, and the inference therefore would be that Krahe had bought them for himself. It also appeared that Krahe was in difficulties in October, and that, subsequently, the contract was made between the wife and defendants. Upon the wife herself being called, she seemed to have such a very hazy notion of the part she had taken in the contract and of her rights and liabilities under it, that it gave rise to the belief that she was not really and honestly a *bona-fide* party to the contract. So it appeared when she gave evidence, some portions of which were favourable to the plaintiff and some portions to the defendants. Again it appears that certain promissory notes really the property of Krahe were handed over to the defendants. This circumstance also might point to the conclusion that thereby he was paying for goods purchased by himself. There are further certain receipts in his name as if the goods were bought and paid for by him. The question arises as to whether the

books themselves do not show that at one time the transactions were entered in the name of Krahe, and were afterwards altered to the name of Mrs. Krahe. But that does not touch distinctly upon the circumstances which surrounded the making of the written contract itself. There is no positive proof that at the time the written contract was entered into fraud had been committed by the defendants, because all the circumstances under which the contract was entered into, and what happened at the time is not before the Court at all. All these suspicious circumstances were of such a grave nature that the Court thought it would be better that the defendant should be called upon to explain them away, although without such explanation the Court was not necessarily bound to come to the conclusion that there was some fraud. Now the defendants put into the witness-box the person who personally entered into this arrangement with Mr. and Mrs. Krahe. The Court has considered his evidence in the light of all the circumstances, and has come to the conclusion that it is entitled to rely upon it. The evidence was honestly given, and disposes of the whole case. It amounts to this: that the original purchases were made by Krahe for his wife, he having stated to Mr. Maine that he disposed of certain furniture belonging to his wife at Worcester, and that he would have to make that good to her. Mr. Maine said that the insolvent purchased goods to the value of £62, and that then there was a clear understanding between himself and the insolvent that when further purchases were made which it was contemplated would be necessary for the boarding-house to be carried on by Mrs. Krahe, then a written contract would be entered into between the defendants and Mrs. Krahe, and that the necessary terms and conditions would then be stipulated and the contract be completed. Well, if we believe that, it is quite clear that no contract was ever entered into by the insolvent on his own account. There were certain circumstances pointed out which it was said the Court ought to take as throwing suspicion on the evidence of Mr. Maine, and it was argued that we should not accept his statement in face of the suspicions raised by the rest of the evidence. But even under all the circumstances of the case very little would have been gained by the fraud which the defendants were charged with at the time the contract was entered into. The

position of the parties was that £62 worth of goods had been sold. Supposing for a moment that Krahe gave in return two promissory notes of the value of £60, he would have given full value for the goods purchased, and the difficulties he might then have fallen into would not have affected plaintiff in that respect at all. The goods were purchased and paid for, and the transaction disposed of. But then it is said that during November he gave a further promissory note of £52 10s. The exact date of this note does not appear. Later in the same month the parties were negotiating for furnishing the contemplated boarding-house. Now, when the contract was entered into another promissory note came into the hands of the defendants, but at the same time they gave a large and valuable consideration. They gave goods to the value of £275 in all, for which they held promissory notes from insolvent for £112 10s. Here it appears then, that this contract, which was said to be fraudulent, had given rise to goods of great value being parted with by defendants and handed over to the insolvent and his wife. Now, I do not think it was a contract which we can imagine would be entered into under the circumstances. If there were financial difficulties on the part of Krahe, the defendants would not have entered into any fraudulent contract which would have put Krahe or his wife under further obligations. Under the circumstances I think the plaintiff must fail in this case, not having proved that the goods ever belonged to the insolvent. What rights or liabilities there might be as far as the delivery of the promissory notes was concerned the Court is not now called upon to say. It might be that Krahe could quite legally have given security for the goods purchased by his wife, and that he could have given that security in the form of these promissory notes, or it might be that under the circumstances he could not legitimately have done so. That is not the question now raised, and even if he had acted wrongfully, under this form of action the Court cannot grant redress to the plaintiff as far as the recovery of the amount of these promissory notes was concerned. Judgment will therefore be for the defendants with costs.

Solomon, J., concurred.

[Plaintiff's Attorneys, Messrs. Walker and Jacobsohn; Defendants' Attorney, Gus. Trollip.]

SCOTT V. ST. GEORGE'S HOME. { 1900.
Nov. 13th.

Building contract—Architect's certificate—Extras ordered by employer—Fines for failure to finish in stipulated time.

Where in a building contract there was a clause providing that the contractor could not charge for any extras which were not authorised in writing by the architect, and the architect in giving his final certificate did not include certain extra work specially ordered by the employer who practically superseded the architect,

Held, that the architect's certificate was not conclusive between the employer and the contractor, but that as far as it went it was to be taken as final in the assessment placed on the value of the extra work ordered by the architect.

This was an action to recover the sum of £6,579 15s. 1d., being the balance due on the contract price for the erection of certain buildings and for extra work.

The plaintiff's declaration set out that the defendant was the Sister Superior for the time being of the St. George's Home. That in November, 1892, her predecessor, through her agent, H. Gibson, advertised for tenders for the erection of new St. George's Home buildings from designs made by S. Stent, who was appointed architect by the defendant's predecessor. An Executive Committee was also appointed to act as her authorised agents in the matter. The plaintiff tendered to do the work for £19,795 14s. 6d., which was accepted, and a contract was entered into on the 28th December, 1892. On proceeding with the work, the plaintiff found serious errors and defects in the plans and specifications and bills of quantities, which errors necessitated a large amount of "extra" work. The plaintiff thereupon threatened to stop the work, and it was then agreed that the cost of the extra work should be submitted to arbitration. From time to time other errors were discovered, which entailed extra work to be done under the same arrangement as before. The value of all the extra

work was £3,047 16s. 7d., of which the defendant has had the enjoyment, but has refused to submit to arbitration. The errors in the plans also caused delay, and incurred other costs and expenses, resulting in the plaintiff sustaining £500 damages. The plaintiff also did other extra day work at the request of the architect and the defendant's predecessor, or her authorised agents, amounting to £1,360 7s. 9d., of which he received £225 8s. 10d., leaving a balance of £1,134 18s. 11d. still due; and other extra work (not day work), amounting to £1,470 14s. 9d. He therefore claimed the sum of £6,579 15s. 1d., being the total of the above amounts, together with £426 4s. 10d., money still due on the contract price.

In the alternative, he claimed the above sum of £6,579 15s. 1d. on a *quantum meruit*.

The defendant, in her plea, begged leave to refer to the contract and tender, and did not admit the errors and defects, and further said that, whether they existed or not, she was not bound to recognise any claim thereon, either for loss or extra work, unless the architect certified to such claim, in accordance with the terms and conditions of the contract. She denied that any extra work was done, except that certified to by the architect and paid for. She specifically denied all the other allegations of the declaration.

In his replication, the plaintiff said that if the Court should hold that the plea that the architect's certificate was required was good in law, he was not bound to do the work done, and that the defendant waived any such conditions, and agreed to pay for the work.

By the contract and conditions all matters in dispute on the contract work, plans, etc., were to be decided by the architect, with leave, however, to the contractor or his sureties to appeal to arbitration.

By clause 7 it was provided that "any deviations from the plans and specifications or in the mode of carrying out the works must have the written authority of the architect, and shall not then invalidate the contract." And by clause 10 it was provided that "no extras will be allowed unless written orders for the same be produced from the architect."

Sir Henry Juta, Q.C. (with him Mr. P. S. Jones) for the plaintiff; Mr. Currey for the defendant.

Mr. Currey: In order to simplify the case I might state shortly the position taken up by the defendant to-day. We admit our liability for "extras" ordered in writing by

the committee, the secretary (Mr. Gibson), and the defendant. We also admit our liability for the day work, but would have the account submitted to Mr. Arnot as referee to assess the amount of our liability thereunder.

As regards the other "extras," we say that the architect's certificate is final according to the 9th clause of the general conditions attached to the contract. We also dispute any liability for the errors and inaccuracies in the plans, specifications, and bills of quantities. For any work done on an order from the architect and which has been assessed by him, we say the assessment is final. Any fines which may have been imposed by the architect should be charged against the plaintiff. If any errors are proved in the drawings and any extra work has been occasioned by delay on that account we would have the cost of such extra work assessed by the referee.

Sir Henry Juta, Q.C.: The whole account might be referred to a referee.

Mr. Currey said that this practically reduced the case to the point of the finality of the architect's certificate, and the defendant contended that she was not liable for the £3,000 odd which was alleged to have been caused by errors in the plans and specifications, and which was not included in the architect's final certificate. She also denied liability for any extras alleged to have been ordered by the architect, for which authority from the latter could not be shown by the plaintiff.

Sir Henry Juta called

George Adey Scott, the plaintiff, who said that after the contract was signed, the architect (Mr. Stent) went away, and during his absence serious errors were discovered. He, however, continued to do the work, it being arranged that it should wait until Mr. Stent returned. When the latter returned he defendant and witness discussed the errors, but they could come to no satisfactory decision, and witness threatened to stop the work. The errors were of such a nature as to throw out the time of the contract. None of the delay was caused by witness. Delay was caused through the errors, the extra day work, and the amount of extra work ordered by the defendant. The latter replied to a letter written by witness on the 9th November. Her reply was that the matter should be referred to some leading barrister for settlement. At a subsequent meeting in February he was instructed to receive orders for extras from the defendant, Mr. Gibson,

and Mr. Arnott. The agreement was that the matters should be referred to arbitration. He would not have gone on with the work if he knew it would be subject to Mr. Stent's certificate. The architect supplied details of work within ten days of the date of completion of the contract. Mr. Stent did not admit that the delay was unavoidable. That would be admitting that his certificate was wrong.

David Arnott, the clerk of works, confirmed the last witness's evidence regarding the discovery of the errors, and respecting his consenting to wait until Mr. Stent returned. In January, 1894, witness was receiving his instructions from the committee, and not from Mr. Stent. If the errors in respect to the levels and drainage had not occurred the others would not amount to a great deal.

Cross-examined: He had never known a contractor in Cape Town employ a surveyor to take out the bills of quantities. There was no claim for expenses caused by errors in the bills of quantities.

By the Court: If he were appointed to check the account for extras he did not intend to allow for errors in the quantities; only in the specifications. Most of the extras were ordered after the Sister Superior went into the building.

This closed the case for the plaintiff.

For the defence,

Thomas Henry Hitching was called. He said he was an architect, and was in 1893 in the employ of Mr. Stent, for whom he acted while he was away. The error in the specifications was due to an error in the plottings. Stent ordered extras, which he included in the final certificate. He also authorised some day work, and this, too, was included in the account annexed to the final certificate. Time was lost in the execution of the work. Witness considered that Mr. Stent's certificate was final. He had never in his experience known of anything being re-opened after the architect's final certificate.

Cross-examined: No extras except those ordered by the architect were included in his final account. These would not come under the architect's certificate.

By the Court: In fixing the penalty Mr. Stent did not take into consideration the extra work ordered by the employers. He simply confined himself to the extras ordered by himself.

Mr. Currey (in argument): The architect's certificate is final, and where he has made an assessment of the value of any work his

estimate is final. According to section 9 of the general conditions, it is a condition precedent to any payment for "extras," that there must be a certificate by the architect. See *Hudson on Building*, Vol. I., p. 305; *Sharpe v. San Paulo Railway Co.* (L.R. 8 Chitty's Appeal Cases, p. 597); *Thorn v. The Mayor of London* (9 Exchequer, L.R., p. 163); *Clarke v. Watson* (18 C.B. (N.S.), p. 278); *Stent v. Williams*, N.O (4 She 1 p. 365); see judgment at p. 371.

Sir Henry Juta, Q.C.: There has been a waiver of clause 9 of the general conditions. This is clear from the defendant's admission that they are liable for "extras" ordered by the committee, the secretary, and the Sister Superior.

Buchanan, A.C.J.: This case is an extraordinary one. The plaintiffs contracted with the defendants to build certain premises for a certain amount. Plans and specifications were prepared by the architect chosen by the defendant, and on these the plaintiff tendered. In these a fundamental error had been made as to the levels of the ground. The parties agreed that an arbitrator should be called in, and were now agreed that this arbitrator should be Mr. Arnott, the clerk of the works, and that he should consider certain accounts for work done to ascertain what sum was due to the plaintiffs. But there were certain items in dispute. It seemed that in the middle of the work the architect was superseded by the persons who employed him. These persons gave orders for a considerable amount of extras. The plaintiff admitted that the extras ordered by the architect must be assessed by him, and that they were bound by his assessment, and the referee would only therefore assess such amounts as had not been dealt with by the architect in this way. As to the plea of the finality of the architect's certificate, Mr. Hitching said that the architect did not take into consideration any extras ordered by the defendant, the committee or the clerk of the works, but confined himself solely to those he had himself ordered. In this case the architect was not allowed to go on with the work, but was superseded by his employers. If he had continued to act throughout, all the extras ordered would most likely have been taken into account, but he admittedly omitted all extras other than those ordered by him, and I do not think that the defendant can now set up this admittedly partial certificate as final. The fine for

not finishing the work within the contract time, imposed by the architect, was imposed by him after his authority terminated, and without considering the extras and alterations ordered by the principal. This can not be held to be binding on the plaintiff. The judgment is that the referee shall assess the amounts due to the plaintiff for work performed by him, including the extras, with the exception of a sum of £500, alleged generally to be damages sustained by delay, to which the plaintiff has not proved his claim, and also with the exception of the amounts assessed by the architect. When this has been done the matter will be reported to the Court, which will then be in a position to give judgment. His lordship directed that if possible the referee's report should be made before the end of the term. He appointed Mr. Arnott referee.

Postea (February 1, 1901).

Sir Henry Juts, Q.C. (with him Mr. P. S. Jones) moved for judgment in terms of the referee's report which awarded the plaintiff the sum of £2,702 11s. 10d. with interest from the 22nd August, 1895.

Mr. Currey (for the defendants) objected to interest being charged from August, 1895. The amount of interest alone would be between £800 and £900.

Sir Henry Juts, Q.C.: If it had not been for the delay of the defendants the matter would have been settled long ago. The defendants agreed to arbitration as early as 1894, but would never definitely agree to an arbitrator being appointed.

Mr. Currey: The defendants wrote in January, 1894, for a draft deed of submission, which only reached them in 1899.

Curia ad vult.

Postea (February 4, 1901).

Buchanan, J.: The case was referred to the arbitration of Mr. Arnott, who has now sent in his report awarding the plaintiffs the sum of £2,702 11s. 10d., for which amount judgment will be given with costs. The only question the parties do not agree about is the date from which interest should be reckoned. The claim was for the sum of £6,500, and the matter has been in dispute since 1895, but I cannot see anything in the case which will justify us in giving interest from any date prior to the date of the summons, viz., August 19, 1900. Judgment will therefore be given for the amount awarded with costs, and interest from the date of the summons.

Maasdorp, J., concurred.

[Plaintiff's Attorneys, Messrs. J. and H. Reid and Nephew; Defendants' Attorneys, Messrs. Sauer and Standen.]

MILLS V. FITZGERALD. { 1900.
Nov. 14th.

Lease—Hostile occupation—Magistrate's jurisdiction—Rights in future—*Bona fide* defence.

M. sued F. under a lease for rent, which included rent for a period during the hostile occupation by the Republican forces of the district within which the property was situate, and also rent for a period subsequent to the occupation. In correspondence prior to the trial the defendant F. claimed that he was not liable for rent during the hostile occupation and expressed his regret that he was unable to pay the rent for the period subsequent thereto. At the trial before the Magistrate, however, he claimed that the hostile occupation had the effect of cancelling the lease and that therefore he was liable for no rent at all, and that any decision on the lease was beyond the Magistrate's jurisdiction as binding rights in future. The Magistrate held the defence to be a bona fide one and dismissed the case as being beyond his jurisdiction.

On appeal, it was held that this was in the circumstances not a bona fide defence, and the case was accordingly remitted to the Magistrate for trial, the appeal being allowed with costs.

— — —
This was an appeal from a decision of the Resident Magistrate of Barkly East in a suit in which the plaintiff (now appellant) claimed the recovery of the sums of £33, £34 10s., and £34 10s., with interest at the rate of 6 per cent. from the 31st January, 30th April, and 31st July, 1900, respectively, being the quarterly rent for a period of nine months upon and by virtue of a certain deed of lease. The defendant pleaded that he was not liable for rent owing to the present

state of affairs, and that the Court had no jurisdiction to try the case on the ground that the amount of rent claimed exceeded the jurisdiction of the Court. The Magistrate gave judgment for the plaintiff for rent to the 23rd November, 1899, with costs, and absolved the defendant from the instance, as regarded rent falling due after that date, as being beyond his jurisdiction.

The Magistrate, in his reasons, stated that the defendant in his evidence admitted the contract of lease, but claimed that it was only binding until the 23rd November, 1899, that date being the day of the occupation of the place by the Free State invaders. That he accordingly found that the plaintiff's claim for rent up to that date in the first quarter was sound. That the defendant having denied the validity of the contract from the date of the occupation by the Free State invaders made a *bona-fide* defence, which, if valid, would extinguish his liability from the 23rd November, 1899, and which would involve questions beyond the jurisdiction of the Magistrate's Court, and that, consequently, the defendant was entitled to succeed on the claim for rent after the 23rd November, 1899. (*Juta*, 10, p. 182.)

Mr. McGregor for the appellant (plaintiff below).

Mr. H. Jones for the respondent (defendant below).

After the record had been read,

De Villiers, C.J., remarked that the question was whether the defence raised was a *bona-fide* one. It certainly was an untenable one.

Mr. McGregor: Even if the defence of non-liability under the lease after the hostile occupation was a *bona fide* one, no decision could have been given by the Magistrate on that point, because it was not raised on the pleadings in the Court below. *Bertram v. Wood* (10 *Juta*, p. 177.)

[De Villiers, C.J.: It is not necessary to go into the question whether hostile occupation put an end to lease, in order to decide whether the defendant was liable during the time of the hostile occupation.]

But there is a claim for three months' rent subsequent to the hostile occupation.

[De Villiers, C.J.: I did not observe that.]

The defence is not a *bona fide* one. The defendant took possession again of the place after the occupation was over. If the lease did not bind him, then he committed a trespass. The most satisfactory presumption to make with regard to his actions is to hold that his re-entry was legal,

as being authorised under the lease, and not illegal, as being a trespass. The defence raised during the trial was bad in law, and not raised on the pleadings. The Magistrate found for the defendant on a defence not raised by him at the outset of the case.

Mr. H. Jones: The whole question is one of *bona fides*, and on this and similar questions the Court usually accepts the view taken by the Court below, before which the witnesses and parties appear. If there is a lengthy and uninterrupted occupation by an enemy, the lease might be determined. The defence was not *mala fide*, because it was untenable. The defendant's first and *bona fide* defence was that he was not liable for the rent. The plaintiff guaranteed the defendant undisturbed possession, and took no steps to carry out his guarantee.

[De Villiers, C.J.: The lessor could not keep off the Queen's enemies. The defendant claims that the lease was cancelled.]

The Court below found the defendant was acting *bona fide*. Surely this Court will not find him to have acted *mala fide*. *Kew v. Peachey* (12 E.D.C., 107).

De Villiers, C.J.: The claim in this suit includes rent for a period when the hostile forces of the Republics were in occupation of the district within which this property was situate, and so far as the defence refers to the rent claimable for that period, it seems to me a perfectly *bona fide* defence, although it might not be perfectly tenable. But an additional defence was ultimately raised in the Court below, which went a great deal farther, and that was not only that the lessor could not claim rent during the period of occupation, but that the lease itself was void. There is not a shadow of authority for such a proposition, which on the face of it is wholly untenable. Not only is that proposition untenable, but it is clear from the conduct of the defendant himself and his advisers that he never intended seriously to raise that defence until the last moment. because in reply to a letter from the plaintiff his advisers said that they were instructed to state that their client did not admit liability for the period when the district was occupied by the Free State forces, and with regard to the balance expressed his regret at not being able to pay the same or any portion thereof at present. So that his inability to pay was the ground for not paying the rent subsequent to the occupation. The circumstances are such as to justify the Court in coming to the conclusion that it was not a *bona fide* defence. It will be

far better for all parties that the matter should now be decided by the Magistrate himself. The question as to whether a lessee is liable for rent during the period a district was occupied by the enemy will, no doubt, be decided by the Supreme Court in cases which have to come before it—one from the High Court and one from the Magistrate's Court of Aliwal North—and by the time therefore that the Magistrate has to decide on his case, he will have an indication at all events as to the payment of rent in such cases, or he might postpone his final judgment until the Supreme Court has given a judgment in these cases. The appeal will be allowed, with costs, and the case remitted to the Magistrate to be tried over again.

Maasdorp, J., concurred.

[Appellant's Attorneys, Messrs. Scanlen and Syfret; Respondent's Attorneys, Messrs. Findlay and Tait.]

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), and the Hon. Mr. Justice MAASDORP.]

LEVY V. DE VILLIERS. } 1900.
 } Nov. 14th.

Slander — Defamatory words —
Hatred and ridicule.

The following words were held, on appeal, to give rise to no cause of action for damages, not being defamatory in the sense of bringing a person into disrepute, or exposing him to hatred or ridicule.

"You d——d fellow, I spend more in a day than you spend in your whole life; d——n it, I can prove that I am a more respectable man than you are; I know hundreds of Jews better men than you are; you d——d fool."

This was an appeal from a decision of the Resident Magistrate of Murraysburg, in a case in which De Villiers (the present respondent), an attorney, sued Levy for £20 damages, claimed by reason of certain slanderous words used towards him in the public streets of Murraysburg.

The facts were as follows: De Villiers, while conducting a case in the Magistrate's Court, made some remarks which the defendant resented as being derogatory to the character of the Jews. On De Villiers coming

out of the Court, the defendant (the present appellant) rushed up to him and said: "You d——d fellow. I spend more in a day than you spend in your whole life; d——n it, I can prove that I am a more respectable man than you are. I know hundreds of Jews better men than you are; you d——d fool." De Villiers sued the defendant for damages, and the Magistrate finding the words slanderous awarded him £3 as damages and his costs. The defendant was also convicted under the Police Offences Act for the use of the same words on the same occasion and fined. He now appealed from the Magistrate's decision.

Mr. H. Jones, for the appellant: The words are not actionable. *Odgers on Slander and Libel* (p. 53). There must be the *animus injuriandi*, which was clearly absent in this case. The words were not spoken of the respondent in his capacity as an attorney. There was some cause which made the appellant angry. If the words were spoken *in rixa*, the plaintiff has no cause of action. These words were spoken in anger, and therefore the presence of *animus* is wanting. *Voet* (47, 10) says that words spoken in anger are not actionable. No special damage was caused the plaintiff by the use of the words. Anyone who heard them would not think any the less of the plaintiff. The plaintiff caused criminal proceedings to be instituted under the Police Offences Act, and so ought to have been satisfied.

Mr. Schreiner, Q.C., for the respondent: The words were spoken *animo injuriandi*. They were uttered in a public street and before a large crowd. The mere fact that criminal proceedings had been taken does not deprive the plaintiff of his civil remedy. *Voet* (47, 10) says that for words spoken *in rixa* to be privileged it must be shown that they were not persevered in. There was no quarrel here. It is not necessary to show any special damage. It is actionable to upbraid a man with being physically deficient, and it is still more so to attack his respectability. (*Voet*, 47, 8, 10.)

De Villiers, C.J.: It is clear that the words are not defamatory in the sense of bringing the plaintiff into disrepute or exposing him to hatred or ridicule. It does not appear that the words were spoken of him in his capacity as an attorney; at all events, that was not alleged in the summons. The defendant seems to have been annoyed at some remarks made by plaintiff, and lost his temper and made use of the abusive words referred to. Provision is made in the Police Offences Act for the punishment by

fine for the use of such abusive words, or failing payment of the fine, for imprisonment. That course was followed by the plaintiff in this case, who prosecuted the defendant for using these insulting words, and the latter was fined, and I think that the plaintiff ought now to be satisfied. I do not think it was defendant's intention to make use of these words towards plaintiff in his capacity as an attorney. Certainly if words of this kind are to be held to be libel, the courts of this country will simply be flooded with such cases. The appeal will be allowed, with costs.

Maasdorp, J., concurred.

[Appellant's Attorneys, Messrs. Findlay and Tait; Respondent's Attorneys, Messrs. Dempers and Van Ryneveld.]

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), and the Hon. Mr. Justice MAASDORP.]

SCHAFF V. FREEMAN. { 1900.
{ Nov. 14th

Architect—Plans.

S. employed F. to prepare certain plans for the improvement of his premises, which were licensed, for the purpose of inducing the Licensing Court to grant him fuller privileges than he had heretofore enjoyed. He alleged that F. agreed to have the plans ready for production before the Licensing Court. The plans were not completed at the date of the sitting of the Court and S. consequently did not obtain fuller privileges and sued F. for £20 damages. F. denied that he agreed to have the plans ready for production before the Court and counter-claimed for £10 10s., the cost of drawing the plans, which S. refused to pay. The Magistrate gave judgment for F. on both claims.

On appeal, the Magistrate's decision was upheld.

This was an appeal from a decision of the Resident Magistrate of Cape Town, dated July 12, 1900. The plaintiff (present appellant), in his summons, alleged that he was

the holder of a retail licence (at Wellington) without extra privileges, and was desirous of acquiring full privileges, for which he was going to apply to the Licensing Court of Paarl on March 7, 1900. Before doing so he wished to satisfy the Licensing Court that he was about to improve and enlarge his premises, and accordingly engaged the defendant to prepare plans, etc., to be delivered to him on the 1st March, 1900, so that he might put them before the Licensing Court on the 7th March. This the defendant failed to do, even though reminded of his engagement before the date agreed upon, and in consequence the plaintiff could not produce the plans to the Court, and the result was the extra privileges were refused. He therefore claimed £20 damages.

The defendant denied the allegations in the summons, and pleaded the general issue. He also claimed, in reconvention, the sum of £10 10s. for services rendered in preparing the plans for the alteration and enlargement of the buildings.

The Magistrate, in his reasons, stated that having heard the evidence he believed the defendant when he stated that he did not agree to deliver the plans within any particular time. He found that the plaintiff was wrong in not accepting the plans when they eventually did reach him through the post, and consequently gave judgment for the defendant in convention and in reconvention for the sum of £10 10s., which was a fair and reasonable amount.

Sir Henry Juta, Q.C. (for the appellant): It is clear that the plans were required for the Licensing Court; how then can the respondent be believed when he states that there was no stipulation as to time? The plans were of no use to the plaintiff unless he got them in time. The probabilities are strongly in plaintiff's favour. The plaintiff in certain letters reiterated the stipulation and defendant never contradicted it.

Mr. Burton, for the respondent, was not called upon.

De Villiers, C.J.: The Magistrate when he had the parties before him had to decide whether the plaintiff or the defendant was speaking the truth, and he believed the defendant. The latter spoke positively, and gave a detailed account of the conversations he had with plaintiff, stating that he had said that he did not think the Licensing Court would grant the application upon plans, and that he distinctly told plaintiff that he would not undertake to complete the plans within a particu-

lar time, and that if it was absolutely necessary that plaintiff should have those plans within a particular time, he had better employ someone else. Defendant also stated that he told plaintiff that it was absolutely impossible for any architect to undertake any work by any particular time, because the plans might require alteration, but in spite of that the plaintiff employed him. The Magistrate believed that evidence, and that the defendant's case was clearly made out. As to the letters written they are quite consistent with defendant's statement that he was doing his best, and that he was very sorry afterwards that, notwithstanding that he did his best, the plans were not completed in time for the Licensing Court. With regard to the counter-claim, the defendant did the work and was entitled to his fees. The appeal will therefore be dismissed with costs.

[Appellant's Attorneys, Messrs. Silberbauer, Wahl and Fuller; Respondent's Attorneys, Messrs. Sauer and Standen.]

EAST LONDON MUNICIPALITY } 1900.
V. NANGLE. } Nov. 14th.

Negligence—Tramcar.

A cart was standing close to the kerb-stone of a road which was 24 feet in breadth from the kerb-stone to the nearest rail of a tram-line. A wagon drawn by oxen, and carrying 27 feet in length was passing along the road partially on the tram-line. A tram was going in the same direction. On its approach, the wagon left the tramway and ran a foot and a half away from the line on the same side as the cart. The tram passed at the rate of from 6 to 7 miles an hour and the oxen taking fright and swerving caused the wagon to collide with the cart.

Held on appeal, that the motor man in charge of the tram was not guilty of negligence.

This was an appeal from a decision of the Resident Magistrate of East London, in a case in which Dr. Nangle, the present respondent, sued the Municipality of East London for £20 damages caused to his cart by reason of the negligent action on the part

of the motorman of an electric tram, which was under the control of the defendant Municipality. The summons and record showed that in Oxford-street, East London, on May 11, 1900, a wagon, drawn by a span of oxen, the whole being twenty-seven feet in length, and in charge of a native driver, when travelling along the street near to and upon the tram line, collided with the plaintiff's buggy, which was standing on the side of the road outside a chemist's shop, in charge of a servant of the plaintiff. The plaintiff alleged that the collision was due to the carelessness and negligence of the motorman, an agent or servant of the defendant Municipality. It was alleged for the plaintiff that the tram was going at a great speed just before reaching the ox-wagon, which shortly before had been travelling along the rails, but which, on the approach of the tram, gradually and properly turned off. Further, that owing to the length from the leading oxen to the back of the wagon the process of turning off the rails was necessarily a slow one, but notwithstanding this, the tram came along at an excessive rate, regardless of the position of the wagon, with the result that the oxen took fright and swerved more than was required, and in doing so, collided with the plaintiff's buggy, causing damage to the amount of £20. There was twenty-four feet of space between the nearest rail and the kerb-stone. The defendants alleged that the rate of speed was not more than from three to four miles, that the tram car was going the same way as the ox-wagon, that the motorman did not see the cart, that he rang his bell, slowed down, and eventually did not pass nearer than eighteen inches to any of the oxen.

The Magistrate found that the plaintiff's cart was in a proper and ordinarily safe position, and that there was no negligence on the part of his servants; that there was no negligence on the part of the driver of the ox-wagon; that the tram was going at an excessive rate; that the motorman did not manage the car with all due care and precaution; and that the excessive speed and the carelessness of the motorman caused the oxen to take fright and swerve, and collide with the plaintiff's cart. He accordingly gave judgment for the plaintiff for £20 and costs.

The defendants appealed.

Mr. Schreiner, Q.C. (for the appellants): I cannot find anything in the record which can be said to constitute the negligence found by the Magistrate to have been committed by the motorman. Reading the

Magistrate's reasons carefully, I take his argument to run thus: That the plaintiff was damaged, that the plaintiff did nothing wrong, and somebody must pay. It was said in the Court below that ringing the bell and the lights frightened the oxen. But is that negligence? No. It would have been negligence if the bell was not rung and no lights carried. The motorman did not see the cart. The Magistrate seems to have considered that the owner of the wagon and the defendant company were joint tortfeasors. This they could not be unless they were acting in concert. I admit that the Municipality is responsible for the defaults of its servants; but those defaults must at least be founded on negligence. On the question of negligence and the acting in concert see *Abbot's Law of Corporations* (pp. 16, 17); *Wakeman v. Robinson* (1 Bingham's Reports, p. 213); *Gibbons v. Pepper* (1 Lord Raymond's Reports, p. 38); *Holmes v. Mather* (L.R., 10 Exchequer, p. 261); *Salder v. Great Western Railway Company* (32 Q.B.D., p. 688). The Municipality was acting under authority in running these trams, section 3 of Act 11 of 1895. The Government authorised an essentially dangerous undertaking, viz., running trams in a crowded street. The evidence discloses no negligence; it is clear that the motorman slowed down on approaching the wagon. Surely the motorman was not bound to stop the car on every occasion on which he saw a possible obstruction on the rails. He might slow down to enable the person or animal to move off the rails. In the case of *Newman v. East London Municipality* (12 Juta, p. 61 at p. 74), this Court has discussed the question of negligence. In that case the accident was one which the Municipality might have foreseen. Here the conditions were quite different. The motorman could not possibly foresee that the oxen would become restive and swerve to the extent they did. See also *Brocklehurst v. Manchester Steam Tramway Co.* (17 Q.B.D., 118).

Sir Henry Juta, Q.C. (for the respondent): The facts disclose negligence. We have the finding of the Magistrate that the tram was going at an excessive rate; the Magistrate did not find that the motorman slowed down. The facts show that the motorman tried to rush the oxen off the line. The bell was rung furiously, and the result was that the oxen took fright, and swerved more than they otherwise would have. They were leaving the rails at the time; but the

rapid approach of the tram frightened them. The motorman did not allow the oxen reasonable time to leave the rails. One of the defendants' witnesses anticipated an accident. A statutory right does not give a tramway company leave and licence to run down everything that comes in their way. The trams have no right to rush people or animals any more than a horse else.

[De Villiers, C.J.: Will you say that the mere fact of a tram passing close to an ox-wagon when going at seven miles an hour is negligence?]

Yes, if it passes so close as to make the probabilities of an accident great. To frighten oxen by driving past them at an excessive rate of speed when they were barely off the rails is clearly negligence. The result here was to cause the oxen to swerve nearly 20 feet, and cause the damage complained of. If this was not negligence, it is difficult to see how motormen can ever be guilty of negligence. The wagon and oxen covered a length of 27 feet, and necessarily required a considerable length of time to leave the rails. This the motorman did not allow, but dashed past at the rate of from six to seven miles an hour.

De Villiers, C.J., said: The defendants have statutory powers to construct and maintain tramways in the East London Municipality. They were therefore quite within their powers in conducting and working these tramways in the ordinary way, and so long as the work is done in a reasonable manner and without negligence the defendants are free from liability, even if some damage has been done. Now in the present case it is clear that some damage has been done to plaintiff, and the Magistrate seems to think that someone must be held liable for that damage. It is clear, however, that by law the defendants cannot be held so liable unless there is some proved negligence on their part. The contention on behalf of the respondent now is that the negligence consisted in going at great speed just before the wagon was reached. Unfortunately, the Magistrate has not stated the rate of speed at which the tram car was going. He said the speed was excessive, but he does not say what witnesses he believed as to the actual rate of speed. According to defendants' witnesses—the motorman and others—the speed was not more than four miles an hour. According to the witnesses for the plaintiff, however, it was more, although the exact speed was not men-

tioned. Now supposing that the speed was from six to seven miles an hour, that does not appear to me to be an excessive rate of speed unless there was something to indicate to the motorman that the oxen he was about to pass were in any way restive and likely to swerve upon the car reaching them. He sounded the gong in the ordinary course, and it is quite true that shortly before the car came up some oxen were upon the tram line, but when the car came up the oxen were clear. They were then about a foot and a half from the tramcar. The Court is therefore asked to lay down that the mere fact that the tramcar came up at a rate of from six to seven miles an hour within a foot and a half of the nearest oxen was an act of negligence. Now in my opinion it is impossible to say that. The business of this company could not possibly be continued if they were compelled to stop when they approached every vehicle from behind. Then there is no evidence and nothing whatever to show that if the motorman had gone any slower the oxen would not have been equally disturbed. Two witnesses for the plaintiff say that the oxen were frightened not by the speed, but by the lights on the car. It was a considerable distance between the oxen and the plaintiff's car, and I cannot see how the Magistrate could hold that the motorman could reasonably suppose that his going at the rate of six or seven miles an hour would cause these oxen to swerve to such an extent as to go several yards in order to upset plaintiff's cart. It does seem to me that an accident could not reasonably have been anticipated under the circumstances, and that therefore the Magistrate was wrong in holding that there was any negligence on the part of the defendants for the manner in which the motorman managed the car that day. As I before observed it must be laid down that if a motorman sees that animals he is coming up to, show any signs of restiveness he would be guilty of negligence if he did not stop the car. In many cases, no doubt, these motormen are careless; they do not think an accident will happen, and consequently drive carelessly; but here there were no signs of restiveness on the part of these oxen, and in point of fact it was the oxen nearest the wagon which did swerve and caused this damage. For these reasons I am of opinion that the Magistrate was wrong in holding that there was any negligence on the part of the defendants, and the appeal must be allowed with costs.

Maasdorp, J., concurred.
[Appellant's Attorneys, Messrs. Fairbridge, Arderne and Lawton; Respondents' Attorneys, Messrs. Silberbauer, Wahl and Fuller.]

WENTZEL V. WENTZEL. { 1900.
Nov. 14th.

This was an action for judicial separation, brought by the wife, Christina Wilhelmina Wentzel, against her husband, Ludovic W. Wentzel.

The declaration alleged that the parties were married in community of property at Cape Town on January 18, 1875, that there were four children of the marriage, three of whom were minors. These three were aged 18 (boy), 16, and 14 (girls), respectively. That owing to the violent temper and intemperate habits of the defendant it became necessary for the plaintiff to separate from him in 1895, and a deed of separation was entered into. In 1896 she returned to him on his promising to mend his ways, but his language was still violent and abusive, he threatened to take her life, and assaulted her and the daughters, and eventually turned them out of the house. She accordingly claimed a decree of judicial separation, the custody of the minor children of the marriage, and a contribution towards their maintenance, and a division of the estate.

The defendant denied the allegations of violence, intemperance, assaults, and threats, and said that the unhappiness was caused by the plaintiff's violent temper. He consented to a separation provided the custody of the minor children be not given to the plaintiff, who, he said, was not a fit person to have them, and suggested that they be sent to a boarding-school.

In reply, the plaintiff agreed to give up the custody of the boy.

Mr. Close for plaintiff; Sir H. Juta for defendant.

After some discussion, the parties and their counsel consulted together as to the custody of the children, the Court wishing to avoid evidence of the character of either of the parties being heard. It was agreed that the plaintiff was to have the custody of the girls, the defendant the custody of the boy, and the plaintiff to maintain the girls without assistance from the defendant.

After the plaintiff had satisfied the Court that she was well able to maintain the children, the Court granted a decree of separation *a mensa et thoro*, the property of the defendant and the plaintiff, as it stood at the commencement of the action, to be equally

divided after the payment of all debts; Mr. Maynard Nash was appointed official receiver. The defendant was to have the custody of the minor son and to maintain him, and the plaintiff to have the custody and maintenance of the minor daughters.

[Plaintiff's Attorney, D. Tennant, jun.; Defendant's Attorneys, Messrs. Van Zyl and Buissinne.]

[Before the Hon. Mr. Justice BUCHANAN and the Hon. Mr. Justice SOLOMON.]

WALTERS V. CORTIS AND ANOTHER. { 1900,
Nov. 14th.
" 15th.

This was an action brought for the purpose of cancelling the transfer of certain property, for an account between the parties, and £100 as and for damages.

The plaintiff, a wagonmaker, at Woodstock, in his declaration, stated that in May, 1897, he was the owner of two lots of ground at Woodstock, upon which there was a mortgage bond for £70. That on May 8, 1897, the second defendant agreed to lend the plaintiff £150 at 8 per cent, the plaintiff to pass a bond in his favour for the amount, and to allow the second defendant to draw the annual rent (£24) accruing from the property, in payment of interest, rates, and taxes, the balance, if any, to go towards paying off the bond. That the plaintiff, after the second defendant's attorney paid off the bond for £70, and a sum of £45 due to one Van Noorden by plaintiff, received £10 as the balance due on the £150 lent. That the bond was passed in favour of one Brown, and the rate of interest raised to 10 per cent. instead of as agreed upon above. That the second defendant received the rents, but did not pay the rates, and did not tender any account as agreed. That in November, 1897, plaintiff agreed with the second defendant to exchange his property with the bond for that of the first defendant and £350, and deposited the transfer deeds with the second defendant, at the same time signing a document which he was informed related to the exchange. That later, the exchange being evidently delayed by the second defendant, the plaintiff withdrew, and demanded his transfer deeds, which were refused him. That on the 16th and 22nd November, 1897, the second defendant fraudulently induced the plaintiff to sign a power of attorney to transfer his property to the defendant under an alleged sale for £175, and a declaration of seller, stating that the

property was so sold, by representing to the plaintiff that they referred to the exchange. That the plaintiff at no time sold his property for £175, it being worth £800, and that he never received the £175, nor any account, and that he never had any transaction with the first defendant. That he discovered the fraud in an advertisement appearing in the "Cape Times" newspaper of June 27, 1900, to the effect that the said property was to be sold on June 29, 1900. That he now ascertained that his property was transferred to the first defendant on October 5, 1898. That on application to this Court on June 28, 1900, the Court interdicted the sale on June 29, 1900, which interdict was still in force. He therefore claimed: (a) An order against the first defendant setting aside the transfer of the property made in her favour on October 5, 1898; (b) an account from both of the defendants of all moneys received by either or both of them as rents from May, 1897, debate of the said account, and payments of any amounts found to be due; (c) an account from the second defendant of the amount due to the plaintiff, being the balance of the sum of 150 agreed to be advanced as mortgages aforesaid, debate of the account, and payment of such amount as is due; (d) £100 as and for damages sustained.

The defendants said that in May, 1897, the second defendant was an unrehabilitated insolvent. That on May 8, 1897, the rate of interest on the bond agreed upon was charged from 8 to 10 per cent. in a power of attorney signed by the plaintiff. That the transfer was made to Brown and not to the second defendant, because the second defendant was insolvent. That the £150 lent belonged to the first defendant. That after paying off the bond for £70, and other debts, at the request of the plaintiff, the second defendant handed to the plaintiff the sum of £10. That as a result of these payments, the plaintiff owed to the second defendant £18, of which amount the latter received £8 8s. from the rents, and to the first-named defendant the sum of £9, being interest on bond and rates and insurance. That the agreement to sell was duly entered into, and the delay in passing transfer was occasioned by the defendants' legal adviser mislaying the necessary documents. That the second-named defendant, being an illiterate man, kept no accounts, but nevertheless could account for the whole of the £150.

Mr. Searle, Q.C. (with him Mr. Rubie), appeared for the plaintiff.

Mr. Gardiner (with him Mr. Bisset) appeared for the defendants.

After hearing some evidence, the Court suggested that the parties should consult together with a view to coming to a settlement.

Postea (November 15).

Judgment was given in terms of a consent paper, filed, which was as follows: (1) That the first defendant re-transfers the property now registered in her name, and in dispute, to the plaintiff; (2) that the plaintiff pays the first defendant £300 sterling; (3) that each pay his or her own costs, the first defendant to pay the rates payable during her ownership.

[Plaintiff's Attorney, D. Tennant, jnt.; Defendants' Attorneys, Messrs. J. and H. Reid and Nephew.]

SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS P.C., K.C.M.G. (Chief Justice). the Hon. Mr. Justice BUCHANAN and the Hon. Mr. Justice MAASDORP.]

ADMISSION. { 1900.
{ Nov. 15th.

Mr. Nathan moved for the admission of Morris Alexander as an advocate of the Supreme Court.

Order granted, and the oaths administered.

EQUITABLE ASSURANCE AND TRUST COMPANY V. J. A. LE GRANGE.

Mr. Howel Jones moved for provisional sentence on a mortgage bond for £800, with interest at the rate of 6 per cent. The bond had become due by reason of the non-payment of interest. It was also asked that the property specially hypothecated be declared executable.

Provisional sentence as prayed, and the property declared executable.

BEPLAT V. W. J. VAN HEERDEN.

Mr. Maskew moved for provisional sentence for £24, interest upon a mortgage bond for £200.

The Chief Justice pointed out that the defendant's estate had been provisionally se-

questrated, and the Court ordered the matter to stand over until the date when the summons in the provisional sequestration was returnable.

PURCELL, YALLOP AND EVERETT V. W. ALGIE

Mr. Close moved for judgment under Rule 329d in this matter for costs only, the balance of the account upon which the summons was issued having been paid.

Granted.

VAN ZYL V. P. H. HENNING.

Mr. P. S. Jones moved for judgment under Rule 329d, for the transfer of certain property sold by the defendant to the plaintiff for £329.

Granted.

HUGHES V. P. H. HENNING.

Mr. P. S. Jones moved for judgment under Rule 329d for the transfer of certain property sold by the defendant to the plaintiff for £1,000.

PAGE V. SIEGMEER.

Mr. Buchanan moved for an extension of the return day in this matter, as it had been impossible to effect service at Thaba 'Nchu in time.

Extension of return day granted as prayed.

GOBELANGA V. GRAND JUNCTION RAILWAYS

Mr. Gardiner moved that an award of arbitrators, be made a rule of Court."

Granted.

On the motion of Mr. Gardiner, similar applications were granted in the cases of James, Butler, Bethge, and Boon respectively against the Grand Junction Railways.

IN THE ESTATE OF THE LATE FREDERICK HENDRIK DE WIT, P.G.SON.

Mr. P. S. Jones moved for an order authorising the transfer of certain property sold to one of the executors at public auction and at a fair valuation. The Master recommended that transfer be authorised.

Granted.

STEER V. KUZE.

This was an application for leave to sue by edictal citation. It appeared that Kuze, as the minister and trustee of the African Methodist Episcopal Church, had pas

a mortgage bond for £50 in favour of R. Steer, hypothecating certain property situated at Zonnebloem, Cape Town. Since then the said Kuze had left Cape Town, and petitioner was now desirous of suing him for the recovery of the said £50, and such interest as might be due. Petitioner therefore asked for leave to sue by edictal citation, and to attach the said property *ad fundandum jurisdictionem*. Leave was asked to serve the interdict, and notice of trial with the citation.

Order granted as prayed.

JARDINE V. COLONIAL GOVERNMENT.

Mr. De Waal applied for the award of an arbitrator made on the 17th October last to be made a rule of Court.

Mr. Howel Jones, for the respondent, consented.

Order granted as prayed.

MITCHELL V. MITCHELL.

Mr. Buchanan applied for leave to sue for restitution of conjugal rights by edictal citation. Counsel explained that when the application was originally heard, it was deferred for further particulars. There was now a second affidavit by the applicant giving particulars as to the manner in which her husband left her. She stated therein that he deserted her one night after having accompanied her to the theatre. They had been unable to effect personal service, though they had made special inquiry in Knysna and Cradock, where they thought he would most likely be found.

The Court granted the order, the citation to be returnable on 1st February, and notice to be given in one paper circulating in each district named, and the "Government Gazette."

GIE V. SOUTH AFRICAN SUPPLY AND COLD STORAGE COMPANY, LIMITED.

Mr. Searle, Q.C., applied to fix a day for the trial of this matter by jury.

The Chief Justice asked if notice of the application had been served on the respondents.

Mr. Searle said he believed it had; he had such a notice in his brief.

The application was ordered to stand over till the end of the roll in order to produce proof of service.

Subsequently evidence of service was produced, and the trial was fixed for the 10th December.

ABRAHAMS V. ABRAHAMS. { 1900
Nov. 15th.

Edictal citation—Restitution of conjugal rights—Husband and wife.

Where the husband left his wife in England and came to live in the Colony, the Court granted him leave to sue her by edictal citation for restitution of conjugal rights, she having refused to join him in the Colony.

This was application made by the husband for leave to sue his wife by edictal citation for restitution of conjugal rights, failing which, for divorce. The petition set forth that the parties were married in England in 1888. There was one child, a girl of ten years, issue of the marriage. Three or four years ago the petitioner came to South Africa, and his wife had refused to join him. She was living in adultery in England.

[De Villiers, C.J.: What jurisdiction has this Court? Has there not always been some residence in this colony on the part of both parties in prior cases?]

Mr. Molteno (for the applicant): I believe that in a recent case leave was granted [Buchanan, J.: Yes, leave was granted in a recent case; but I expressed great hesitation in the matter, and intimated that the question of jurisdiction would have to be carefully considered.]

Surely it is the wife's duty to follow her husband?

[De Villiers, C.J.: Oh, yes, it is her duty; but she has not performed her duty, and the question now is whether we have jurisdiction.]

The question can be gone into at the trial if the defendant wishes to raise the point. In *Reeres v. Reeres* (1 Menzies, p. 224), an order was granted calling on the wife, who had never been in the Colony, to join her husband here. In the case of *Van Rhyn v. Van Rhyn* (9 Sheil, p. 563), where the husband came out to this colony, leaving his wife in Rotterdam, the Court granted him leave to sue by edictal citation for restitution of conjugal rights, although the wife had never been in this colony. See also *Tare Miller* (3 Searle, p. 227).

[De Villiers, C.J.: In that case, Bell, J. dissented.]

The Court granted leave to sue by edictal citation, returnable on January 12, 1901: personal service to be effected.

The Chief Justice, in making the order, said he was afraid there was a great danger of the Court being utilised for purposes of collusive divorce actions, because there was nothing to prevent anyone wishing to obtain a divorce coming from England, living here a few months so as to become domiciled, and then obtaining a divorce, the wife being in default on the edictal citation.

SMIT V. CORBET { 1900.
Nov. 15th.
" 22nd.
" 29th.
" 30th.

This was an application for provisional sentence for £100 upon an acknowledgment of debt signed by the defendant in favour of one Mrs. Van Bergen in 1891, and by her ceded to the plaintiff in 1897. The amount due on the document was payable on three months' notice, and bore interest at the rate of $7\frac{1}{2}$ per cent. per annum.

Mr. Benjamin moved.

The defendant appeared in person, and handed in to the Court a document, dated April, 1899, made by Mrs. Van Bergen in the presence of two witnesses, which stated that the acknowledgment of debt now sued upon was stolen from her house. She further stated in the document that owing to the love and affection she bore the defendant, who was the husband of her granddaughter, she gave by way of donation to the defendant the full amount of £100 due on the acknowledgment of debt, together with any interest due thereon.

Defendant stated that the document was drawn up by a law agent, and took its rise from the fact that when Mrs. Van Bergen asked him for the interest due, he asked her to release him from the debt, and she, being unable to find the document, signed the one just handed in.

[De Villiers, C.J.: Mr. Benjamin, if this is true, it is a good defence, and there ought to be some opportunity given to defendant to obtain Mrs. Van Bergen's affidavit.]

r. Benjamin: According to the summons, the interest has been paid up to March, 1898; the acknowledgment was made in 1891, and the cession took place in 1897.

[De Villiers, C.J., pointed out that in the acknowledgment certain words which seemed to be "as collateral security" had been struck out.]

The matter was ordered to stand over until November 22, 1900, to enable the defendant to file affidavits.

Postea (November 22, 1900).

Mr. Benjamin again moved for judgment, as no affidavits appeared to have been filed.

The Court pointed out that affidavits were filed, but apparently no copies served on the plaintiff, and ordered the matter to stand over until November 29, so that the plaintiff's attorney might have an opportunity of seeing the affidavits.

Postea (November 29, 1900).

The defendant again appeared in person, and put in a further supporting affidavit bearing out the statements made by him on the 15th November, 1900.

The Court ordered the matter to stand over until the 30th November.

Postea (November 30, before Buchanan, J., and Maasdorp, J.).

Affidavits for the defendant were filed, setting out the facts as stated by the defendant on the 15th November. There was, however, no affidavit by Mrs. Van Bergen to maintain that there was no cession, and that there was a release to the defendant.

The Court granted provisional sentence, pointing out that, although there might have been a release to defendant by Mrs. Van Bergen, yet that release was dated, 1899, whereas the cession to the plaintiff was dated 1897.

Ex parte VENTER. { 1900.
FLEMMER V. VENTER. { Nov. 15th.

Minor—Landed property—Costs.

This was an application made by the father and natural guardian of the minor Venter for leave to mortgage certain property belonging to the minor, in order to raise the means (£40) wherewith to defend an action pending between the minor and one A. Flemmer. The declaration in the action set out that the father of the minor borrowed from the plaintiff Flemmer the sum of £63 11s. 5d., for the purpose of improving certain property, and that it was specially agreed at the time that that property should be liable for the amount advanced, the defendant undertaking to pass a bond over the property for the amount. That the money advanced was expended in enhancing the value of certain property belonging to the minor. The claim therefore was that judgment might be given against the father in his capacity as guardian, making the minor's property liable. To this declaration the present applicant took the exception that the agreement (even if it had been made, which was not admitted) was not binding on the minor; that there was no cause of action, in that no obligation on the part of the minor was present.

The petition further stated that at a previous hearing of a suit instituted by the plaintiff Flemmer against the father in his individual capacity for the sum of money advanced, the Court gave judgment for the plaintiff. That now, as the father could not pay, the plaintiff was suing the father in his capacity as guardian, seeking to make the minor's property liable. The minor had no means to defend the action, and it was consequently sought to raise the money on mortgage.

Mr. Close appeared for the applicant.

Sir Henry Juta, Q.C., appeared for the plaintiff in the action to oppose the granting of the application.

[De Villiers, C.J.: The claim against the minor's estate amounts to £63 11s. 5d., and it is proposed to raise £40 to resist the claim.]

Mr. Close: Our contention is that the minor is not liable at all. We have taken exception to the declaration, and it is probable that the whole matter will be decided on motion. Although the father borrowed the money from the plaintiff and expended it on the minor's property, we say that there was no agreement between the plaintiff and the father by which the minor's property can be made liable. There is no cause of action. I think it is a general principle that transactions in minors' estates without the previous consent of the Court will not meet with the Court's approval.

[De Villiers, C.J.: But supposing it appears at the trial that the minor has been benefited to the extent of this £63, will the Court not ratify the payment of that amount out of the minor's estate?]

If the Court ratifies this action of the father's, it will be setting up a dangerous precedent for getting at a minor's estate.

De Villiers, C.J.: If it appeared upon the pleadings that there was a strong probability of the minor succeeding the Court might have granted this application. As the matter stands, it is admitted that the case will be decided upon exceptions, and as those exceptions do not on the face of them appear to the Court to be good exceptions on behalf of the minor, I think the application should not be granted. It will be far better to save costs by stopping the case at this stage. The application will therefore be refused, the father to pay the costs *de bonis propriis*.

Sir Henry Juta asked that the costs might come out of the minor's estate as they would get nothing out of the father.

The Chief Justice: We cannot punish the son for the father. The son derives no benefit at all from this application.

Sir H. Juta: The son gets a material benefit in not having his property mortgaged for £40 to defend that action.

The Court decided that the application must be refused, with costs against the father *de bonis propriis*.

S.A. BREWERIES V. FOTHERGILL. { 1900.
Nov. 15th.

Lease—Tender—New trial—Act 23 of 1891, section 36.

B. leased to F. certain premises as an hotel, and in the lease undertook that F. should have and enjoy quiet and peaceable possession, and the use and benefit of the licence attached to the premises. At the next annual meeting of the Licensing Court F. applied for a renewal of the licence, but this was refused because certain improvements, imposed upon the previous licensee as a condition to renewal, were not carried out. F. sued B. before a jury for damages for the loss of the use of the premises and the licence, and obtained judgement on both claims, and the learned judge presiding held that B. was liable under the lease to carry out the improvements, and that, even if this were not so, as B. made a tender of £300 "in full settlement of all claims" and wrote to the plaintiff saying "that the only question at issue is the measure of damages," B. could not raise any defence as to the legal liability on either claim.

This was an application for a new trial under Act 23 of 1891, section 36, sub-sections 1 and 3, in connection with the abovenamed case, which was heard before Solomon, J., and a jury on the 6th and 7th September, 1900. The plaintiff Fothergill (the present respondent) sued the defendant company (the present applicant) for damages amounting to £3,000, for the loss of the use of certain premises leased to him by the com-

pany, and for loss of the use and benefit of the licence attached to those premises. He was awarded the sum of £450 on the first count, which was not disputed, and the sum of £2,000 on the second count. It was in connection with this second count that the defendant company applied for a new trial, on the grounds:

1. That there was no evidence on record to show that the defendant company was liable for £2,000 damages for the loss of the licence.

2. That the learned judge misdirected the jury on the points that upon correspondence between the parties the defendant company admitted liability for the damages, and could not then raise the point that they were not liable, and that the only question for the jury to consider was the amount of damages sustained, and

3. That the damages were excessive.

It appeared at the trial that under the lease the defendant company undertook that the plaintiff should have and enjoy quiet and peaceable possession of the property, and the use and benefit of the licence during the period of the lease. The defendant company maintained that this did not throw on them the duty of carrying out every alteration and requirement imposed by the Licensing Court before a renewal of the licence could be obtained. The learned judge presiding, however, decided that, as the defendant company, subsequent to the closing of the pleadings on August 9, wrote to the plaintiff's attorneys offering the "sum of £300, with taxed costs to date, in full settlement of all claims," and on August 14 again wrote saying that "the only matter really at issue between the parties now is, as you state, the measure of damages," they were debarred from raising any defence as to their liability on either claim, and accordingly instructed the jury that the question was one of how much damage the plaintiff had suffered.

[De Villiers, C.J.: The learned judge who presided at the trial is of opinion that the damages were excessive. The Court will therefore hear that point argued.]

Sir Henry Juta, Q.C., for the respondent: The damages were not excessive. Two thousand pounds for the loss of a licence during a lease of ten years is by no means excessive. There is not a particle of evidence to show that. The test to apply is: "What is the value of the goodwill of the licensed premises?"

Mr. Searle, Q.C., for the applicant: The plaintiff's position under the lease was a mere speculation, since the Licensing Court might at any time take away the licence. It is not a question of goodwill, because at the end of the lease the plaintiff had to give up the premises, without being able to claim any compensation for the goodwill. There is nothing in the lease and the correspondence which will debar us from raising a defence on the question of the liability for the loss of the licence. We are not liable for the loss of the licence. See *Newby v. Sharp* (8 Chancery Division, p. 39). The lessor cannot be held liable for the loss of a licence attached to premises leased by him. We gave no guarantee to protect the plaintiff in his enjoyment at any price. It we were bound to rebuild the premises it would have cost us £5,000. We did not know of the conditions informally imposed by the Licensing Court. On the question of a party being bound by a tender, see *Vander Spuy v. Paarl Bank* (7 Juta, p. 245).

Sir Henry Juta, Q.C., in reply: The defendant company did not do everything that was reasonable to ensure the continuance of the licence. The admission in the correspondence was a clear one of liability on both counts, which were made quite separate in the declaration. There could not possibly be any mistake.

De Villiers, C.J.: The question now to be decided is whether there has been a misdirection by the learned judge, whose direction was briefly stated in the record. The presiding judge held that the only question for the jury to consider was as to the amount of the damages, and that the defendants' tender of £300 was general as to both claims. He further held that the defendants were liable under the lease, and that upon correspondence between the parties the defendants admitted liability, and could not now raise the defence that they were not legally liable on the second claim. Now the declaration clearly stated that damages were claimed upon two grounds, first, that the plaintiff was deprived of the use of the premises from the month of July, 1899, till March, 1900; and secondly, that he was deprived of the use and benefit of the licence from April till the termination of the lease. On the first claim there are no difficulties as there was no dispute that the defendants were liable, and the plaintiff was duly awarded £450. It is upon the second ground that the real difficulty comes in. On that ground, the damage was

based upon the duty which, according to the plaintiff's declaration, lay upon the defendant company by virtue of the lease, and it was alleged in the declaration that it became and was the duty of the defendant company to duly carry out certain alterations and improvements as specified in the requirements of the Licensing Court. I have read and re-read the lease, in order to find if there is anything in the lease to justify the conclusion that there was any such duty imposed on the defendant company, and I have been unable to find that there is. I am satisfied that there was no warranty that the defendants would be responsible if the Licensing Court did not continue to grant the licence. But then it has been said that there was some understanding on the part of the defendants to do everything that was reasonable to ensure that the licence should be annually granted. I will say nothing about what was reasonable. The property came into the hands of the lessee, who should suggest anything that might be necessary for the purpose. But then it was said that the lessee had suggested to the defendants that these alterations should be made. I cannot find from the correspondence that any such clear suggestion was made, and I see nothing in the lease which imposes upon the lessors any liability to incur an expenditure of £5,000 in order to induce the Licensing Board to continue to grant the licence. That being so, it seems to me that damages could not be claimed upon the second amount, more especially if it be true that the defendants were not aware of the condition imposed by the Licensing Court. The learned judge seemed to have gone further than that, and said that whether this was so or not, the correspondence imposed on the defendants liability. I do not think the correspondence can be read to go as far as that. The defendants consented in the correspondence that no further evidence need be led than as to the amount of the damages, but that did not mean in my opinion that they relinquished any right of defence they had as to the second ground of claim. The proper course will be to let the case go for a new trial. In the ordinary form the course would be to enter judgment for £450, but that would be on the assumption that the plaintiff did not prove knowledge. Mr. Searle has had the points he wished cleared up as affecting the other leases of the defen-

dant company, and I now suggest that he should consent to judgment for £1,450. This will save the expense of a new trial, which the Court will otherwise have to order. Perhaps the parties will consider this suggestion. Meanwhile the Court will not, pending the decision of the parties, make the order for a new trial.

Buchanan, J., and Maasdorp, J., concurred.

The defendant company consented to judgment being entered against it for £1,450 and costs.

[Applicants' Attorneys, Messrs. Van Zyl and Buissonne; Respondents' Attorneys, Messrs. Silberbauer, Wahl, and Fuller.]

LEVER BROS. V. NANNUCCI, { 1900.
LIMITED. { Nov. 15th.
Dec. 4th.

Trade-mark—Infringement—Interdict.

N. manufactured soap and sold it enclosed in wrappers bearing the words "Sunflower—Why does," &c., and on the soap itself impressed the words "Sunflower—Guaranteed." L. who was the registered owner of a trade mark which allowed him to make the impression "Sunlight—Guaranteed" on his soap and sell it in wrappers bearing the words "Sunlight—Why does, &c.," applied for an interdict restraining N. from wrapping and "impressing" his soap in the above-mentioned way.

The Court granted an interdict restraining N. from using the wrapper complained of, but made no order as to the impression on the soap itself.

This was an application for an order restraining the respondents, Nannucci (Ltd.), from selling, or exposing for sale, any soap got up in tablets with the words "Sunflower" and "Guaranteed" impressed thereon, and put in wrappers bearing the words "Sunflower soap—Why does," etc., and enclosed in boxes similar to those of applicants. The applicants also asked for an order compelling the respondents to deliver to them all the moulds in which the soap was made, and the wrappers and boxes.

Mr. Schreiner, Q.C., appeared for the applicants.

Mr. Searle, Q.C., appeared for the respondents, and asked that the hearing of the application be postponed, as Mr. Nannucci, the managing director of the respondent firm, was ill, and could give no instructions or make an affidavit.

Mr. Schreiner, Q.C., asked that an interim interdict be granted.

The Court granted an interim interdict, and postponed the matter until November 24, 1900.

The hearing of the application, however, did not take place until December 4.

Affidavits were then filed on behalf of the applicants, setting out that they manufactured and exported soap, that they were the registered proprietors of certain trade marks and trade labels in this colony. They exported their soap and sold it in this colony in tablets which bore the words "Sunlight Soap—Guaranteed." Three of these tablets were wrapped together in a certain wrapper, made of imitation parchment, which bore the words "Sunlight Soap—Why does, etc." The whole was then enclosed in a cardboard box bearing on the outside the words "Sunlight—Honour where honour is due." The affidavits further stated that the respondents were not the registered owners of any trade mark in connection with soap, that they manufactured and sold soap in this colony, getting it up so as to almost exactly resemble the applicants' soap, and in such a way as would be calculated to deceive the general public. The cakes of soap bore the words "Sunflower Soap—Guaranteed"; three tablets were enclosed in a wrapper similar to that used by the applicants, and bearing the words "Sunflower Soap—Why does, etc.," printed in a similar type as that which the applicants used. Three tablets so wrapped were sold in a cardboard box very similar to the applicants' box, and bearing the words "Sunflower—Merit where merit is due." The applicants further stated that they were suffering irreparable loss by reason of the respondents' action, and wished to have them interdicted from continuing selling soap in the way complained of.

The respondents alleged that the use of the word "Sunflower" was not an infringement of the applicants' trade mark, the latter not having the word "Sunflower" registered as a trade mark. The wrapper round their soap was totally different in colour, texture, and style, type of prints and words used from the applicants' wrapper. They denied that the applicants had suffered any damage, and

that they were passing off "Sunflower Soap" for Sunlight Soap, or even attempting to do so. They were willing to remove any words from the tablets save the words "Sunflower Soap," and were ready to discontinue the use of cardboard boxes for packing, as they found it too expensive.

Mr. Schreiner, Q.C.: This is not the first time that the applicants have been constrained to apply to this Court for an interdict in regard to their trade mark "Sunlight." In July, 1898, they had to proceed against the Star Perfumery and Soap Company, to interdict them from using the word "Starlight" on their soap. The Court then granted the interdict applied for. *Lever Bros. v. Star Perfumery and Soap Company* (8 Sheil, p. 231). The decision in that case ought to have induced the respondents to refrain from contesting the present application. They have consented to discontinue the use of the boxes complained of, but I must press for an interdict against them in regard to the wrappers and labels. The words used in this case may not be the same, but the intention to deceive is clear.

Mr. Searle, Q.C.: The respondents are willing to discontinue using the boxes and to withdraw the wording from the soap.

[De Villiers, C.J.: Therefore there is only the question of the wrappers. There is not much difference between the wrappers used by the parties.]

There is not such a similarity as will deceive anyone purchasing the soap. Take the wrappers away from the soap and no similarity is left.

[De Villiers, C.J.: "Sunflower" is very like "Sunlight." Both wrappers commence with the words "Why does." Taking "Sunflower" and "Why does" in conjunction, the similarity to "Sunlight" and "Why does" is striking and misleading.]

It is a common thing for people to press their wares by way of a circular which began with the question "why does" or "why" something else. There must be proof here that someone has been deceived. I am instructed, however, to consent to an order restraining the use of the label.

De Villiers, C.J.: The respondent has adopted the word "Sunflower" to describe his soap, but the very circumstance that he used a word which was so like "Sunlight" ought to have induced him not in any other respect to imitate the registered trade-mark of the applicants. The imitation is very close, and to a person who did not see the two boxes together there would

appear to be almost no difference between them. Mr. Searle contended that there was not such a similarity as would deceive the purchaser; and there is no doubt that if these wrappers are taken without the contents, then there is not that similarity; but if one looks at the manner in which the contents are wrapped up, there is certainly a very great similarity. These are the first words that catch the eye on the wrapped-up bars of each: "Sunflower Soap—Why does," etc., and "Sunlight Soap—Why does," etc. These words are in the most prominent position on the wrappers, and the effect would really be to deceive the ordinary purchaser. It is not for the Court to indicate what alteration should be made to prevent this deception from being practised, but it strikes me that if the words "Why does" were struck out, the rest of it would not be so objectionable. It would not require much alteration to make this wrapper perfectly legal and justifiable. It is the manner in which the soap is got up that would tend to deceive. In regard to the soap itself, I do not see any objection to it. It is a very convenient form to have three tablets in one bar, and the only objection that might arise is that in each case the specimens bear the word "Guaranteed." That is not a sufficient reason for objecting to it. It might be an important thing to the seller that he should give a guarantee that the soap contained no injurious chemicals, but one person by giving such a guarantee could not prevent another person from giving the same guarantee. It would give the first one an enormous advantage, especially if he chose to break his contract with the public. Why should he have the benefit of a guarantee of a non-injurious soap, and another person be prevented from giving a similar guarantee? No order will be made in regard to the soap itself, but the Court will grant an interdict restraining the respondents from selling or exposing for sale any soap packets or boxes having labels similar to those on the applicants' boxes, and from selling or exposing for sale any soap in wrappers in the form in which they appear upon the annexure; the respondents must pay the costs of the application.

Buchanan, J., and Maasdrop, J., concurred.

[Applicants' Attorneys, Messrs. Walker and Jacobsen; Respondents' Attorney, Gus Trollip.]

HILLIARD V. RANSOME.

1901.
Nov. 16th.
" 19th.
" 20th.

Architect—Negligence—Damages.

This was an action in which A. Hilliard sued G. Ransome, an architect, for damages in connection with the erection of certain villa residences, of which defendant was the architect.

The declaration set forth that the plaintiff was a draper, carrying on business in Cape Town, and the defendant was an architect practising in Cape Town. In February, 1899, one Skippon entered into a written contract with the plaintiff whereunder Skippon undertook to erect four villa residences in the Gardens, Cape Town, for the sum of £2,870, to be paid by the plaintiff to him in accordance with the terms of the said contract, and upon the certificates of the architect engaged by the plaintiff. The said architect was the defendant in this suit. From time to time the plaintiff made payments to Skippon upon the certificates of the defendant, and upon January 19, 1900, the defendant, as such architect aforesaid, granted his final certificate for the sum of £588 14s. 5d. in favour of Skippon. At the time when the defendant granted the final certificate in favour of Skippon there were manifest defects and faults in the work undertaken by Skippon under the contract and specifications of the said work and in the material employed by the said Skippon, which defects and faults were set forth in an annexed statement. The declaration went on to say that it was the duty of the defendant as such architect diligently to protect the interests of the plaintiff, his principal, in and about the execution of the said contract, in accordance with the terms thereof, and the aforesaid specifications, and to refuse to grant the aforesaid final certificate until the aforesaid manifest defects and faults had been made good; but that the defendant wrongfully, unlawfully, and negligently, and not regarding his duty in that behalf, granted the aforesaid final certificate, upon which, after action brought thereon by the said Skippon, the plaintiff was legally compelled to pay the balance then due of the amount so certified by the defendant. It was alleged that by reason of the wrongful and negligent act of the defendant in granting the said final certificate to Skippon the plaintiff lost his remedy against Skippon in regard to the said defects and faults which

the defendant wrongfully and unlawfully neglected, and omitted to observe and to call upon the said Skippon to make good. The plaintiff, in consequence of such negligent act, omissions and defaults of the defendant as aforesaid, was put to expense in the sum of £123 15s. 6d. in having the said defects and faults made good, which sum represented the damage so sustained by the plaintiff in having lost his remedy through the negligence as aforesaid of the defendant. The plaintiff further stated that he had sustained special damages by the loss of the rent of the said villa residences, which should have been completed under the said contract on or before August 15, 1899, but were not so completed, owing to the negligence of the defendant in not properly supervising the work and compelling the said Skippon to use due diligence in completing the said work, and the plaintiff had also sustained damages in the costs of the suit brought against him by the said Skippon, and founded upon the final certificate so wrongfully and unlawfully and negligently granted by the defendants as aforesaid. The damages so sustained, it was stated, amounted to £200 sterling. All conditions had been fulfilled, all things done, and all times elapsed necessary to enable the plaintiff to demand payment by the defendant of the sums of £123 15s. 6d., and £200 sterling as aforesaid, but the defendant refused to pay the said sums or any part thereof.

The plaintiff therefore prayed for judgment for (a) £123 15s. 6d. sterling, and (b) £200 sterling, or that he might have such further or other relief as to the Court might seem meet, together with costs of suit.

The defendant admitted the formal allegations, and said that the delivery of two of the cottages was made and accepted on October 1, 1899, and that the certificate was granted by the defendant on October 19, 1899, on which day delivery of the remaining two cottages was made by him and accepted by the plaintiff. By the tenth clause of the contract it was provided that any defects, shrinkage, omissions, or other faults which might be discovered within three months from the date of the architect's final certificate should be made good by the contractors at their own cost, and in case of default the employer should be entitled to recover from the contractors the cost of making good the works, and by the term employer the plaintiff was meant. After

October 19 certain defects which were complained of were made good by the contractor, and on January 19 the defendant in accordance with the terms of the contract gave a certificate stating the final amount due to the contractor. He denied that there were manifest defects and faults in the work undertaken as alleged, and said further that no defects, shrinkages, or omissions other than those aforementioned were known to or pointed out to him between October 19, 1899, and January 19, 1900. He admitted that it was his duty diligently to protect the interest of the plaintiff, and said that he did so, and that the plaintiff was compelled to pay the amount due to the contractor, but save as above he denied the other allegations. He admitted that the contract time was August 15, 1899, and that the buildings were not completed in the said time, but denied that it was owing to any negligence on his (the defendant's) part or for any reason for which he was responsible. Wherefore he prayed that the plaintiff's claim might be dismissed with costs.

The replication was general.

Mr. Schreiner, Q.C. (with him Mr. Buchanan), appeared for the plaintiff.

Sir Henry Juta, Q.C. (with him Mr. Solomon), appeared for the defendant.

The plaintiff, after bearing out the statements in the declaration, said further that according to the contract a clerk of works should have been appointed. This was not done. That he was continually on the spot, gave the contractor whatever assistance he could by paying him weekly instead of monthly, and in other ways. He frequently wrote to the defendant complaining of defects which were never attended to. He lost rent for 2½ months through the houses not being finished in contract time, and had not yet received an "occupation certificate" for one of the houses owing to a defect in the drainage. The tenants complained of leakage, want of paint, etc., but the defendant would do nothing to remedy the defects, so the plaintiff called for tenders as stated in the declaration. Rain could not have caused the delay. The penalty clause was never put in force. The houses cost £750 each. Other witnesses, among them two architects, deposed to the defects in the buildings, and stated that they were due to negligence and want of supervision, and could have been avoided by ordinary care. One of them, Mr. Olive, stated that the final certificate should never have been given with all these defects unremedied.

Postea (November 19).

The defendant stated that there was considerable difficulty and delay in connection with the buildings, owing to the premises being flooded, and the discovery of a spring on the premises. He explained what was done in regard to the various defects complained of, and denied that there were cracks in the walls when he left the buildings on October 19. He said that the paper came off the walls, because the plaintiff, contrary to his advice, insisted on papering too soon. He would not have given a certificate if any of the alleged defects existed. He personally supervised the work, and went there sometimes two or three times a day. When once he gave his certificate he had nothing more to do with the building, whether there subsequently turned out to be defects or not. Anything that he did after October 19, 1900, was done as a matter of courtesy; he was not bound to go and look for defects subsequent to that date.

Edward Knox said that, like the defendant, he was an associate of the Institute of Architects, and that there was no negligent or careless work in connection with the buildings.

A. W. Ackerman, a civil engineer and architect, corroborated the previous witness.

Postea (November 20).

Other witnesses who were employed in connection with the building denied that there were such defects as were alleged by the plaintiff, and deposed generally that the defendant was on the premises frequently supervising the work.

After argument, Buchanan, J., in giving judgment, said: The plaintiff in this case employed the defendant, an architect, to supervise the construction of certain cottages to be erected in Cape Town, and the plaintiff alleged that the defendant wrongfully and negligently performed this duty in a way which resulted in loss to the plaintiff. There is no doubt in law that an architect must not only be reasonably proficient in his calling, and is liable for any ordinary want of skill, but he is also liable if he does not proceed with sufficient care and attention in the conduct of the business entrusted to him. He is liable for any loss resulting through his want of skill or negligence to the person who employs him. The plaintiff alleges that he has suffered a loss through the negligence of the architect in three different ways: that the defendant certified to certain work having been done when omissions existed, that the defendant was answerable for the delay in not having the work completed within the

contract time, and that he was answerable for the costs of an action brought by the builder against the plaintiff. Under the contract the architect was in the position of referee as between Mr. Hilliard and Skippon, and when Mr. Ransome gave his certificate Mr. Hilliard had no defence. He ought not, therefore, to be able to recover from the architect the costs which he lost by taking up an untenable defence. As for the question of delay, that is a ground of action against the builder, and in the absence of any misconduct on the part of the architect, the delay of the builder in not completing the buildings in time cannot be laid to the architect's charge. There remains only the question of the omissions. The architect certified that the houses were completed, and possession was taken. Mr. Ransome has taken up an altogether improper position when he says that after he gave the final certificate the buildings ceased to be a concern of his, and that he thereafter acted out of mere courtesy. The contract, drawn by himself, provided that he was to be the final referee in regard to any claims which might arise within three months after the completion of the buildings. When Mr. Hilliard wrote to the defendant on the 17th January he called attention to the cracks in the walls, and the substitution of brick for stone concrete in the yard. He mentioned none of the other twenty-one items contained in the schedule annexed to the declaration. These are all trifling with the exception of the omission of the concrete. It is perfectly clear that the specifications required stone concrete, and it is also clear that this was not carried out. This Mr. Hilliard himself admits was brought to his notice at the time, and that a conversation took place about it. Mr. Ransome, the builder, the carpenter in charge, and the mason all say that Mr. Hilliard gave his consent to the substitution. Mr. Hilliard denies this, but I am inclined to think Mr. Hilliard has overlooked this. At any rate, he allowed the work to proceed, and it was only after he had taken possession, that by the letter of the 17th January Mr. Hilliard made further reference to it. I think Mr. Hilliard has, in this point, put himself out of court, and this is the most serious item in the schedule. Mr. Black estimated the cost of replacing this concrete at £65 out of the £126 claimed. On the other items I do not think the Court would be justified in saying

the defendant was guilty of negligence, seeing the difference of opinion among the professional men in regard thereto. Mr. Ransome has perhaps not been so exact as he ought to have been, but I do not think the charge of negligence has been established against him, and on the whole facts we are bound to give judgment for the defendant with costs.

[Plaintiff's Attorneys, Messrs. Van Zyl and Buissinne; Defendant's Attorney, Messrs J. and H. Reid and Nephew.]

UNITED MINES OF BULTFO- } 1900.
TEIN V. DE BEERS CONS- } Nov. 17th.
OLIDATED MINES, LIMITED. }

Rent—Abatement—War—General
Law Amendment Act, 1879—
Lease—Unavoidable misfortune.

The plaintiff company leased to the defendant company certain claims in a diamond mine but, during a portion of the time covered by the lease, Her Majesty's forces occupied the property in consequence of war with the Republics and the defendant company was deprived of beneficial occupation during that period.

Held that, under the General Law Amendment Act 8 of 1879, the defendant company was deprived of any right, which it might otherwise have enjoyed to an abatement of rent.

This was an appeal from a judgment of the High Court of Griqualand (before Hopley, J.) in a case in which the respondents sued the appellants, the United Mines of Bultfontein, for sums of £1,441 11s. 1d., £5, and £18. The declaration was as follows:

1. The plaintiffs are the De Beers Consolidated Mines (Limited), duly registered and incorporated in the Cape Colony, and carrying on business at Kimberley, and the successors in title of the London and South African Exploration Company (Limited), and as such the proper parties to sue in this action.

2. The defendants are the United Mines of Bultfontein (Limited), a joint-stock company, carrying on business at Kimberley, registered and incorporated in the Cape Colony.

3. On or about the 3rd day of March, 1896, the defendants entered into an agreement with the London and South African Exploration Company (Limited) of Kimberley, the predecessors in title of the plaintiffs, whereby the aforesaid company let and the defendants hired certain 199 claims in the diamond mine situate on the farm Bultfontein and known as the Bultfontein Mine, more fully set forth in the said agreement hereto annexed, at a rental of thirty shillings per claim per month, payable in advance without any deduction or abatement whatsoever.

4. On or about the 1st July, 1899, the plaintiffs purchased and thereafter received transfer from the London and South African Exploration Company (Limited) of the said farm Bultfontein with the said mine thereon, of which fact defendants have had notice.

5. There is due from the defendants to the plaintiffs for and as rent in respect of the said 199 claims, for the six months from November 1, 1899, to April 30, 1900, the sum of £1,791. less the sum of £349 8s. 4d. paid on account, since issue of summons.

6 There is due further to the plaintiffs by defendants the sums of £6 rent from the 1st November, 1899, to April 30, 1900, of a certain compound site at the Bultfontein Mine, leased by plaintiffs to defendants on the 1st August, 1896, at the rate of £1 per month, less than the sum of £1 paid on account since the issue of summons, and £24 rent, less £6 paid on account since the issue of summons, from December 10, 1899, to April 9, 1900, for a certain depositing site at the Bultfontein Mine leased by plaintiffs to defendants on the 10th July, 1899, at the rate of £6 per month.

7. The defendants, though requested to pay the said amounts due, have failed and refused so to do.

8. All things have happened, all conditions have been fulfilled, and all times have elapsed necessary to entitle plaintiffs to claim the said moneys.

Wherefore plaintiffs pray: Judgment for the sums of £1,441 11s. 8d. £5, and £18, or £1,464 11s. 8d. in all, with interest *tempore morae*.

The amounts of £5 and £18 were abandoned.

For a plea to the plaintiffs' declaration, the defendant company says:

1. It admits paragraphs 1, 2, 3, and 4, but save as is hereinafter set forth denies the allegations in paragraphs 5, 6, and 8.

2. On or about October 12, 1899, upon the outbreak of war between Her Majesty's Gov-

erument and the Governments of the Orange Free State and South African Republic, and in consequence of the said hostilities, the property and works let by the plaintiff company to the defendant company were taken possession of by Her Majesty's Forces for defensive purposes, and were occupied by the said forces for the said purposes and for purposes in connection with the said war until the 7th March, 1900.

3. During the whole of the period aforesaid, the defendant company was deprived of the beneficial use, occupation, and enjoyment of the said works and property in consequence of the said hostilities, and the plaintiff company is not entitled to demand any sum for rent during the said period.

4. After the issue of summons in this suit, to wit, on or about April 23, 1900, the defendant company paid to the plaintiff company the sum of £358 14s. 6d., being the amount due for rent of the said property to the end of April, 1900 (including an amount of £2 6s. 2d., refund of Divisional Council rates) deducting the period during which the said property was in possession of Her Majesty's forces as aforesaid; the defendant company also tendered to pay the cost of summons as soon as the plaintiff company advised it of the amount thereof.

5. The defendant company denies that the sum of £1,464 11s. 6d. is due as alleged, or any portion thereof except the sum of £368 14s. 6d. paid as above set forth, and admits that it refuses to pay any further sum in respect of the plaintiff company's claim.

Wherefore, subject to the above tender as to costs of summons, it prays that the said claim may be dismissed with costs.

Before replying to defendants' plea, plaintiffs excepted to the second and third paragraphs thereof, as containing no answer and as bad in law and insufficient, inasmuch as it was stipulated between the parties, as will be seen from the deed of lease annexed to the declaration to which this Honourable Court is referred, that the rent should be paid during the period of the lease which still subsists without any deduction or abatement whatsoever, and pray that the second and third paragraphs of defendants' plea may be struck out with costs.

And for a replication should the above exception be overruled, but not otherwise, the plaintiffs admit the tender to pay the costs of summons, but deny the remaining allegations of fact and conclusions of law in the said plea contained, save in so far as it ad-

mits any of the plaintiffs' allegations, and join issue with defendants thereon, and again pray for judgment with costs.

In the Court below the exception was allowed with costs.

The learned Judge, in deciding the question in the High Court, said, *inter alia*: "I do not think that such a lease as this is affected by Act 8 of 1879, section 7, which seems to me to deal with leases of land and not with leases of houses, claims, and other things not being in a legal sense 'land,' nor do the words ('without any deduction or abatement whatsoever') used, seem to deal with a case of *vis major* arising from an incursion of an enemy." After remarking that he was borne out in this opinion by the decision of the Judge-President in the case of *Enochson v. Erans*, decided on the 17th April, 1900, in the High Court, Kimberley, the learned Judge proceeded: "The present case then being the case of a lease unaffected by statute law, we must follow the provisions of the common law. *Van der Linden* puts the matter thus: The obligations of the lessee consist in the punctual payment of the rent according to the covenant in that behalf but the lessee is entitled to demand the entire remission of this rent, or an abatement of part, according as he has had no use of the thing let during the whole or part of the time of the lease, unless this has been occasioned by his own act (pp. 238-9, *Henry's Translation*). *Voet* (19, 2, 23, and 24) enumerates various examples of *vis major* upon the happening of which a tenant might lawfully abandon his lease and claim an abatement of his rent, or if he had not actually abandoned he might claim a remission on certain grounds. In both cases an incursion of the enemy figures as a just cause for the tenant to set up. Similarly the *Digest* (19, 2, 33) dealing with a case where the property sold or leased has been taken by the State for public purposes, states that the landlord must remit or return the rent to the tenant who has been dispossessed by such *vis major*. Thus it seems to me that, but for anything to the contrary in the agreement of lease, the present defendants would have been entitled to set up the defence upon which they rely, and to claim an abatement or deduction from the rent due. But according to the lease, they have promised to pay their rent punctually, without any deduction or abatement whatsoever. I have already stated that we must take the parties to be contracting

according to the existing law at the time of the contract, and have shown what the circumstances of the present case are upon which the defendants rely as exempting them from payment of the rent. Is there anything, either in law or in the manifest contemplation and intention of the contracting parties to exclude such circumstances from the operation of the words by which the defendants renounce the benefits of any abatement or deduction whatsoever? The words are clear and unambiguous, and we must give effect to them, if possible. Mr. MacKenzie, for the defendants, when pressed as to their meaning, contended that the parties could never have contemplated such a thing as a war, and that though the words were very wide, the abatement now contended for by the defendants was not excluded. He maintained that the parties were contemplating ordinary mining risks, and that the words referred only to claims for deduction or abatement arising from such causes. But that can hardly be, as the Court decided in 1885 that a mine tenant could not claim any reduction or remission of rent for being kept out of beneficial use by such causes. *King and Others v. Dalton* (3 H.C., 160). Cutting away all that class of causes for avoiding payment, what would remain? As far as I can see, only such causes as I have touched upon, all being cases of *vis major* of one kind or another, and it seems to follow irresistibly that the parties meant to exclude such cases in whatever manner the future might provide them. I therefore think that the defendants by the terms of their lease contracted themselves out of the benefits reserved to them by the common law, and that they must pay the rent demanded of them. *Voet* contemplates such a contract (19, 2, 23) where he says: "Non etiam . . . remissio facienda est . . . quoties lege quis fundum locavit ut etiam si quid vi majore accidisset hoc ei praestaretur id est, praestaretur tamen locatori quod mercedis nomine promissum, etc." The exception must be allowed with costs.

The defendants now appealed.

Mr. Searle, Q.C. (with him Mr. Rubie), for the appellants: The words in the lease "without any deduction or abatement whatsoever" do not apply to a case of this sort. The words only apply to rates and taxes. If "the act of God, or the Queen's enemies" were intended, they would have been mentioned. War was clearly not in the contemplation of the parties. The learned judge

relied on *Voet* (19, 2, 23), and in the course of his judgment referred to the case of *King and Others v. Dalton* (3 H.C., 160), which decided that the rights of a mining lessee were similar to those of an usufructuary rather than an ordinary lessee. See also *Matthaeus de Auctionibus* (2, 5, sections 15, 16, and 17) on the distinction between "fortuitous" and "unusual" occurrences. War is "unusual" and "beyond all expectation." If the lease was made during war, then no reduction could be made. *Vinnius* (Book 2, chapter 1), and *Festing v. Taylor* (3 Best and Smith, p. 317), *Gleadow v. Leetham* (22 Ch. Div., p. 269). If the premises leased were burnt down, the tenant would not be liable for the rent. *Baily v. De Crespigny* (L.R., 4 Q.B.D., 162, at p. 185), *Hall v. Divisional Council of King William's Town* (1 E.D.C., p. 97, at p. 103). Our common law is much more favourable to the lessee than the English law. The General Law Amendment Act of 1879 does not apply. The provisions therein contained are merely a reproduction of the words on lease used by *Van der Linden* (p. 238, Henry's Translation). See also *Grotius* (p. 397), *Voet* (19, 2, 23-24). Act 8 of 1879 does not apply to cases of *vis major*. *Enochson v. Evans* (High Court, April 17, 1900). See further, *Rubidge v. Hadley* (2 Menzies, 174), *Grotius* (3, 19, 12), *Van Leeuwen* (Vol. 2, p. 333, Kotze's translation), *Code* (4, 65, 28), *Digest* (19, 2, 13, section 5, 19, 2, 33), *Perezius ad Codicem* (4, 65, 25-28), *Treasurer General v. Loxton* (1 Juta, p. 304). These authorities all say that *vis major* has the same effect on general contracts as it has on leases. The principle at any rate applies to the contract of emphyteusis. *Voet* (6, 3, 20) lays it down that the emphyteutic tenant can claim a remission of rent if he has been wholly driven from the land by the enemy. See also the *Censura Forensis* (2, 16, 74-71, Foord's translation), see also *Voet* (7, 4, 10) on the position of the usufructuary, *Preston v. Dixon* (1 Appeal Cases, p. 322 or p. 347). A "claim lease" is different to a lease of land; it gives a right of perpetual renewal, and the rights under it can be assigned.

Mr. Schreiner, Q.C. (with him Mr. McGregor), for the respondents: Is this a lease of land or is it not? That is the first question. Then we must determine whether this was an unavoidable misfortune under Act 8 of 1879. Well, it is clearly a lease of land; if it is not that, then it is no lease at all. If it was a lease of land, then the Act applies.

If the Act does not apply, then the ordinary common law of contracts does not allow any remission. The lease here entered into was a special kind of lease akin to servitude. It created rights *sui generis*, which were not exactly usufructory rights, nor servitude rights. See for the legal description of such a lease *London and S.A. Exploration Co. v. Rouliot* (8 Juta, p. 74, at p. 89). Roman Law principles do not apply in such a case as the rights created do not fall under any Roman classification. The Act of 1879 refers to a case of hostile incursion as being a circumstance not contemplated by the parties. In *Van der Linden's* time a remission on the ground of hostile or military occupation would have been allowed; this kind of remission was just one of those which the Act 8 of 1879 was intended to do away with. See *Kersteman's Woordenboek onder "Huur"* and *Hollandsche Consultation*, No. 201. *Voet*, when mentioning the cases in which remission would be allowed, drew no distinction between the act of God or man; consequently the Act of 1879 did not. This was clearly a lease of land.

Mr. Searle, Q.C., in reply: See *Voet* (6, 3, 11), which shows that a lease of mines would come under emphyteutical tenure. See also *Pallock on Contracts* (p. 391).

De Villiers, C.J.: I am of opinion that this appeal should be dismissed, but not upon the same grounds as were relied upon in the judgment of the Court below. That judgment was based entirely upon the terms of the lease, and it was held that the words "without any deduction or abatement whatever" debar the defendant company from setting up the want of beneficial use during the siege of Kimberley as a defence to an action for rent. It appears to me, however, that these words should be confined to such deduction or abatement as might reasonably have been in the contemplation of the parties at the time when the lease was executed. The declaration alleges that the plaintiff company let to the defendant company 199 claims in the Bultfontein Diamond-mine, and demands rent for a period of six months. The plea alleges that during that period the property let was taken possession of by Her Majesty's Forces for defensive purposes in consequence of the war with the Republics, and that the company was thus deprived of the beneficial use, occupation, and enjoyment of the property, and the plea accordingly denies the right of the plaintiff company to claim the rent which would otherwise have accrued during that period. This

plea was excepted to as bad in law, and the exception was sustained in the Court below. For the purpose of our decision we may assume that the lease is an ordinary lease of land. If it were not a lease of land there is no authority for holding that the lessee would be entitled to an abatement of rent by reason of the land having produced nothing. If it was a lease of land there is certainly authority in our law for the proposition that the tenant is entitled to a deduction of rent for loss of beneficial occupation caused by the Queen's enemies. The question was discussed by Menzies, J., in *Rubidge v. Hadley* (2 Menzies, 174), as far back as 1843. The judgment is very briefly reported, but it evidently was based upon the authorities cited by the then Attorney-General, Mr. Porter. "By the law of England," he contended, "losses for non-user of this kind fall on the tenant; by the law of Scotland they fall on the landlord, and also by the Roman-Dutch law, where such losses are occasioned by reason of extraordinary seasons of unfruitfulness, war, fire, and acts of God," and the first authority cited was *Van der Linden* (pp. 238, 239). The law is stated by him in the following terms: "The lessee is entitled to demand the entire remission of the rent or an abatement of part, according as he has had no use of the thing let, during the whole or part of the time of the lease, unless this had been occasioned by his own act. To this head also appertains the case when through inundation, tempest, or suchlike unavoidable misfortunes, the land has produced nothing." This text-writer says nothing as to war; but *Grotius*, in the passage cited by Mr. Porter (Introd. 3, 19, 12) says: "If by unexpected misfortune, such as war, fire, or unfruitfulness, or something of a like nature, the lessee has been hindered in the use, then the rent must be reduced in proportion." In 1879, it was enacted by the 7th section of the General Law Amendment Act that "in the absence of any special stipulations to the contrary contained in any contract of lease, no lease of land shall become void or voidable, nor shall the rent accruing under such lease be incapable of being recovered on the ground that the property leased has, through inundation, tempest, or such like unavoidable misfortune, produced nothing." The Legislature, by these words, clearly intended to repeal the law which allowed an abatement under the circumstances mentioned by *Van der Linden* and *Grotius*, and, indeed, the law thus in-

tended to be repealed is stated in the identical language employed by *Van der Linden*, as translated by Henry. Before the passing of the Act, the fact that a lessee was deprived of beneficial occupation through a misfortune which, so far as the lessor was concerned, was unavoidable, entitled the lessee to a proportionate abatement of the rent. A war would be such a misfortune as much as an inundation or a tempest, but if these misfortunes were placed on the same footing for the purpose of relieving the lessee, they cannot be placed on a different footing when the rights of the lessor under the Act are in question. The words of the Act are, in my opinion, wide enough to meet a case like the present. The plaintiff company is not alleged to be responsible for the war, and for the consequent occupation by Her Majesty's forces of the property leased, and therefore the misfortune through which the property produced nothing for a period was, so far as that company was concerned, unavoidable. The appeal must therefore be dismissed with costs.

Buchanan and Maasdorp, J.J., concurred.
[Appellant's Attorney, Gus Trollip; Respondent's Attorneys, Messrs. Scanlen and Syfret.]

LAMB V. A. AND I. PETERS. } 1901.
Nov. 17th.

Insolvency—Trustee—Costs *de bonis propriis*.

Where a trustee in an insolvent estate brought an action for undue preference without consulting the general body of creditors, there being practically no assets in the estate, and the action failed and he was ordered to pay the costs de bonis propriis.

The Court, on appeal, declined to interfere with the judgment.

This was an appeal from a judgment of the High Court of Southern Rhodesia in an action brought by the respondents (plaintiffs below), for the recovery of the sum of £93 6s. 9d., less £37 6s. 8d. paid on account, and interest from the 14th March, 1899, against the appellant (defendant below). The appellant, in his capacity as trustee of the insolvent estate of Harris and Co., had previously brought an action to set aside an alleged undue preference made by the in-

solvent to A. and I. Peters, the present respondents. At the time of the action there was only an amount of £17 or thereabouts in the estate as assets, and the trustee did not consult the creditors in the estate, but only obtained an indemnity for any costs that might be incurred from one of the creditors, Carr and Co. Judgment in the action for undue preference was given against the trustee, with costs, which amounted to £93 6s. 9d. The defendants in the previous action then sued the trustee in his individual capacity for the amount of these costs, and the Court ordered the trustee to pay the costs *de bonis propriis*. Against this decision the trustee appealed.

In the suit between the present parties (A. and I. Peters v. Lamb), in which the respondents were plaintiffs, the declaration stated that the plaintiffs traded at Bulawayo, and the defendant (present appellant) was a broker. That the estate of Harris and Co. was sequestrated on 15th August, 1898, and that the defendant was appointed trustee on November 1, 1898. That on or about the 12th January, 1899, the defendant (recklessly and negligently, and without instructions or directions of the proved creditors) instituted an action wherein it was sought to have a certain transaction between the insolvent and the plaintiffs of March, 1898, set aside as an undue preference in terms of section 84 of Ordinance 6 of 1843, and delivery of the goods or payment of their value (£130) was claimed. [At the date of the action the assets of the estate, besides the goods claimed, amounted to £20.] The judgment in the action was absolution from the instance with costs, which, when taxed, amounted to £93 6s. 9d., and of which the defendant now paid £37 6s. 8d.

By an amendment the words within brackets above [] were deleted from the declaration, and an additional clause added, viz., that as an alternative the defendant instituted the action recklessly, negligently, and without the instructions or directions of the proved creditors, and that on the date of the action the sole assets of the estate over and beyond the goods claimed from the plaintiffs were of the value of £20 or thereabouts.

The defendant, in his plea, admitted all the allegations of the plaintiff, except that he denied that he instituted the action recklessly, etc., and that the only assets at the time were £20. He alleged that the action was instituted after careful inquiry, and under legal advice, and upon the mandate of the creditors.

The facts appear from the judgment.

Mr. Russell, for the plaintiffs, in the Court below argued that the trustees should have obtained an indemnity, and cited section 50 of Ordinance 223, 228; *Ex parte Angerstein* (L.R., 9 Ch., p. 479); *Pitts v. Lafontaine* (L.R. 6, Appeal Cases, p. 486).

Mr. Ward, for the defendant, submitted that the trustee was not liable, because he was not reckless, but took counsel's opinion. It required a special order to make the trustee personally liable here, because he sued N.O.: *Wehmeyer v. Swemmer* (Buchanan, 1874, p. 46). *Mala fides* must be proved: *Du Toit v. Jones* (9 E.D.C., p. 51); *Trustees of Wilson and Glyn v. Wilson and Another* (4 Juta, 209); *Standard Bank v. Bilen's Trustees* (2 H.C., p. 222).

Mr. Russell, in reply, cited *Standard Bank v. Jacobsohn's Trustees* (9 Sheil, p. 365). The learned judge (Vintcent, J.) found, on the facts, that the trustee acted *bona fide*, with the concurrence of the creditors, and upon the advice of counsel, but, nevertheless, that in view of the decision in the cases of the *Standard Bank v. Jacobsohn's Trustees*, *ex parte Angerstein* and *Pitts v. Lafontaine*, the defendant was personally liable for costs. His lordship added: In my opinion the facts and circumstances of the case of *Wehmeyer v. Swemmer, Trustee of Heyns*, were different from those in the present action. As the trustee in insolvency is empowered to take proceedings without instructions from someone else, and as he is the legal owner of the insolvent estate, I see no reason why he should not be personally liable for the costs of an unsuccessful action instituted by him.

Mr. Schreiner, Q.C. (with him Mr. Rubie), for the appellant: The trustee was bound to bring the action under section 50 of Ordinance 6 of 1843, seeing that all the assets of the estate, except £20, had been made away with, consequently he cannot be made to pay the costs *de bonis propriis*. Our law is not so strict as to the payment of the costs of an action by a trustee as the English law. It is the duty of a trustee to bring an action to set aside an undue preference, and if, in doing so, he acts *bona fide*, believing he has a good action, he cannot be made to pay the costs *de bonis propriis*. He would be personally liable if he were guilty of negligence—*Myburgh v. The Commissioner of the Sequestrator* (1 Menz., 345)—or brought the action recklessly. Here there was no recklessness at all. See also *Gardner v. Executors of Jones* (9 Sheil, p. 98). In

Trustees of Wilson and Glyn v. Wilson and Another (4 Juta, p. 209), a trustee was allowed his costs, even though he prosecuted against the wishes of the creditors. A judgment against a trustee in his official capacity cannot be enforced against him in his individual capacity. *Swemmer, Trustee of Heyns v. Wehmeyer* (Buch., 1873, p. 96). The case of *Du Toit v. Jones* (9 E.D.C., p. 51) was very similar to this case. The learned judge took a wrong view of the case of the *Standard Bank v. Jacobsohn* (9 Sheil, p. 365). A trustee who brings an action only after he has taken legal advice can hardly be said to be acting negligently or recklessly. The trustee took counsel's advice in this case. If the trustee has to wait until he has sufficient cash in hand before bringing an action, many cases, which ought to be investigated, will not be heard, and malpractices by insolvents will become frequent. Here the trustee was merely doing his duty, and that very diligently; it is hard to penalise him for that. See *Dunn v. Hill* (11 Meeson and Welsby, p. 471).

Mr. Searle, Q.C. (with him Mr. Howel Jones), for the respondents: There is no reason for revising the judgment. It is the trustee's duty to act only according to the creditors' directions. The trustee was negligent in not consulting them, especially as he had no funds in hand. He should not sue unless he has funds in hand, and gets an indemnity from the creditors. Actions by trustees should not be multiplied. He should not, acting under the shield of his official capacity, recklessly incur costs which might have to be paid by others. Section 8 of Ordinance 6 of 1843 does not apply; it does not provide for the case where there is nothing in the estate. There is no difference on this point between the English and Colonial laws. See *Van Heerden v. Goosen's Trustee* (4 Juta, 41); *Slater's Trustee v. Smith and Co.* (4 Juta, 135); *Wood and Co. v. The Lower Albany Flockmasters Association* (1 Roscoe, p. 91). *Du Toit v. Jones* is not in point. No person acting in a fiduciary capacity has any right to bring actions unless he has funds wherewith to pay any costs he may be ordered to pay.

Mr. Schreiner, Q.C., in reply, argued as to the effect of sections 8 and 50 of Ordinance 6 of 1843.

De Villiers, C.J.: It is to be regretted that this question as to costs *de bonis propriis* was not raised before the High Court at the time when the action for undue preference was brought. If the question had

been raised, and the learned judge had had in his possession the information now before the Court, and had decided that the costs were to be paid by the estate,, but failing the ability of the estate to pay the costs that they should be paid by the appellant *de bonis propriis*, I do not think any Court of Appeal would have interfered with that judgment. In fact, under the Act of 1896, as well as under the provisions of the previous Acts, there could have been no appeal upon such a question of costs, except by leave of the Court pronouncing such judgment.

[At this point his lordship's voice failed him, and he requested Mr. Justice Buchanan to deliver judgment.—*Rep.*]

Buchanan, J., said that in his opinion this appeal would have to be dismissed on the grounds that his lordship the Chief Justice was about to proceed to explain that it was essentially an appeal on a question of costs, and that had all the facts that had come before the Court been before the Court below when the question of undue preference was being tried against Pieters, the facts proved would have justified the Judge in coming to the conclusion that Peters, who had been successful in the action, should also get his costs, not only because the trustee in this case had brought an unsuccessful action, but also because he had brought this action when the estate itself had next to no assets which justified the bringing of the action, and further because he had obtained from the only creditor at that time a guarantee for any legal expenses which the trustee might incur in bringing the matter before the High Court for its decision. His lordship was not prepared to say that the mere fact of the trustee's bringing an action on behalf of the estate in which there were not sufficient available assets to pay the costs of the suit if he lost it, was necessarily an act of *mala fides*, but it was a circumstance to be taken into consideration together with the other circumstances of the case. When it has been proved that a guarantee has been provided by the creditors, and the action has been wholly unsuccessful, he thought the Court was justified in saying that the trustee should pay the costs *de bonis propriis* if the insolvent's estate was not sufficient, leaving the trustee his recourse against the creditors who guaranteed his outlay. On these grounds, in his lordship's opinion, the appeal should be dismissed with costs.

Maasdorp, J., concurred.

The Chief Justice said: I would like to state that in order to make a trustee liable there should always be some proof of negligence on his part. In the present case there is not an entire absence of such negligence, inasmuch as the appellant himself stated that the assets of the estate consisted of only a few articles valued at £17 10s. and moreover in the present case if the question of costs had arisen at the original trial, and it had been brought before the Judge that there was the indemnity given by Carr and Co., that would have been an additional reason to justify the Judge in ordering the trustee to pay the costs of the suit, and in such case there would not have been an unwise exercise of his discretion on the question of costs. The question of costs was now raised in an independent action, and I think that the same principles which would have applied in the Court below in such a case should guide the Court in the present case. These are my reasons for holding that the appeal should be dismissed, with costs.

[Appellant's Attorneys, Messrs. Van Zyl and Buissinne, Respondent's Attorneys, Messrs. Findlay and Tait.]

MICHAU V. WESTERMAN. } 1900.
 } Nov. 19th.

Malicious prosecution—Damages—
Absolution from the instance.

M. sued W. for damages for malicious prosecution, in that W. falsely, maliciously and without reasonable and probable cause made certain charges against M. on affidavit, thereby inducing a criminal charge for high treason to be commenced against him.

After a preliminary examination the proceedings against M. were abandoned and he was discharged. The Court held, that, as W. was merely a witness against M., and did not himself institute the criminal proceedings, he was not liable for damages for malicious prosecution, and granted absolution from the instance.

— — —
This was an action instituted by J. J. Michau, a British subject, Justice of the Peace, and attorney, for the recovery of

£500 damages for malicious prosecution, against Walter Westerman, a permanent-way inspector employed on the Cape Government Railways at Modder River.

The declaration alleged that on December 14, 1899, the defendant falsely, maliciously, and without reasonable and probable cause, laid information, on oath, before a Justice of the Peace, which charged the plaintiff with having engaged in treasonable intercourse, and having assisted the Republican forces then invading the Colony. That in consequence of this information the plaintiff was arrested on January 26, 1900, on a warrant which charged him with high treason and rebellion. That a preliminary examination was taken, at which the defendant gave evidence in support of the charge, and the plaintiff was committed for trial on the 20th February. He was released on bail shortly after his committal for trial, and was ultimately informed that the Attorney-General declined to prosecute. He alleged that the damages sustained amounted to £500, and therefore claimed judgment for that amount with costs. The affidavit containing the information on which the plaintiff was arrested and charged set out that the defendant frequently saw the plaintiff conversing with the officers and men of the Republican forces during the occupation by them of Modder River; that the plaintiff invited officers to dine at his house, and displayed red, white, and green lights from his verandah, these lights corresponding to other lights observable from the direction of the Orange Free State border; that the defendant was of opinion that the lights were used as signals for the benefit of the Republican forces. It further set forth that the plaintiff shook hands with a Republican General, named De la Rey, and wished him "God speed" when he was leaving to engage the British forces.

The defendant denied that the information was given falsely, maliciously, and without reasonable and probable cause. That the affidavit in question was made at the request of the military authorities after the latter had put to him a number of questions. That he did not apply for the arrest of the accused, and had nothing to do with it, the arrest being made entirely on the initiation of the military and civil authorities. He also denied that the plaintiff suffered the damages alleged, and prayed that the plaintiff's claim be dismissed with costs.

Mr. Burton appeared for the plaintiff.

Mr. Searle, Q.C. (with him Mr. Gardiner), appeared for the defendant.

The evidence led for the plaintiff was to the effect that he had a country residence at Modder River, where he went from Kimberley on the 14th October to spend the week-end. His return was cut off, so he was forced to remain at his house, near which was an hotel where the men of the Republican forces used to congregate. This hotel was also near the Modder River Station, so he naturally came into contact with these men. The plaintiff denied talking to the Republican officers or inviting them to his house. He denied that he was on very friendly terms with the Republicans, although he sympathised with them. He visited the Boer laager once in order to apply for a pass to go further down into the Colony, but could not obtain it. He denied the statements made in the affidavit, and alleged that he was guilty of no treasonable actions. The Landdrost (Van Heerden) visited his house once, but only as an acquaintance.

Further evidence was led to the effect that the defendant was enraged with the plaintiff because the latter would not try and induce General De la Rey to grant the defendant privileges in regard to his movements, and said that he would get the plaintiff hanged.

The defendant said that he made the affidavit at the request of Captain Gale and other British officers. The Magistrate wrote the affidavit from notes of replies made by the defendant to questions put to him, and then the defendant signed it. He never volunteered the information. There were other affidavits against the plaintiff, and the arrest took place prior to the date of the making of defendant's affidavit.

Before the defendant had completed his evidence, the Court ordered him to stand down, and called upon Mr. Burton to argue the question whether under the circumstances the defendant was liable.

Mr. Burton: The mere fact that the defendant was requested to make the affidavit, which was false, does not excuse him from liability. *Mattheson's Precedents in Pleadings* (p. 389). His object in making the affidavit was clearly to induce a criminal prosecution of a serious nature. The charge was based on his affidavit; the statements in it were false, and made without reasonable and probable cause, and the effect thereof was to set the criminal law in motion. The proceedings against the plaintiff commenced with the warrant, which was granted on the defendant's affidavit. The fact that there were other affidavits will not

render the defendant immune. *Pollock, on Torts* (4th Edition, p. 289); *Fitz-John v. McKinley* (9 C.B. (N.S.), p. 505). In the latter case the prosecution, although ordered by the authorities, was due to false statements made by the defendant. The defendant in the present case was not merely a witness corroborating information, which was already sufficient to justify a prosecution; although the plaintiff was already arrested when the defendant made his affidavit, yet the proceedings were not started until the defendant's affidavit was made. On it the warrant was issued.

Mr. Searle, Q.C.: The person who is active in putting the criminal law in force is really the person who sets the law in motion. The defendant is not such a person. *Dunby v. Beardsley* (43 Law Times, p. 603); *Cohen v. Benjamin* (4 Juta, p. 99); *Litchburgh v. De Beer and Low* (9 Sheil, p. 297). The defendant was merely an ordinary witness, and took no active part in the prosecution.

Mr. Burton in reply: The decision in *Cohen v. Benjamin* was based on the circumstance that the defendant there stated the facts fairly. That was not done here; the defendant went out of his way to draw wild conclusions from the fact that he saw a light or lights at the plaintiff's house.

De Villiers, C.J.: The circumstances of this case are peculiar and of a nature quite special. The forces of the Republics were in possession of the portion of the Colony in which the plaintiff resided. The plaintiff was under arrest at the time in the hands of the military on information which had been obtained by the military authorities themselves. Subsequently the military authorities obtained additional information from defendant, whom they requested to appear before the Magistrate to give information. The defendant did not volunteer to give his evidence. Questions were put to him by the Magistrate, and in answer to these he made statements which are now relied upon as proving that the defendant instituted criminal proceedings. Now in my opinion, there is no evidence whatever that the defendant set the criminal law in motion. We cannot lose sight of the fact that at the same time the affidavit was made by the defendant, affidavits were made by several other witnesses, and it was upon all these affidavits that the military authorities acted in pressing the charge against the plaintiff, and that the civil authorities acted in entertaining those charges

and in holding the preparatory examination. Now in all these circumstances the defendant must be regarded as being in the position of a person who gave evidence as a witness rather than as a person who voluntarily instituted criminal proceedings. The Court cannot lose sight of the fact that there was a duty imposed on the defendant to answer the questions just as much as there was on a witness in a court of justice. A witness in a court of justice is in a different position to a man who of his own accord institutes a criminal prosecution. The present case is instituted against the defendant not on the ground that, as a witness, he gave false evidence, but that he made certain charges and instituted a prosecution. The Court is entirely at the mercy of the defendant in regard to the circumstances under which the affidavit was made; there is no evidence to contradict the statements made by him in that respect, and in the absence of anything in contradiction, or any proof that the defendant himself set the law in motion, I am of opinion that the plaintiff cannot succeed upon the present declaration. Under these circumstances the Court will give absolution from the instance with costs.

Maasdorp, J., concurred.

[Plaintiff's Attorney, J. G. van der Horst; Defendant's Attorneys, Messrs. Scanlen & Syfret.]

SUPREME COURT

| | | |
|------------------------|---|------------|
| MILLS V. ESTATE MILLS. | { | 1900. |
| | | Nov. 20th. |
| | { | 1901. |
| | | June 6th. |
| | | " 10th. |
| | | " 12th. |
| | | " 25th. |

Domicile—Presumptions and burden of proof as to change of domicile.

The late James Spencer Mills was a partner in a certain mercantile firm in Cape Town, and was domiciled there. In 1898, he and plaintiff (by whom he had had issue) went to England, and were there married. The evidence as to Mills's intention to return to the

Colony was conflicting. Before leaving the Colony he had made provision by will for the plaintiff and his issue by her. He took a three years' lease of a house in England, and died there in 1900. Counsel for plaintiff contended arguendo that the onus of proving a change of domicile lies on him who asserts such change.

Held: (1) That repeated assertions of the late Mills that he intended to leave the Colony for good, coupled with the act of his removing and taking a lease of a house in England, was proof of a change of domicile.

(2) As the Court found as a fact that there had been a change of domicile, they were not called upon to say on whom the burden of proving such change was cast.

(3) Everybody is presumed to know the law of the country in which he lives, hence Mills must be presumed to have intended the legal consequences which would follow on a change of domicile to England.

The declaration alleged that plaintiff was the widow of the late James Spencer Mills, of Cape Town, and the defendants were the testamentary executors of her late husband. Prior to the year 1898 the plaintiff and Mills lived together as man and wife, and three children were born of them. In 1897 plaintiff and the said children proceeded to England, and in 1898 the said Mills followed them there, and on the 22nd June, 1898, the plaintiff and Mills were married without any ante-nuptial contract or settlement. At the date of the said marriage the plaintiff and her said husband were domiciled in this colony, and they proceeded to England and stayed there for the purpose of getting married there. Thereafter the said Mills died, he having retained his domicile in this colony. He left his last will and testament, by which he bequeathed the sum of £10,000 to the plaintiff for life, with remainder of the three children. The plaintiff contended that she was married

in community of property to the said Mills, and was entitled to one-half of the joint estate, as well as to the usufruct of the £10,000, but that the defendants denied her claims and refused to pay her any sum whatsoever.

The defendants in their plea denied that the plaintiff and her husband were domiciled in this colony at the date of their marriage. They alleged that Mills gave up his domicile in this colony, proceeded to England, and intended to take up and did take up his domicile in England, which was their matrimonial domicile at the date of their marriage. They denied that she was entitled to one-half of the estate, but admitted that she was entitled to the usufruct of £10,000 during her widowhood.

The plaintiff stated that when her late husband joined her in England, he brought with him nothing beyond his clothes and musical instruments, leaving at Cape Town his horse, dogs, books, and other things. She and her husband had no intention of remaining in England. They remained there longer than was intended on account of her illness. Her husband was always anxious to return to the Cape, and was frequently put out at the delay caused by her illness.

Other witnesses examined on commission in England stated that the deceased testator often spoke about going back to the Cape, and was only waiting for his wife to become well; that as soon as she was well, and his children were placed at a suitable college, he intended returning to the Cape. It was also stated that he merely came to England on account of his health. On one occasion one of the witnesses found Mrs. Mills in tears, and on making inquiries from Mr. Mills, was told that the cause of her grief was that he had expressed an intention of immediately returning to the Cape. Another witness alleged that when he was selling furniture to the parties, they did not wish to buy expensive furniture, because (as they said) they intended leaving England, and the furniture would then have to be sold.

For the defence witnesses stated that on bidding good-bye, the deceased said he was never coming back again, that he had done sufficient work, and that his two brothers could continue to do the work connected with the business. Witnesses, who were examined on commission in England, stated that the parties frequently said they intended returning to the Cape, but only for business purposes. That the deceased testator was desirous of building a house in England, saying that he intended remaining, and even

consulted a builder. Another witness said she saw a letter written by deceased's brother, stating to the deceased the amount of his share in the business at the Cape. The deceased testator told her that the letter was received in reply to a letter written by himself, in which he expressed his intention of retiring from the partnership. Other witnesses stated that Mrs. Mills frequently told them that she and the deceased testator never intended to go back to the Cape, but were desirous of taking a large house in the country.

Sir Henry Juta (with him Mr. Benjamin) for plaintiff: The whole question in dispute is as to the domicile. Mills was Colonial born, and so was his wife. He was a partner in a large business in Cape Town. He made no business arrangements when he left this country. The *onus* of proving change of domicile is on defendants. He was fond of his children, and therefore would not have married under a law which would bastardise them.

[Maasdorp, J.: That supposes him to have known the English law.]

We must presume he knew Cape law, and that he intended to legitimatise the children. As to *onus* of proving change of domicile, see *Wrestlake* (p. 313, par. 262), *Footo* (p. 31), and *Dacey's Conflict of Laws* (p. 133). The evidence in this case, for defendants, is the lowest form of evidence a Court will accept. *Phillimore* (Vol. IV., p. 156). See also judgment of Lushington, J., in *Hodson v. De Brauchene* (12 Moo, P.C. 285), and of Jessel, M.R., in *Doucet v. Geoghegan* (9 Ch.D. 441). Mills never told the senior partner of his firm that he was not coming back to Cape Colony. He was expected back, and his old place in the firm was kept open for him as a matter of business. His letters showed an intention of returning. On the other side there were only some passing words to acquaintances. Considering his habits, much weight could not be attached to these.

[Buchanan, A.C.J.: These remarks, coupled with the fact of his removal, may be important.]

[Jones, J.: He did not live in the same house with Mrs. Mills. He sends her to England. He follows, and dies there. He did not marry her here, because he was ashamed to face his friends.]

There was no reason why he should be ashamed, save for the sake of his children.

[Maasdorp, J. What reason can you give for his delay in going to England?]

His sister was very ill. He writes to his wife: "You are not coming back again unless under my care, or rather, I under yours." There was nothing to show that he could not face Cape Town again.

[Jones, J.: If he was ashamed to do so, he would hardly tell people that.]

He would surely have discussed the matter with his wife. He certainly was not delayed here by winding up his business affairs, but by his illness, and that of his sister. His statements to his wife are far more important than those made to strangers, and they show an intention of returning to this country. Dr. Smith was an impartial witness, and he was quite clear that Mills intended to return. His tailor and the music master were of the same opinion. His only reason for taking his children to England for their education was that he considered he could there procure for them a better education than could be obtained at the Cape. Even the housemaid, one of defendant's own witnesses, said Mills was always talking about going back to the Cape. Two other witnesses for the defence were also on our side. The commissioner wished to treat them as hostile. Mills's delay in returning to the Colony was fully explained by the state of his health, and that of Mrs. Mills. He speaks of taking a trip to England. Again, the will was a Cape will, with a reservatory clause, which would have no meaning in English law. In the *Latubrdale Peerage Case*, Herschel, L.C.J., decided that the parent had never lost his Scotch domicile. Domicile is residence *sine animo revertendi*, and the presumption always is in favour of retention of domicile. *Crookenden v. Fuller* (1 Swabey and Tristram, 441). Mills never intended to bastardise his own children.

[Buchanan, A.C.J.: Why did he not get married in Cape Town?]

Everybody would then have known his domestic history.

[Maasdorp, J.: Knowing our law, he left his wife £10,000, and then went and got married in England. Why did he leave this legacy if he thought he was going to be married in community of property?]

[Buchanan, A.C.J.: When he made his will he was not married, and dealt with the whole of the property.]

[Maasdorp, J.: If the will dealt with the whole estate, plaintiff must be put to election.]

[Buchanan, A.C.J.: It is a question of either election or of setting aside the will.]

To sum up: (1) Mills went to England without arranging as to his business. That

is my strong point. (2) I rely on the word "trip" to England, which occurs in his correspondence. (3) The *onus* lies on defendants to show change of residence.

Mr. Searle, K.C. (with him Mr. (C)lose), for defendants, cited *Dicry on Conflict of Laws*. The place of a man's death is presumed to be his domicile at that time. *Westlake* (Section 252) says the residence of the wife is a very important element in determining the question of domicile. In Section 250, he says that the fact that a man has his children educated at a certain place is evidence of his domicile. Deceased had every reason to leave the Colony, on account of the esteem in which his family was held. In case of a conflict of evidence, letters are most important. The letters of April 27, 1897, and May 5, 1897, showed that Mills intended to settle in England. As to domicile, see *Dicry* (p. 135). Six disinterested witnesses have said that Mills left this country for good. Communications made to a tailor or to a musicmaster cannot be set against those made to intimate friends. How in the face of his letters could it be said that deceased had not settled his affairs? Mrs. Borlase has said that he had no friends in England. That was why he went to England. He wished to "lie perdu." He slipped away from Dr. Thomson at the station, and from all his old friends. He wished to strike out a new line. The doctor's evidence was quite in defendant's favour. Mills wished to remain in England. It was very easy to explain the evidence given on the other side. His brother wrote to say that the partnership was finally dissolved. He referred to all assets, and wrote up the balance. He had finally retired, and was to get 5 per cent. interest. The position that he went to England to get married was an afterthought. The evidence of the servant girl took the case no further. The Borlases gave their evidence very fairly, but it is quite against plaintiff. The letter of May 26 was quite an afterthought. There is not a tittle of evidence on the documents in favour of plaintiff's contention. If Mills had intended to return to Cape Colony he would not have invested his capital in the firm. Frederick Mills was reserved, and said very little; but his sister (who was in his confidence) knew that deceased was not coming back. Section 247 of *Westlake*, and Section 256 (143, Sub-section 5) sufficiently differentiate this from the case of *Moorhouse v. Lord*.

Sir H. Juta (in reply): Mills was anxious to return. It was Mrs. M. who did not wish to do so. The letters she had put in proved her *bona fides*. Up to the date Mills married, he never severed his connection with his business. He was kept *au courant* with the transactions of the firm. After his marriage some suggestions of a final settlement were made, but they never came to anything. It is for defendants to prove change of domicile, and this they have not done.

Cur. ad. cult.

Postea (June 10).

The Court delivered judgment.

Buchanan, A.C.J.: The plaintiff in this case is the widow of the late James Spencer Mills. Both parties formerly resided in Cape Town. The declaration sets forth that for some years prior, and up to, the year 1898, the parties had cohabited together. Three children were born before that date, but there had been no marriage. This kind of life went on for many years. From the correspondence it appears that late in 1896 the plaintiff's dissatisfaction with the life they were living, came to a head, and she informed Mills of her intention of leaving for England. The letters written by Mills to plaintiff in reply, show that he was surprised at the sudden determination of the plaintiff. Plaintiff avers that she and defendant had, on several occasions, discussed the question of marriage, and that it had eventually been agreed upon between the parties that they should go to England for that purpose. Before the marriage, both parties were domiciled in this colony. In 1898 they left for England, and counsel, for plaintiff, has contended that the onus rests on defendants to prove a change of domicile. Counsel for defendant, however, maintains that as the parties were long in England, and the husband died there, the onus lies with the plaintiff. The question of onus is, however, of no great consequence in this case, as the Court is, on the evidence, in a position to find, as a fact, the actual domicile of marriage. Before the year 1898, Mills had repeatedly stated to several friends and to some of his brothers, that he intended to leave the Colony for good. The law is, however, clear on the point that a mere assertion of this kind does not suffice to prove a change of domicile. There must be a combination of intention and of fact, *animo* and *facto*, as the books put it before there can be a change of domicile. In this case, after careful consideration, we have come to the conclusion that the change of residence

was intended as a change of domicile. The circumstances under which the parties have lived together, and the fact of their having concealed the relationship, and their desire not to publish that relationship to the world by a marriage in the Colony, but to recommence life together where they were not known, would point to the desire of the parties that the change of residence should be permanent. It must be presumed that the parties knew the law of the country in which they lived; and in accordance with such a presumption, it must be conceded that Mills must have known that if he had married in this country it would have been in community of property, unless it was otherwise agreed upon by an ante-nuptial contract. If they were married in England, this would not be so. The defendants, who are the executors of the testator, are bound to resist this claim, and to contend that plaintiff has the right only to that portion of the estate left to her by the will of her late husband. There is authority for saying that a change of domicile will not be so readily presumed, as it may be when no such change is involved. One can understand the hesitation of anybody wishing to change his domicile, if such change of domicile means change of allegiance. In this case there can have been no hesitation on that score, since the change of domicile did not mean a change of nationality. Another significant fact is that before leaving Mills made his will, and provided for the plaintiff and the children. In making his will he did not, however, make provision for a half-share in the estate to go to his wife on his death. When he got to England he took a three years' lease of a house. He went further, and entered into negotiations to have a house built to his liking. Though not of itself decisive, yet the choice of a residence for himself and his wife and family is important among the external criteria of a man's domicile. About the time of his marriage, one of his letters to South Africa contains the following significant sentence: "Although not in quite a strange country, I will soon have the honour of becoming one of its units." That statement is another strong point to show that he intended that his residence in England should be a permanent one. From his marriage in 1898 to his death in 1900 there has been a continuity of residence in the country of the new domicile. All his correspondence points to the fact that Mills meant to sever his connection with Africa when he went

to England. There is nothing in any of these letters to show any intention of returning to the Cape. Another point is that he arranged to have their children educated in England. This, like many other points, is not necessarily conclusive, but it must be taken with the rest, and they all strongly indicate an intention to change the domicile, and that the testator did not intend to marry in community of property, but according to the laws of England. It is true that his property and his entire estate remains invested in a business in the Colony. The reason for this, however, is given in one of his letters, namely, that it would be best to leave it here, where it could more easily revert to those who would have to get it. It is true the plaintiff asserts that they always intended to return to the Colony, but this is hardly consistent with her own letter, written immediately after her husband's death, in which she stated it had been his intention that year to go to Honolulu, and after, to pay a visit to the Cape. Coming to the conclusion we do, on the facts, judgment will have to be given against plaintiff on her main claim. By consent of parties the costs of the action will come out of the estate.

Jones and Maasdorp, J.J., concurred.

Postea (June 12).

Sir Henry Juta, K.C., moved for leave to appeal to His Majesty the King in his Privy Council.

Mr. Searle, K.C., did not oppose the application.

The Court granted leave to appeal on the usual terms.

Postea (June 25).

Mr. Searle, K.C., said that a compromise had been arrived at in this case, and he had now to ask that judgment be entered in terms of the consent paper. It was agreed that to finally settle all matters in dispute, the executors should increase the £10,000 left to Mrs. Mills by her late husband to £13,000, to be administered in terms of the will; the executors also, in addition, to pay Mrs. Mills forthwith for her own use the sum of £2,000, and to make over the furniture in the estate in England, as well as the cash balance there, also to pay all the costs incurred in the suit, except her passage money to and from England.

The Acting Chief Justice: You wish this then to be entered in lieu of the judgment already given.

Mr. Searle: Yes, the judgment was simply for the defendants. If this

now made an order of Court, the appeal that is pending and all other proceedings will be abandoned.

The Acting Chief Justice: Very well, judgment will be entered in terms of the consent paper, and that withdraws the appeal.

[Plaintiff's Attorneys, Messrs. Van Zyl and Buissinne; Defendant's Attorney, Mr. Gus. Trollip.]

MELMAN V. BUTLER. { 1900.
Nov. 21st.

This was an action brought by Samuel Meyer Melman against William Butler for an order compelling the defendant to pass transfer of certain property alleged to have been sold by the defendant to the plaintiff.

The declaration set out that on the 17th day of January, 1900, the defendant sold to the plaintiff, and the plaintiff purchased from defendant, certain property known as No. 8, Hyde-street, Cape Town, for the sum of £550. That he paid £25 on account, and that he was willing to take transfer and pay the balance of the purchase price and all necessary expenses, but that the defendant refused and still refuses to carry out the terms of the agreement, and to pass transfer. The plaintiff accordingly claimed an order compelling the defendant to pass transfer.

The defendant in his plea admitted that there was a sale, but said that it was subsequently cancelled by reason of the failure of the plaintiff to carry out the terms thereof. He said that it was agreed between the parties that if the plaintiff did not take transfer of the property by the 1st of March, 1900, the sale would be considered to be cancelled. This the plaintiff failed to do, being unwilling to pay more than £500 for the property.

Mr. Molteno, for the plaintiff, said that as the sale was admitted the onus was on the defendant to prove the cancellation.

Mr. Close, for the defendant, accepted the onus, and called

Wm. Butler, the defendant, who said that in 1899 he desired to sell the property in question, and a man brought plaintiff to him. When the plaintiff spoke to witness on the 17th January his two daughters were present. He agreed to sell the property for £550. This was in the morning, and about four hours afterwards plaintiff brought a man named Franks to look at the property. The £25 was paid in the morning on account of the purchase money, but no broker's note was passed. Witness gave him to understand that it was a cash transaction.

When Franks came up with the plaintiff, he told the latter that the property was not worth more than £500. The plaintiff then said that if witness would take £500 he would buy the property, but if not witness could keep the £25. In the evening the plaintiff came up with the man who had introduced him to witness. Witness told him that if he did not like the property he would have to settle the matter. The plaintiff wanted £10 of the £25 returned to him, but witness refused this. The plaintiff was anxious to back out of the transaction, and witness understood he would be willing that he (witness) should keep the £25 if he would not take £500 for the property. There were subsequent interviews, and witness ultimately told the plaintiff in the presence of Mr. Meyer, a shopkeeper, that if he did not take transfer by the 1st March he must consider the business closed. The plaintiff again said that if witness would give him £10 he would drop the matter. Plaintiff came up to his house in October, and wanted witness to pay him £20. Witness refused, and he then went away, saying nothing about transfer. Witness had already sold the property for £550. On the following day the plaintiff's attorney wrote to witness saying that the plaintiff was prepared to take transfer.

Further evidence by the plaintiff's two daughters and one Meyer, corroborating that of the defendant, was led.

In support of the declaration, the plaintiff said that the arrangement with the defendant was that he (witness) was to pay a £400 bond and £150 cash. Witness did not tell Mr. Butler that he cried off the bargain, and was willing that the plaintiff should keep the £25. Witness was always ready and willing to pay the defendant £150 if he could get the bond for £400. A few days after the sale he took Mr. L. Melman, his cousin, to see the property. He told his cousin of the terms of the contract, as he (witness) understood them, in the presence of the defendant. Witness never refused to take transfer, nor did he agree to cancel the sale. He was always ready to pay the balance, which he understood was £125.

The plaintiff's cousin corroborated the plaintiff with regard to the conversation with the defendant: the defendant said nothing about cancelling the agreement.

After argument, Buchanan, J., said: The plaintiff does not allege that there were any conditions to the purchase. It was a plain contract for the purchase of the property

for £550, and at the time it was entered into a sum of £25 was paid by the plaintiff to the defendant and retained by him. I believe that, after purchasing, the plaintiff found he had given too much money for the property, and that he attempted to have the bargain broken. The defendant was anxious to sell the property, and endeavoured to force the plaintiff to complete his purchase. He told the defendant he would cancel the purchase if it were not completed by the 1st March, 1900. Thereafter, until October, the plaintiff never made effort to complete the bargain, and meanwhile the defendant found another purchaser for the same price. It is not one of those cases where the contract was broken by defendant in order to get a higher price. The defendant was perfectly justified in acting as he did when the purchase was not completed by the given date, the 1st March. If there was a misunderstanding as to the terms, there would be great force in the argument that the £25 should be returned to the plaintiff, but the contract was plain and simple, and on the evidence, I think there was a clear undertaking that if the contract was not completed the amount deposited should be forfeited. Judgment will be given for the defendant, with costs.

[Plaintiff's Attorneys, Messrs. Dempers and Van Ryneveld; Defendant's Attorney, Mr. John Ayliff.]

FLEMMER V. VENTER. { 1900.
Nov. 21st.

Pleadings — Exception—Guardian—Minor—Hypothecation.

F., in his declaration against V., in his capacity as father and natural guardian of his minor son, set out that he lent certain money to V. in his private capacity for the purpose of expending it on certain property, and that V. used the money in improving certain other property, which belonged to his minor son. He claimed that the minor's property was liable on the ground that the minor had been benefited.

V. excepted to the declaration on the ground that there was no cause of action alleged against the minor.

Held that, as the declaration failed to state that the father was insolvent, or unable to pay in his individual capacity, the declaration disclosed no cause of action against the minor.

This was an action instituted by Alida Flemmer against the defendant Venter in his capacity as father and natural guardian of the minor Venter for an order to compel the father to pass a bond over the minor's property in favour of the plaintiff.

The declaration set out that the plaintiff entered into an agreement with the defendant, whereby the plaintiff lent and advanced to the defendant the sum of £63 11s. 5d., and the defendant borrowed that sum. That it was agreed at the time that the money so lent should be expended on certain property, and that the defendant should pass a bond in favour of the plaintiff over that property. That the defendant, without the knowledge and consent of the plaintiff, used the money in improving and enhancing the value of certain other property, which belonged to the minor. That the minor having been benefited to the extent of the money advanced, was liable, and therefore the plaintiff sought an order compelling the father in his capacity as natural guardian to pass a bond over the property of the minor in favour of the plaintiff, or otherwise an order declaring the minor's property executable for the amount.

The defendant excepted to the declaration that the declaration disclosed no cause of action in that there was no binding obligation on the minor.

Mr. Close, for the defendant (the exceptor): The minor is not liable. The declaration sets out an agreement between the father in his individual capacity, and the plaintiff. This does not bind us. There is no contract or quasi-contract by which we can be bound. There is no obligation binding on the minor. *Van Leeuwen* (4, 13, 8, section 3). If there is any cause of action the declaration does not allege it. See also Ord. 105 of 1833, section 24, which says that in any agreement by which a minor's estate is in any way alienated or mortgaged the consent of a court or judge is required. Even if there was an agreement to bind the minor's property this Court will not sanction it. *Trollip v. Harpur* (3, E.D.C., p. 240), and (Cape Law Journal, Vol. 1, 1884, p. 42).

Sir Henry Juta, Q.C., for the plaintiff: There is surely some liability resting on a

person who has been enriched. The minor having been enriched and benefited, his property is liable.

De Villiers, C.J.: The question involved in this case has already been raised before the Court in general terms. What the Court has now specifically to decide is the question as to whether the exception raised in the present case is a good one or not. The exception is a general one, viz., that the declaration discloses no cause of action against the minor son. The defendant did not use the money advanced to him in his individual capacity by the plaintiff to build a certain house on a certain ground, but without the plaintiff's knowledge used it in building a house on ground registered in the name of his minor son, the ground of the latter being thereby enhanced in value. There can be no doubt that the father would be liable personally to the plaintiff for the money so lent, and that no liability could attach to the son unless certain conditions existed, one condition being that the child was benefited by the expenditure. Another condition is that it would have to be clearly proved that the money borrowed was expended on that particular erf. A further condition is that the Court should in some way or another have sanctioned the borrowing of this money for the purposes of expenditure on the property of the minor. These conditions are clearly not fulfilled by the statements in the declaration. It is not stated that the father is unable to pay. In the absence of such a statement the declaration is at fault. There is not sufficient in the statement in the declaration to give a clear legal claim as against the minor, and seeing that an exception is taken to the declaration, the Court is bound to uphold the exception. As to the form of allegation, it is not for the Court to advise, but it is clear that there should be an allegation that the father was insolvent or unable to pay.

Sir Henry Juta: Will your lordships grant us leave to amend the declaration in view of the judgment of the Court?

Mr. Close: We are prepared to submit to a bond upon the property for £63; but claim that we are entitled to costs.

De Villiers, C.J.: The exception will be sustained with costs up to October 12.

Maasdorp, J., concurred.

[Plaintiff's Attorneys, Messrs. Walker and Jacobsohn; Defendant's Attorneys, Messrs. Van Zyl and Buissinne.]

VAN SCHALKWYK V. DU PLESSIS AND OTHERS. } 1900.
Nov. 21st.
" 22nd.
" 23rd.

Public road—Road of necessity—Prescription.

In an action for a declaration of a right of road over the defendants' farm, the evidence showed that, although for a period of more than thirty years some of the public had used the road without hindrance, many others had been prevented by the owners of the farm from using it, and that the plaintiff had access to and egress from his neighbouring farm by another practicable but much more circuitous route.

Held, that the plaintiff was not entitled to have it declared that the road was either a public road or a road of necessity.

This was an action instituted by T. J. van Schalkwyk against D. G. du Plessis, J. D. J. van der Merwe and J. W. van der Merwe for an order declaring him to have a right of way over the respective farms of the defendants, and an order interdicting the first-named defendant from placing any obstruction on the right of way and £100 damages. The two first-named defendants contested the action.

Plaintiff's declaration:

1. The parties to this action are all farmers residing in the district of Piquetberg, and they each of them own a subdivided and separate portion of the farm Gelukwaards in the said district. The plaintiff annexes hereto a plan, marked A, showing the subdivisions of the said farm and the portions of the various parts of it owned by himself, the defendants, and the other proprietors; and he asks that the said plan may be taken as forming part of this declaration.

2. In addition to his share of the farm Gelukwaards, the plaintiff is the owner of certain mountain land lying to the east of the said farm, and contiguous to those portions of it which are owned by the first and second defendants.

3. For a period far longer than the period of prescription there has been in existence a right of way over portion of the farm Gelukwaards, leading from the Porterville-road at a point upon the share of the said farm owned by the third defendant, thence over the said share, and also over the properties of the second and first defendants respectively, and thence on to and over the mountain land now owned by the plaintiff as aforesaid. The point from which the said right of way commences is marked B upon the plan A, and its course is indicated by a line marked "road," which, after passing through the points U, C, H, and D, enters the plaintiff's mountain land at the point E.

4. During the said period the said right of way has been used as a treckpath, and for the passage of men, animals, and vehicles, by the general public as of right, and more especially by the owners of Gelukwaards and by residents in the neighbourhood, for the purpose of reaching the plaintiff's mountain land and other land adjoining it, and this plaintiff contends that he is entitled so to use it.

5. Alternatively, the plaintiff says that the said right of way is the only way by which he can obtain access to his said mountain land, and egress therefrom to the nearest public road, and he contends that he is entitled to a road of necessity for men, stock, and vehicles along the course indicated above.

6. The first-named defendant wrongfully denies that the plaintiff is entitled to any right of way across his share of the said farm. The second and third defendants are joined in this action, because the said right of way passes over their properties, and the plaintiff prays no costs against them, as they do not deny the existence and validity of the said right of way. (The second-named defendant was joined on the plea at the trial.)

7. Between the months of March and August, 1899, the first defendant erected fences across the course of the said right of way, between the points J and K and K and L; and in or about the month of June, 1899, he ploughed over the ground over which the said right of way passes, at or about the point H.

8. The first-named defendant has in that way prevented the plaintiff from using the said right of way, or from sending stock along it; and the plaintiff has in consequence been unable to send his stock to pasture upon

the mountain land, and has suffered loss in consequence. He estimates his damage at the sum of £100.

The plaintiff claims as against all the defendants:

(a) An order declaring that he, as a member of the public, and as owner of the said mountain land, is entitled to a right of way leading from the point B in the said plan, thence along the course marked thereon, through the points U, C, H, D, and E, on to his mountain land aforesaid, and that he is entitled to use the same as a treckpath, and for the passage of men, animals, and vehicles.

(b) Alternative relief.

And as against the first defendant:

(c) An order interdicting him from blocking the said right of way, or in any way interfering with the plaintiff's use of it.

(d) Payment of the sum of £100 for damages, as aforesaid.

(e) Alternative relief.

(f) Costs of suit.

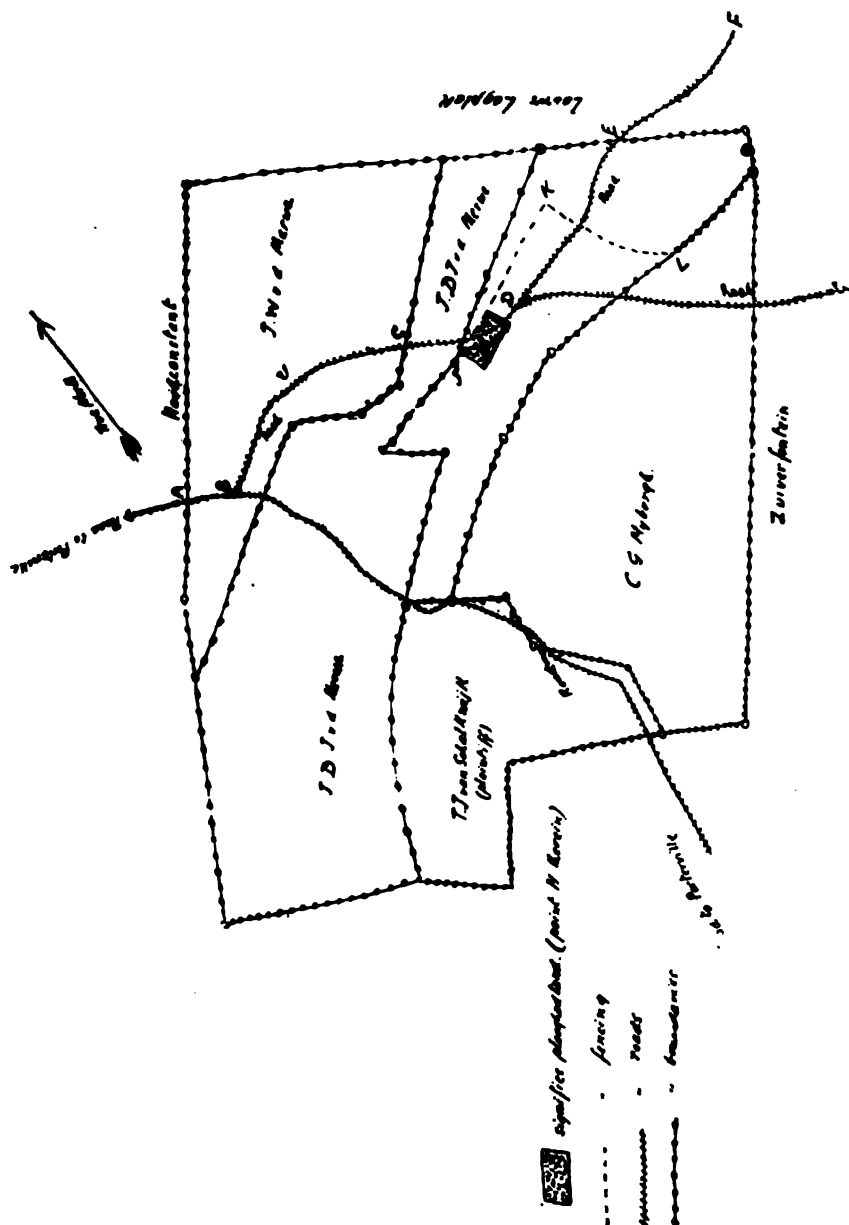
The first and second named defendants pleaded as follows:

1. They admit paragraphs 1 and 2, save that they do not admit the correctness of the plan marked A in all particulars, and crave leave to refer to the diagrams of the plaintiff and defendants attached to their title deeds.

2. They deny paragraphs 3 and 4, and say that no right of way, as alleged therein, has ever existed. On certain occasions, but not continuously, during the period of ownership of the defendants and their predecessors in title certain of the adjoining owners have driven their stock to the mountain across the land now owned by them by different tracks or footpaths; they have done so either secretly, without the knowledge or permission of the defendants or their predecessors, or with the said permission, leave and licence, and in return for payment; the plaintiff is amongst those who have paid for the said permission.

3. They deny that the right of way claimed by plaintiff is the shortest route to the mountains over their (defendants') ground, and say that there are public roads in existence whereby plaintiff might take his stock to the mountain; that there is no necessity for plaintiff to drive his stock over their (defendants') farms, and that the shortest route from plaintiff's farm to his mountain land is over the farm of one C. G. Myburgh.

4. They deny that the plaintiff has any right of way across their farms, and admit



that the first-named defendant (Du Plessis) has erected fences and ploughed his land, and has prevented plaintiff from driving stock across his farm. After that plaintiff refused any longer to pay for permission so to do.

5. They deny that the plaintiff has sustained any damage for which the defendant Du Plessis is liable, and save as above deny all allegations in paragraphs 5, 6, 7, and 8.

Wherefore they pray that the plaintiff's claim be dismissed with costs.

The replication was general.

The evidence led for the plaintiff was to the effect that the right of way claimed was used by plaintiff and the general public for a considerable number of years, almost 60, for the purpose of taking cattle and sheep to the grazing grounds in the mountain land to the east of the farm Gelukwaards. The plaintiff stated that he drove along the road without being stopped until about a year previous to the hearing of the case. He admitted that there was a road by means of which access could be got to the grazing grounds, and which was considerably shorter than the right of way claimed, but said that it was extremely dangerous to go that way, and that at places it was impossible to drive along the road. He said that annually he used to take up along the road claimed as many as 700 sheep at a time, never missing a single year until December, 1899, when the defendant erected a fence across the road. He himself used to go up the road every month in order to inspect the cattle and sheep. He denied that he ever paid Du Plessis any money to be allowed to use the road, but did offer to pay 10s. a year if Du Plessis would have the right he (plaintiff) claimed registered as a servitude against his property. The road he now claimed was the one which the former owner of Louw's Legplek used to use 15 years ago, before he (plaintiff) purchased the Legplek.

Other witnesses stated that they had since boyhood made use of the road in question. Among them was the son of a former owner of the whole place Gelukwaards, who said that during his father's ownership numbers of people went that way without permission.

For the defence, Charles Marais, a surveyor, put in a plan showing the road claimed as an "imaginary road," and stated that from the condition of the road, it appeared to have been in disuse for two or three years. The defendant, Du Plessis, who owned the land for twelve years, and had known it for thirty-one years, stated that the plaintiff and others paid him 10s. a year for permission

to go across the land. Plaintiff paid him two years in succession, and then ceased to do so because he (defendant) would not grant him the right for life. No one went that way, or made use of the ground, without paying. Access could be got to the mountain land by going along public roads through the property of C. G. Myburgh, and also through J. W. van der Merwe's property. Sheep and cattle could be taken along those routes. Other witnesses deposed that the right of way claimed was not a "trek" path, but only a footpath. Several of them said they knew of people being prevented from using the road. Others again deposed to having made payments for the right to go over the first defendant's property. One witness stated that thirty years ago he was stopped by the defendant from using the road and his cattle were impounded. The diagram of the title deeds of the original grant of the farm Gelukwaards, which was put in by the defendants, showed no reservation of a public road.

Mr. Schreiner, Q.C. (with him Mr. McGregor): There has been user *nece vi, nec clam, nec precario* for a period of nearly 60 years. When the grazing land which is now owned by the plaintiff was commonage, the public generally, and among them the plaintiff, used this road. Before the farm Gelukwaards was granted to anyone, and was still Crown land, this road was used by the public. It is clear that prescription can run against the Crown. A public way can be formed by immemorial user over Crown land. *Goldsmith's Roman Law* (p. 224, section 81); *Peacock v. Hodges* (Buchanan, 1876, p. 65). We have proved that the public have used this road, therefore the legal aspect of the case is clear.

[De Villiers, C.J.: But will not payment interrupt prescription?]

On the evidence, the Court will not hold there has been any payment as the price of a right. The evidence of prohibition is very weak. The impounding of cattle by Du Plessis amounts to nothing more than that he impounded cattle which strayed off the road. According to English law, this continuous user would be presumed to have been the result of a grant. The user here has been lawful in origin, uninterrupted, and continuous. The Roman and Roman-Dutch writers speak only of rights of way as a means of access to towns and villages. But it does not follow from that that no right of way can be acquired here. Circumstances have changed, and we must keep pace with

them. *Colonial Government v. Brady* (10 Sheil, p. 580). It is clear that prescription can run against the Crown. Depasturing cattle on Crown lands is no trespass; the act is not a tort. The pasture land now owned by the plaintiff was once commonage, and it seems inconceivable that the Crown, when parting with their rights over it, should give no means of access thereto. The previous grantee of the whole of Gelukwaards had means of getting there. Surely all the co-proprietors would have a right of way to the pasture lands when Gelukwaards was subdivided. *Van Leeuwen* (Vol. I., p. 287). The right of way has been acquired by user, but even if this fails, the plaintiff has a right of way by necessity. He as owner of Louw's Legplek finds it necessary to have access thereto. The defendant says that if he wants a *ria necessitatis* he must use the rough mountain path which has been the cause of the loss of so many head of cattle. Now a dangerous mountain path cannot be said to be a *ria necessitatis*. The *ria* must be something he can reasonably use. It is clear that the *ria* suggested by the defendants means three more days' journeying.

[De Villiers, C.J.: Can you as of right claim the nearest route?]

No; I do not say that, but I do say that the *ria* pointed out must be one we can use without danger or unreasonable delay.

Our main point, however, is that as one of the co-proprietors of a farm which originally acquired a prescriptive right to use this road we are entitled to share this right. The defendants must be presumed to have purchased their respective shares of Gelukwaards knowing of this right. *Schoof v. Weyer* (5 E.D.C., 33); *Ehlert's Executors v. Hildebrandt* (7 E.D.C., 172).

Mr. Searle, Q.C. (with him Mr. Buchanan), was not called upon to argue.

De Villiers, C.J.: The plaintiff claims a right of road over the defendant's farm Gelukwaards on two grounds, namely, that it is a public road and that to him as the owner of a mountain farm adjoining Gelukwaards it is a road of necessity. In regard to the road being a public one, there is no indication whatever on the title deeds of Gelukwaards of the existence of such a road. It is said that the public frequenting the mountain farms have for over thirty years used the road and have thus converted it into a public road. But the evidence shows that the persons who so used the road were squatters on Crown land who had no right to be

there at all. Assuming, however, that those people had a right to occupy the Crown land, and that they used the road, that would not give other people the right to the use of the road. If the lawful occupiers of that land have for thirty years used the road as of right, their successors in title will be entitled to a right of road by prescription, but this is not the mode of acquisition sought to be established. It is as one of the public that the plaintiff claims his right in the first instance. But the evidence shows that although some of the public did at different times use the road without being turned off by the owners of the farm, a great many others were turned off. There certainly was not such a continuous and uninterrupted user of the road by the public of any particular locality which would justify a declaration that the road is a public one. As to the road being one of necessity to the plaintiff, the Court has never laid down any definite rule as to what circumstances would constitute such a necessity, nor is it advisable that such a rule should now be laid down. It is not necessary for the purpose of the present case to go as far as to hold that there can be no road of necessity over a neighbour's land unless the only possible approach to a public road is over such land. There may perhaps be cases in which the alternative route would be so difficult and inconvenient as to be practically impossible, and in such cases the Court might be justified in affording relief subject to compensation, and the other restrictions mentioned by Fort (8, 3, 4). The present case is not, however, of such a nature. It is an inconvenience—I may say a great inconvenience—for the plaintiff not to be able to use the road in question in order to bring his cattle from his mountain farm on to the nearest public road or to his other farms. But the inconvenience to the plaintiff is not so great as to justify the Court in putting the defendants to the still greater inconvenience of having a cattle track through their narrow and cultivated strip of land. The plaintiff can reach the public road by a track over the farms Louw's Legplek and Pampoenfontein, and although that track is more circuitous and less convenient than the one claimed, it is certainly not impracticable as a means of access to and egress from his farm. The judgment of the Court must therefore be for the defendants, with costs.

[Plaintiff's Attorneys, Messrs. Walker and Jacobsohn; Defendants' Attorney, D. Tennant, jun.]

MARSHALL V. VAN RYN. { 1900.
Nov. 23rd.

This was an action instituted by Walter Marshall against G. W. Steytler, the duly-appointed representative of Jacobus van Ryn, for transfer of a certain strip of property alleged to have been sold, or in the alternative, £1,500 damages.

The declaration set out that Van Ryn was the owner of certain property, Ellerslie, situate at Sea Point, and through his duly-authorised agent and broker, entered into negotiations with the plaintiff with a view to the latter becoming the purchaser thereof. The broker produced to the plaintiff a diagram of the property, showing that, in addition to a 30-foot road, which the plaintiff thought was the only division between the property to be sold (Ellerslie) and the Bellevue Estate, there was a 20-foot road, making in all 50 feet between the two properties. The plaintiff being anxious to purchase the property, and not understanding how the 20-foot road came to be marked on the plan, asked the broker to make inquiries about the matter. The broker did so, and then represented to the plaintiff that the 20-foot road was the property of Van Ryn, and would be included in the sale; and the plaintiff being induced by, and relying on the broker's representations, purchased the property, a broker's note being drawn up and signed, transfer to be passed on the 10th February, 1900. The defendant failed to pass transfer, and plaintiff accordingly claimed transfer, or £1,500 damages. The defendant pleaded that the said strip of 20 feet was not registered in the title, and diagram of the property as belonging to him, and that the plaintiff well knew this; that he only sold to the plaintiff such property as was registered in the titles of the estate Ellerslie, and not being registered owner of the 20-foot strip, he could not sell it. That the plaintiff failed to comply with the terms of the contract, and that he was willing to pass transfer.

Sir Henry Jut. Q.C. (with him Mr. Rubie), for the plaintiff.

Mr. Percy Jones (with him Mr. Bisset) for the defendant.

After some evidence was heard, the parties agreed to judgment in the following terms:

Judgment for the plaintiff for transfer as prayed, with costs, transfer to be passed within three months; and failing transfer of the 20-foot road in dispute, the defendant to pay to the plaintiff the sum of £250 as damages, and to pass transfer of the remaining extent of the property.

[Plaintiff's Attorneys, Messrs. Fairbridge, Arderne and Lawton; Defendant's Attorneys, Messrs. J. C. Berrange and Son.]

O'DOWD V. R. A. FALCONER. { 1900.
Nov. 22nd

Mr. Maskew moved that the provisional order of sequestration granted against the defendant be superseded.

Granted.

BEAMISH AND ANOTHER V. LATEGAN.

Mr. Benjamin moved for the final adjudication of the defendant's estate as insolvent.

Granted.

VINCENT AND CO. V. PATERSON AND ANOTHER.

Mr. Bisset moved for the final adjudication of defendants' estate as insolvent.

Granted.

ORLSCHIG V. COLEMAN.

Mr. Bisset moved for provisional sentence upon a mortgage bond for the sum of £550, interest and costs.

Granted.

SCOTT V. AHRENS.

Mr. Bisset moved for provisional sentence on a mortgage bond for £135, interest and costs of suit.

Granted.

SAWKINS V. WATSON.

Mr. P. S. Jones moved for judgment, under Rule 329d, for the sum of £35 10s. 9d. for work and labour done.

Granted.

Ex parte CAMERON.

Mr. Nathan moved for the applicant's rehabilitation under the 117th section of Act 6 of 1843.

Granted.

Ex parte VOS.

Mr. De Waal moved in this matter for leave to the petitioner to sue her husband *in forma pauperis* for divorce.

The petitioner, Theodore Christina Vos, appeared in person, and stated that she was married to respondent, Christoffel Vos, in 1874, and the said marriage still subsisted. In 1882 her husband deserted her,

and was now living in adultery with an other woman in Durban, Natal, by whom he had three children.

Buchanan, J., asked Mr. De Waal to take the reference.

Mr. De Waal: I have examined a number of witnesses, and am prepared to certify that the petitioner has a good cause of action.

The Court thereupon granted a rule calling upon the respondent to show cause why the applicant should not be allowed to sue him *in forma pauperis* for divorce, the rule to be returnable on January 12; personal service to be effected.

Postea (January 12, 1901).

The return day was extended to February 7, on which date service by edictal citation was substituted for personal service and the return day extended until April 12.

Ex parte STEIN AND WIFE. { 1900.
Nov. 22nd.

Antenuptial contract—Husband and wife—Registration subsequent to marriage.

Where two persons were married in Germany and entered into a bona fide agreement to be married according to the provisions of the German Law, the Court allowed the terms of the agreement to be embodied in an antenuptial contract and registered.

This was an application for leave to the petitioners to register an antenuptial contract executed subsequent to the date of their marriage. The parties were married in Germany some short time before the application, the husband having gone there from the Cape Colony, where he was domiciled, for that purpose. Prior to their marriage they agreed that there should be no community of property, debts, or profit and loss between them, but that the marital power should not be excluded. This agreement could be entered into, and be binding according to the law of Germany without registration. Having, however, taken up their matrimonial domicile in the Cape, they desired to have the provisions of their agreement embodied in a contract and registered.

Mr. P. S. Jones moved for the petitioners.

The Court granted leave to the petitioners to draw up a contract embodying the terms agreed upon, and to have it registered, there

being a *bona fide* agreement between them that they should be married according to the terms mentioned.

FRASER V. BISCHOFSWERDER. { 1900.
Nov. 22nd.

This was an application made on behalf of the defendant in the above-named suit for the postponement of the action pending, on the ground that two of the defendant's witnesses were absent. The one was in Scotland and the other serving with the military forces. They were material witnesses. The dispute between the parties was with regard to the rent of certain premises, leased by Fraser to the applicant Bischofswerder. Against Fraser's claim for the rent the applicant (defendant) claimed to set off certain damages which he sustained in consequence of the unsanitary condition of the premises leased.

Mr. Burton for the applicant.

Sir Henry Juta for the respondent: I consent to a postponement provided the applicant pays into court the amount claimed by us.

The Court ordered the matter to be postponed until the February term of 1901, the defendant (applicant) to pay into court the amount of the plaintiff's claim within three days; costs to be costs in the cause.

WRIGHT V. WRIGHT. { 1900.
Nov. 22nd.

This was an application on notice for the removal from the Supreme Court of the trial of the above case for a decree of judicial separation to the Eastern Districts Court, on the ground that, as both the parties to the suit resided at King William's Town, it was undesirable to have the matter tried in Cape Town.

The respondent consented to a removal of the case to the Circuit Court of King William's Town, but not to the Eastern Districts Court at Graham's Town, stating that if the parties and their witnesses were to be compelled to make any journey at all, they might just as well come to Cape Town as Graham's Town, the suit having been commenced at Cape Town.

The applicant, in reply, pointed out that the case might be heard at Graham's Town during the November term, whereas the Circuit Court would not sit at King William's Town until March, 1901.

Mr. Gardiner for the applicant.

Mr. Howel Jones for the respondent.

Buchanan, J.: The parties in this case both reside in the district of King William's Town, and an action has been instituted in the Supreme Court, in which charges are made by the plaintiff against the defendant, while there are counter charges by the defendant against the plaintiff. It is common cause that there is no reason why the parties should be brought down to Cape Town, and the question is whether the trial should be removed to the Eastern Districts Court or to the King William's Town Circuit Court. The latter Court will not sit until March, while the Eastern Districts Court is now in term, and the next term will even be held before the Circuit Court. The Court will grant an order for the removal of the case to the Eastern Districts Court, leaving it open to that Court to decide whether the case should be heard on circuit or not.

[Applicant's Attorneys, Messrs. Goddington and Low; Respondent's Attorneys, Messrs. Innes and Hutton.]

ADENDORFF AND CO. V. SONNENBERG. { 1900.
Nov. 22nd.

This was an application made on behalf of the defendant for leave to purge his default, and to plead in an action in which the plaintiff claimed the delivery of certain bags of potatoes in accordance with an agreement between the parties.

The defendant (present applicant) filed an affidavit stating that he had a good defence, and was desirous of defending the action. The delay in pleading was caused by the difficulty of communicating with his agents at Bloemfontein.

Mr. Benjamin for the applicant.

Mr. Howel Jones for the respondent.

The Court granted leave to the defendant to purge his default, and ordered him to file his plea before the 30th day of November.

IN THE MATTER OF THE MINOR WOODING. { 1900.
Nov. 22nd.

Mr. Bisset moved for an order authorising the Master to make certain payments out of moneys belonging to the minor in his hands. It appeared that the minor, who was seventeen years of age, assaulted one Johanna Keet by throwing a stone which struck her in the eye. He was brought before the Magistrate and fined £2. The said Johanna Keet then issued a summons in a civil action for £125 damages, but had since consented to accept £25 and costs of the summons in settlement. The present application was therefore to

draw the amount necessary for this settlement, as also for the costs of this application.

The Master reported favourably on the application, and stated that he had £122 9s. 4d. belonging to the minor in his hands.

Order granted as prayed.

IN THE ESTATE OF MARY LAVINIA EDWARDS.

Mr. M. Bisset moved for leave to sell certain property and to purchase certain other property.

Granted.

LAMPRECHT V. LAMPRECHT.

Mr. M. Bisset moved that a certain award of arbitrators be made a rule of Court.

Granted.

LAING V. LAING.

Mr. P. S. Jones moved, on behalf of the wife, for an order on the respondent to contribute £20 towards her maintenance *pendente lite*, and to pay a certain sum towards the costs of the action pending. The application was in connection with an action about to be instituted by petitioner against her husband for a decree of judicial separation on the ground of his cruelty. The respondent, it was stated, had considerable means, and petitioner was married to him in community of property.

The respondent was in default.

The Court ordered respondent to pay to petitioner the sum of £10 forthwith, another £10 on January 1, for the maintenance of herself and three children, and further to pay the sum of £20 towards the costs of the action to be instituted.

IN THE ESTATE OF THE LATE HADJE BADAD ABSOLM.

Mr. S. Solomon moved for leave to raise money on mortgage of certain property in which minors were interested.

The Master reported favourably.

Granted.

CROOKS AND CO. V. JONES. { 1900.
Nov. 22nd.

Principal—Agent—Correspondence.

C. and Co. employed J. as manager of a branch business, and during his term of office addressed letters to him dealing with matters relating to the firm's business.

Held, that the letters were the property of the firm.

This was an application on notice for an order upon the respondent to deliver up certain letters.

One of the applicants, Mr. Crooks, in his affidavit stated that he and his partner carried on business in England, and had a branch business at Cape Town. That the respondent had been manager of the Cape Town branch, but had lately been dismissed. The applicant and his partner wrote numerous letters to the respondent in his capacity as manager of the branch business, and these letters the respondent now retained, and refused to deliver them to the applicants, who claimed that they were their property.

The respondent claimed that the letters were his own property, having been addressed to him in his private capacity. They contained many allusions to private matters. He stated that the letters were required by him in connection with an action about to be instituted by him against the applicants for breach of contract.

Mr. Rubie for the applicants.

Mr. P. S. Jones for the respondents.

Buchanan, J.: The applicants in this case are a firm carrying on business in Liverpool, and the respondent was the manager of their branch business in Cape Town. While this capacity existed between the parties, certain letters were written by one other of the partners to their manager in Cape Town. The manager has now been dismissed from his position, and any property belonging to the firm should have been handed over by him when he left its employ. The letters in question are alleged to be private letters, but while it was true that they were addressed "Dear Mr. Jones" they were written on the firm's notepaper and certainly contained reference to the business of the firm. These letters *ex facie* appear to be connected with the business of the firm. The respondent's attorney says that these are private letters, and that there is information in them absolutely necessary to his client in the action he is about to institute against the applicants for damages for breach of contract. But copies of the letters can be made, and if the originals are not produced at the trial of the action, no doubt under the circumstances the Court will admit copies. The Court will order the respondent to hand over the letters received by him from the applicants now in his possession within seven days, this time being allowed so that respondent may have an opportunity of having the letters copied, costs to be costs in the cause

should an action be instituted by next term, failing such action the respondent to pay the costs.

[The applicants also gave an undertaking that the letters would remain in South Africa pending the bringing of the action, provided the respondent brought his action so that it could be heard by next term.]

[Applicants' Attorneys, Messrs. Van Zyl and Buissonne; Respondent's Attorney, Gus Trollip.]

DE BEER'S COMPANY V. MCCARTHY. 1900.
Nov. 24th.
„ 27th.

Proprietary rights—Selecting and locating claims—Diamond mines.

By deed of agreement between the plaintiff and the defendant company as owners of certain property, the latter gave to the former the right to search for diamonds by underground working only within a limited area with the right of obtaining within a certain period a lease of a certain area. One of the articles of the agreement was as follows: "The lessors reserve the right in the event of surface ground being resumed by competent authority to enter on and prospect such ground, but so as not to interfere with the lessee in locating the claims he may elect to take on lease under this agreement, which claims the lessee shall be at liberty to select and locate by means of trial pits." The plaintiff in the course of prospecting having found diamonds.

Held, that the High Court was justified in ordering that the plaintiff be at liberty to make trial pits within a defined area in the neighbourhood of the place where the diamonds had been found "for the purpose of selecting and locating the claims not exceeding one hundred in number."

This was an appeal from a decision of the High Court of Griqualand West in an action

in which the appellants (defendants below) were sued by the respondent (plaintiff below) for a declaration of rights in connection with mining operations, and in which judgment as below was given for the plaintiff.

The plaintiff's declaration was as follows:

1. The plaintiff is a prospector, residing at Beaconsfield, and the defendants are a joint-stock company, duly incorporated within this colony, and carrying on business in Griqualand West.

2. On or about the 18th January, 1899, the plaintiff entered into an agreement in writing with the London and South African Exploration Company, Limited (then the registered owners of the farm Dorstfontein, in the division of Kimberley), their successors and assigns, whereby the plaintiff obtained from the said company the sole right, for twelve calendar months, dating from the 2nd of January, 1899, to search for diamonds upon the said farm by underground working from a certain spot thereon, known as the "Alice Syndicate" ground, which ground was part of a certain depositing floor in the occupation of the defendants, but was surrendered by them to the said Exploration Company by order of the Supreme Court, dated the 6th of September, 1893. Copy of the said agreement is hereunto annexed, marked A.

3. Under the said agreement, the plaintiff had the further right, in terms of paragraphs 3 and 9 thereof, of obtaining, at any time within the twelve calendar months aforesaid, or any extension thereof, a lease for five years, renewable from time to time, of an area upon the said farm in one block, equal to any number of claims of thirty feet square each, not exceeding in all one hundred, at a rental of 30s. (thirty shillings sterling) per claim per month, which claims the plaintiff was at liberty to select and locate by means of trial pits.

4. At the time of making the said agreement and subsequent thereto, it was further agreed upon and understood between the plaintiff and the said Exploration Company that in the event of the plaintiff taking out a lease of claims as in the last paragraph hereof described, he should obtain the use of sufficient ground in the vicinity of such claims for hauling, washing, and depositing sites upon the said farm, as well as for all necessary easement for the proper working of such claims.

5. Subsequent to the date of making and during the currency of the said agreements, the defendants purchased and took over the assets and undertakings of the said Explora-

tion Company, including the said farm Dorstfontein, with the full knowledge of the existence and terms of the agreements, whereof the plaintiff also gave them due notice before transfer of the said farm to themselves; and the defendants are liable for the fulfilment of the obligations undertaken by the said Exploration Company in the said agreements.

6. The plaintiff, by virtue of the rights conferred upon him in the said agreements, proceeded to dig and search for diamonds on the said farm by underground working from the spot thereon already referred to as the Alice Syndicate ground, and carried his said operations by means of tunnels therefrom into and under certain depositing floors upon the said farm which were in the possession of the defendants, and of which they then had only the superficial rights for depositing and other mining purposes.

7. The plaintiff duly treated the ground found in his said operations, and at divers dates between the 6th January, 1899, and the 30th September, 1899, discovered diamondiferous ground and diamonds both in the said Alice Syndicate ground and also in his tunnels made under the defendants' said depositing floors. The plaintiff deposited the diamonds so found with the said Exploration Company, and subsequently with defendants as the successors of the said agreement.

8. Upon proof such as in the last paragraph mentioned of the diamondiferous nature of the soil discovered by the plaintiff under the said depositing floors, the said Exploration Company became entitled to resume possession of the surface rights of the said floors, and was bound under the same agreement with the plaintiff to exercise such rights of resumption in order to enable him to select and locate the claims which, under the said agreement, he was entitled to obtain.

9. Thereafter, to wit upon or about the 12th July, 1899, the plaintiff applied to the defendants, who had then become the successors and assigns of the said Exploration Company as aforesaid, for permission to go upon their said depositing floors and sink trial pits therein from the surface for the purpose of defining the area of the diamondiferous ground discovered by him and of selecting and locating his said claims as aforesaid.

10. The defendants, however, refused, and still refuse to grant the plaintiff any access to the said depositing floors or to give him any facilities for the exercise of his rights under the said agreements.

11. By reason of the defendants' refusal to comply with the plaintiff's request as aforesaid, the plaintiff has been absolutely debarred from the exercise of his rights under the said agreements, and has in consequence sustained damage to the extent of £1,000.

12. The said agreement expired on the 2nd of January, 1900.

13. The plaintiff has always duly performed his part of the said agreements.

In view of the foregoing the plaintiff claims:

(a) That the defendants may be ordered to carry out the said agreements and to allow the plaintiff access to their said depositing floors for the purpose of sinking trial pits at the various places mentioned in paragraph 9 hereof.

(b) As an alternative the defendants may be ordered to allow the plaintiff access to the said floors for the purpose of selecting and locating his said claims by means of trial pits sunk, in the first instance, in the immediate neighbourhood of the said workings, and extending gradually outwards, until the area of the diamondiferous ground discovered by him as aforesaid is defined.

(c) That for the purpose of enabling him to select his claims as aforesaid and exercise his rights under his said agreements, the plaintiff may be declared entitled to a period of time equal to that calculated from the 12th July, 1899, up to the expiration of his agreement on January 2, 1900.

(d) That he may be declared to be entitled to the use of sufficient ground in the vicinity of the said claims when selected by him for hauling, washing, and depositing sites upon the said farm, as well as for all necessary easement for the proper working of such claims.

(e) Generally a declaration of his rights as against the defendants under his said agreements.

(f) £1,000 as damages aforesaid.

(g) General relief.

(h) Costs of suit.

The defendants pleaded as follows:

1. They admit paragraphs 1, 2, 3, 5, 6, 9, and 12 of the plaintiff's declaration, but deny so much of the remaining paragraphs thereof as is not hereinafter expressly admitted.

2. As to paragraphs 7 and 8 of declaration, defendants say that the alleged discovery of diamonds or diamondiferous soil has never been satisfactorily proved to defendants who have demanded further proof, which plaintiff has neglected and refused to furnish; nor

have the places at which the diamondiferous soil or diamonds are alleged to have been discovered ever been pointed out to defendants.

3. Defendants have always been ready and willing to have the soil tested by means of trial pits at the points on the Alice Syndicate ground or along the tunnels at which it may be alleged the diamonds or the diamondiferous soil have been discovered, and they have offered and again offer to have the said pits sunk by and under the supervision of the Government Inspector of Mines, or any other qualified person mutually agreed upon, who shall employ his own men, and wash fifty loads of soil at each pit, the parties to this suit to be represented by one person each to watch on their behalf, the expense of employing the said Inspector or other chosen person to be borne by defendants, and the expense of the men employed by him to be borne by plaintiff, who shall, in the event of success, have reasonable time for the selection and locating of his claims in and about the place where such diamondiferous soil may be discovered.

4. As to paragraphs 9 and 10, defendants admit that plaintiff applied to come upon their depositing floors and sink the several pits marked on plaintiff's plan, 1 to 13, and that defendants refused to allow plaintiff so to do, but say that, as will be seen from the said plan, the whole of the spots indicated are entirely away from and unconnected with the said tunnels, upon ground which has not been resumed for mining purposes or proved to be diamondiferous, and where plaintiff has no right under the said agreement to come.

5. Defendants deny the allegations contained in paragraph 11 of declaration.

Wherefore defendants pray that plaintiff's claim may be dismissed with costs.

The plaintiff's replication was as follows:

1. Save as to the defendants' admissions, and save as hereinafter stated, the plaintiff joins issue with the defendants upon their plea.

2. As to paragraph 4 of the plea, the plaintiff admits that certain of the spots indicated upon the said plan are some distance away, from, and may be unconnected with, the said tunnels; but he says that before action brought he made the alternative proposition contained in paragraph (b) of the claim in his declaration to the defendants, who refused to agree to it.

The agreement annexed to the declaration was as follows:

8. The lessee binds himself to pay all costs and charges of every kind in connection with any injury or damage to the property of the lessors, and their surface tenants, by the mining operations of the lessee, and to pay proved by the lessors as not likely to endanger the surface from the said "Alice Syndicate" ground, provided that the said lessors, by their agents or servants, shall at all times have the right to enter the underground workings of the lessee, and examine and make plans thereof.

2. All diamonds found by the lessee shall be his property; but so long as he shall hold no lease of claims entitling him to search for and win diamonds, they must be, in the first instance, and at the end of every week, delivered at the Kimberley office of the lessors, and produced and declared by them at the office of the Detective Department in Kimberley.

3. At any time within the twelve calendar months aforesaid or any extension thereof, should any such extension be granted, the lessee may apply for and the lessors should be bound to grant to him a lease for five years, renewable from time to time, of an area in one block equal to any number of claims of 30 feet square each, not exceeding in all 100, at a rental of 30s. per claim per month, and in respect of such claims no premiums shall be payable for twenty-five, and a premium of £150 shall be payable for every claim not exceeding seventy-five in all above the twenty-five first taken.

4. The lessee shall, during the term hereby granted or any extension thereof, carry on his underground working continuously and in a workmanlike manner, and do nothing likely in the opinion of the lessors to endanger the safety of any surface ground.

5. The lessee shall not sublet or assign this agreement without the consent of the lessors in writing being first had and obtained.

6. The lessee shall, at the expiration or sooner determination of the agreement or any extension thereof, deliver up to the lessors all pits, shafts, tunnels, and other workings in good order, excepting only such as may have been abandoned with the consent of the lessors, or may have been ordered by the lessors to be filled up, which orders the lessee binds himself to regard and obey.

7. The lessee binds himself to pay any rates or taxes which may be levied on the said ground known as the "Alice Syndicate," or on any buildings or machinery or other property placed thereon by him during the term of this agreement or any extension thereof.

1. The lessors agree to give the lessee for twelve calendar months, dating from the 2nd day of January, 1899, the sole right to search for diamonds by underground working only, and at such depth as shall be apportioned compensation and cost of removal if any that the lessors may have to give for the removal of such tenants by reason of such mining operations, and if the amount of the compensation for removal and for damage done cannot be agreed upon between the lessee and such tenants as may be affected and arbitration be resorted to, the lessee must place in the lessors' hands prior to arbitration such sum as the lessors may estimate to be necessary for compensation or damage and cost of arbitration.

9. The lessors reserve the right in the event of the possession of surface ground being resumed by competent authority to enter on and prospect such ground, but so as not to interfere with the lessee in locating the claims he may elect to take on lease under this agreement, which claims the lessee shall be at liberty to select and locate by means of trial pits, but not by the removal and manipulation of any large bodies of soil.

The facts appear sufficiently from the judgment of the High Court, which was delivered by Hopley, J.

His Lordship said: Up to July, 1899, the London and South African Exploration Company (Limited) were the owners of the farm Dorstfontein, upon which is situated the Du Toit's Pan Mine, the claims in which they had from time to time let to various companies formed for the purpose of diamond-mining. These companies were gradually acquired by the defendant company, which succeeded them as lessees of the Exploration Company, until eventually the defendant company held practically the whole of that mine on lease, together with all the accompanying mining facilities and servitudes. For the purposes of the present case, the important mining facility in connection with the lease of the claims was the right to use a large extent of the surface of the said farm for the purpose of depositing thereon the diamondiferous soil won from the claims. Such portions of the surface are known as depositing floors, and are granted in large blocks, containing one acre for every claim in the block of claims to which such area is assigned and attached, and the lessee's rights to such floors are secured by articles of agreement on the matter, as shown by the exhibits numbered 30 and 31 in this case. Among the depositing sites so held by the defendant company are those shown in the

plan marked B attached to the declaration, which still on the plan bear the names of the companies which were the defendants' predecessors in title. It has been proved in this case that the depositing sites shown in plan B are, and have for some years been, lying unused; and apparently there is no intention of any very early resumption of active working there—at least nothing of the kind was suggested at the hearing. The articles of agreement above referred to stipulate as regards depositing sites granted to lessees of claims that "should at any time any portion of any ground so given out as depositing ground be discovered to be diamondiferous, the said lessees shall, so far as they are interested in such ground, surrender at the request of the lessors such diamondiferous ground to the said lessors, who shall thereupon grant to the said lessees an area of land for depositing ground equal in extent to that surrendered," etc. In 1893, upon an alleged discovery of diamondiferous soil in a well upon a portion of the floors in question, an action was brought by the Exploration Company against the present defendant company, and the Supreme Court, after being satisfied that the soil below the floors was indeed diamondiferous, ordered the defendants to surrender an area equal to five claims as prayed. (See 10 Juta, pp. 218 and 231.) Those five claims were known as the Alice Syndicate claims. They were subsequently added to, by what process this Court does not know, probably by agreement between the lessors and lessees, until they numbered 21, and they were then known as the Alice Mine, an undertaking that seems to have been abandoned after a short period of work of a more or less experimental and exploratory character, in the course of which the syndicate sank a couple of shafts in their claims, and drove some tunnels underground, beyond the limits of their claims. In October, 1898, the plaintiff in this suit approached the Exploration Company with a proposal that he should be allowed to prospect for a diamond-mine which he had reasons for supposing to exist below a portion of these floors, by tunnelling from the old workings of the abandoned Alice Mine, and after a reference to the London Board of that company and some correspondence on the subject, an agreement was entered into between the plaintiff and the Exploration Company, which is annexed to the declaration, and forms the basis of the present action. Acting in terms of this agreement, the plaintiff set

about underground prospecting, starting from the abandoned claims and workings of the defunct Alice Syndicate. At first he made a long tunnel in a north-easterly direction, but he abandoned this about the month of July, 1899, partly on account of the discouraging nature of the prospect, and partly because he was unable to ventilate the tunnel without trespassing on the defendants' surface rights, but about the same month he started a branch tunnel in a southerly direction, and in July was encouraged by finding three small stones, two of which he forwarded to the Exploration Company in terms of his agreement; the third he gave to his attorney, Mr. Coghlan, to forward, but that gentleman seems to have forgotten to do so until he forwarded it in a later month with some other finds, to which I shall presently refer. These three stones were found at the point marked S on the plan (exhibit No. 6). During the month in which these finds were made the Exploration Company and the defendant company had come to terms, and the latter had bought and taken over, as from July 1, 1899, all the assets and obligations of the former, so that from that date the defendant company became the landlords of the farm Dorstfontein, and were bound, as they admit, by all contracts, such as the present, which their predecessors had made. The plaintiff continued working and communicating with the Exploration Company, whose manager or acting manager was apparently winding up matters for the defendant company, and it was not until the end of August that plaintiff was referred to the defendant company, and told to communicate directly with them. Meanwhile, however, he was working steadily and continuously; and at a point a few feet on the south side of the point S he had divided his tunnel into two branches, one running south-east and the other nearly due south. Both these tunnels, he asserts, run through diamondiferous soil entirely. He tested the soil almost every yard in small quantities. It was the ordinary yellow diamondiferous soil, which invariably overlies diamond-mines in this vicinity. On being washed it gave the usual diamondiferous deposit, consisting of carbon, garnets, greenstone, etc. No actual diamonds were found in the south-easterly tunnel, but in the other, at or near the point marked T in the plan (exhibit No. 6) he found, early in October, three stones, which he sent to his attorneys to forward, and which they forwarded in their letter of October 7, together, apparently, with the

one stone found in July, which they had neglected to forward earlier. It was very shortly after this that the war broke out. Kimberley was besieged, and the plaintiff was requested by the military officer in command at Beaconsfield to abandon his tunnels for military reasons. To this request he acceded, and he personally joined the Town Guard and did military service. As the contract was one for a limited period, this reason for the temporary abandonment of work must not be lost sight of—and indeed the subsequent correspondence with the defendants and their attitude in court at the trial show that they recognise the justice of the plaintiff's having a reasonable time, in which to attain his objects in lieu of the time lost owing to the siege and to the attitude adopted by themselves, on legal grounds, if they should prove to have been wrong.

Now, in construing the agreement and in adjusting and declaring the rights of the parties to this suit, it is necessary to look at the matter as though the Exploration Company were still in existence, and to divide the defendant company into its component parts, the one representing the landlord interest as embodied in the former Exploration Company; the other the tenant interest, with surface rights over those depositing floors. To the Exploration Company the discovery of a new mine would have been most valuable; to the De Beers Company it would, at the time the contract was entered into, have been very unwelcome. One can therefore understand that when they were approached by a respectable man like the plaintiff, who was ready to spend a large sum of money in *bona fide* prospecting, the Exploration Company would be ready to afford him every assistance, and to grant him every facility in their power, and that he was right in trusting as he was invited to do to their goodwill and liberality. It seems to me, therefore, that in this contract, though they could not give him the right to prospect from the surface on account of the rights of their surface tenants, they undertook to give him every facility from the coign of vantage they possessed at the Alice Mine, and that they undertook, upon the discovery by him of diamondiferous soil in sufficient quantities to justify them in such action, to obtain the surrender of so much of the floors as would enable him to prosecute his search further by means of trial pits. That they intended to resume a large portion of these floors for that purpose seems to me to be

shown by the terms of clause 9 of the agreement, which provides for prospecting, locating, and selecting claims on a large scale by means of themselves. I am also satisfied that they specially promised him all ordinary mining facilities in case he found the mine, took out leases for the 100 claims he was entitled to, and proceeded to mine. This is not embodied in the agreement, but it almost went without saying, as the claims would be of no value without hauling and depositing sites and the other facilities which must be granted by an owner on whose land a claimholder in a mine holds claims. However, I am satisfied that to make doubly sure the matter was specially mentioned, and the promise specially made. To come now to the situation as affected by the facts proved, I am satisfied that before July 12 the plaintiff had found diamondiferous yellow ground, and thereupon wrote asking practically for a resumption of surface in order that he might more easily prospect. (See exhibit 9.) At this time the change in ownership had taken place, as Mr. Currey expressed himself unable to take action. (See his endorsement on the said exhibit.) The plaintiff, however, went on with his work as I have said, and with his requests, by correspondence at first with Mr. Jones, the acting manager of the expiring company, and later on with the defendant company. The attitude taken up by the defendant company was one of restriction and circumscription. They were willing to allow and to help to pay for trial pits and testing of the ground by an impartial man, Captain Quentrell, but only on the exact spots at which diamonds had been found, and if they were satisfied after such tests made at such spots that the ground was diamondiferous, they were willing that plaintiff should be granted his lease, as specified in the agreement, of 100 claims, but they insisted that he should mark them off practically blindfolded in any direction he liked, in one block, starting from such prospecting shaft or shafts. About mining facilities they would not commit themselves to any promises. These proposals the plaintiff rejected. The proposal that the investigation should be conducted by Captain Quentrell was no doubt suggested by the fact that the Supreme Court had in the case above referred to in 1893, concerning the Alice Syndicate claims, appointed the same gentleman to test the ground then alleged to be diamondiferous. But in that case the evidence that was before the Court that the ground

was diamondiferous was very slight, and the allegation to that effect was denied, and the Court appointed a person whom they could trust to make an independent report to satisfy them on the point. That, no doubt, is a very satisfactory mode of procedure, but it obviously is not the only one, and an applicant who is prepared to risk his case on the proofs he is able to adduce may very well refuse to incur the delay and expense of such a process. In this present case the plaintiff has satisfied the Court that diamonds have been found at both the points S and T on the plan produced. It is true that of the six stones sent in two turned out to be crystals, but still there are four small diamonds which have been found, and at least one, and possibly more, of these must have been found at one of the spots mentioned, and the others at the other spot. The diamonds are very small, but that is not the criterion. They are diamonds, and moreover there seems to be a considerable body of yellow ground of a diamondiferous nature in the two southerly tunnels. It is obvious, therefore, on the authority of the case already referred to in the Supreme Court in 1893, that on the proof of these facts the Exploration Company, if still existing, would have been entitled to come to this Court and ask for an order that the defendant company should surrender a reasonable amount of the surface to enable them and the plaintiff to prosecute further investigations. Not only would they have been entitled to do this, but I think they would have been bound under their contract with the plaintiff to do so, and I have no doubt that had they continued to exist as a company they would have taken that course. The defendants are, in my opinion, bound to assent to the same course. It may be that the plaintiff has discovered for them a very valuable mine, in which case it would be highly unjust that his labour and expenditure should be entirely unrewarded. It may be, on the other hand, that the ground, though diamondiferous in its nature, will not pay working expenses, in which case they cannot be damaged by further prosecution of the present investigations—for it must be remembered that all this ground is lying idle, and that none of the defendants' workings will be in the slightest degree hindered or injured by the course proposed. The defendants' proposal that the plaintiff should select his spot by means of, and along the course of his underground workings, and from that spot choose his block of 100 claims,

seems to me quite unreasonable, and I think that clause 9 of the agreement shows that such a restricted and haphazard process was not in the contemplation of the contracting parties. Though the first claim made in the prayer of the declaration is in the opinion of the Court too wide and objectionable on the grounds raised by the defendants, I think that the rights of the plaintiff under the agreement may be declared to be that, having proved to the satisfaction of this Court that there is a considerable body of diamondiferous ground below the surface about the points S and T on the plan, and that there is *prima facie* evidence of more of such soil to the south and south-east of such points, he should have an order against the defendants that a reasonable amount of the depositing floors should be surrendered to the plaintiff in order that he may prosecute his prospecting operations by means of trial pits, as stated in the agreement. The Court is further of opinion that should the result of such operations and further underground investigations be to prove that the ground extends beyond such area so ordered to be surrendered, the plaintiff would be entitled to have a further order made for further surrender or surrenders, and that such rights shall continue for such time as is reasonable in view of the delay which has taken place. The Court is further of opinion that should the plaintiff within such period locate and select his block of 100 claims in terms of the agreement, he should be entitled to a lease as is in the said agreement provided, and that thereupon he should be granted all the ordinary mining facilities. The Court is further of opinion that an area equal to twenty claims should, in the first instance, be surrendered, and that the time to be allowed for the further prosecution of his investigations should be a period of six months. As to the exact location of the area to be surrendered at present, the Court, at the adjournment of the hearing of the case, requested the surveyors of the plaintiff and the defendant company to proceed to the *locus in quo*, and to mark out an area equal to twenty claims in such locality in the neighbourhood of the points S or T as might be pointed out and desired by the plaintiff. This they have done, and have supplied a plan, which has been put in as exhibit 32, showing the area marked and bounded by lines and indicated by the letters A, B, C, D. The plaintiff called no evidence as to damages, and through his counsel abandoned that portion of his claim. The

order of the Court therefore is that the defendants do forthwith surrender the area indicated on the said plan by the rectangular figure A, B, C, D for the purposes hereinbefore indicated, and that the plaintiff do have a period of six months wherein to carry on his investigations and reap the benefits of his said contract. The Court having sufficiently indicated its views on the further rights of the plaintiff and defendant company, makes no further order at present in that direction. The defendants must pay the costs of this action.

The following reasons were submitted by Lange, J.:

I expressed full concurrence in the judgment delivered by Mr. Justice Hopley.

The plaintiff satisfied the Court, on the basis laid down in what is known as the Alice Syndicate case, heard in the Supreme Court in 1893, that he had discovered diamonds and diamondiferous soil under the depositing floors in question, and that his *bona fide* object was eventually to work the ground as a diamond mine.

That being proved, it remained for the Court to decide what area of ground should be surrendered by the defendants in terms of their original agreement with the Exploration Company, to enable the plaintiff to further prosecute his investigations, and locate his 100 claims by means of trial pits sunk from the surface, as provided in the agreement annexed to the declaration. In the Alice Syndicate case the Supreme Court ordered the surrender of five claims, the number claimed in the declaration, in the immediate vicinity of a well which had been sunk, and in which the diamondiferous soil had been found. In the present case the plaintiff has done a considerable amount of work in tunnelling and otherwise, and it seems not unreasonable in the circumstances that he should be allowed an area of twenty claims running in the direction in which the diamondiferous soil trended, within which to carry on his surface testing during the period of six months fixed by the Court. These twenty claims, as located by the surveyors, cover a surface area of only 100 yards by 20 yards, on an extensive acreage of depositing floors, which, according to the evidence, have been for years lying unused, and are not likely to be used by the defendants within the above period.

Against this judgment the defendants appealed.

Mr. Schreiner, Q.C. (with him Mr. Rubie), for the appellants: On the evidence, no

diamonds were found on the ground before July 12. The fact that the company allowed the plaintiff to continue working owing to the interruption in October, 1899, by reason of the siege was merely an act of grace. The plaintiff can be in no better position than he would have been if the L.S.A. Exploration Company had not sold to De Beers Company. The only contract De Beers have with the plaintiff is the one they took over from the Exploration Company. The plaintiff as the sub-lessee of a depositing site cannot bring the original lessor *qua talis* into Court. The case of *London and S.A. Exploration Co. v. De Beers* (10 Juta, 218, 231), is not applicable. There is no privity of contract between De Beers and the plaintiff. The latter has only a remedy against the L. and S.A. Company, and the company a remedy in turn against De Beers. The company's remedy could only be for damages, but not for specific performance. The plaintiff has no legal rights since his contract expired in January, 1900.

[De Villiers, C.J.: Does not the merger of the company's interests in De Beers affect the plaintiff's position? True the plaintiff could not have sued the L. and S.A. Company for specific performance, because the company was in the hands of De Beers. But that is no longer so.]

We stand to the contract rights of the original lessors. The plaintiff claimed more than he was entitled to. He claimed to work by surface workings; this the contract did not allow him. He wanted to sink trial pits all over our land. Our contention is that he should be limited to the vicinity of his tunnels, where diamonds have been found. The contract only allows him to proceed by underground working. (Clause 1 of the contract.)

Mr. Burton (with him Mr. Close) for the respondent: The Court will look to the terms of the original agreement. We have proved the ground to be diamondiferous, and so have a right to sink pits to locate our claims. We are entitled to test the ground by means of trial pits, and are not bound to locate and select our claims in the dark. This is the construction to be placed on the reading of the 3rd and 9th clauses of the agreement. No prejudice should occur to the plaintiff by the merger of the L. and S.A. Company and De Beers. The plaintiff required to sink pits in order to find out where the mine lay. This he could not possibly do by tunnelling.

Mr. Schreiner, Q.C. (in reply): The order of the Court below goes further than the plaintiff's claim.

[De Villiers, C.J.: Clause 9 of the agreement is strong enough to support the Court's order.]

The plaintiff may not fish wherever he wishes for his claims. The finding of five or six "splints" of the total weight of half a carat does not prove the ground to be diamondiferous. There has been no breach of the contract by the defendants.

Curia ad. vult.

Postea (November 27).

De Villiers, C.J.: The Court has had occasion, in the case of *L. and S.A. Exploration Co. v. De Beers* (10 Juta 218, 231), to consider the nature of the rights reserved by the Exploration Company under its articles of agreement with the De Beers Company to claim a surrender of any portion of the depositing floors that has been proved to be diamondiferous. The plaintiff in the present case claims under a totally different contract. The rights, therefore, which were held to belong to the Exploration Company can afford no measure of the rights accruing to the plaintiff under his contract with the Exploration Company. Since the date of the plaintiff's contract that company has been practically amalgamated with the De Beers Company, and it is not now denied on behalf of the De Beers Company, which is the defendant in the present case, that it is liable to all the obligations incurred by the Exploration Company under the contract. What then is the nature of those obligations? The 1st, 2nd, and 3rd articles of the deed of agreement give to the plaintiff the right to search for diamonds by underground working only within a limited area, with the right of obtaining within a certain limited period a lease of an era in one block not exceeding 100 claims. The obligations, therefore, of the defendant company under these articles extended no further than to allow the plaintiff full liberty to prospect for diamonds by underground working within a certain area until he has found diamondiferous soil and was prepared to select his claims. If the agreement had ended there, it is clear that the plaintiff would have had no right to enter upon the surface for the purpose of making trial pits or otherwise testing the soil in order to enable him to select and locate his claims. The 9th article of the agreement, however, runs as follows: "The lessors reserve the right in the event of the possession of surface ground being resumed by competent author-

ity to enter on and prospect such ground, but so as not to interfere with the lessee in locating the claims he may elect to take on lease under this agreement, which claims the lessee shall be at liberty to select and locate by means of trial pits but not by the removal and manipulation of any large bodies of soil." Under this article the plaintiff claims "access to the floors for the purpose of selecting and locating his said claims by means of trial pits sunk, in the first instance, in the immediate neighbourhood of his workings and extending gradually outwards until the area of the diamondiferous ground discovered by him is defined." The Court below found that before July 12, 1899, the plaintiff had found diamondiferous ground by means of his underground working, and this finding is supported by the evidence. The learned Acting Judge-President, in his reasons, adds that the plaintiff thereupon wrote to the manager of the Exploration Company "asking practically for a resumption of surface in order that he might more easily prospect." The letter itself, however, is in the following terms: "In connection with my prospecting operations in Du Toit's Pan I have ascertained that the diamondiferous soil extends considerably beyond the boundary marked on the plan sent to me. And I am now ready, according to section 9 of my agreement, to point out the spots I wish to sink holes and select my claims." Here then was a clear demand to be allowed the right of locating his claims under the 9th article, and this demand was repeated by letter on the 4th of August, 1899. Subsequently the defendant company took over the obligations of the Exploration Company, and on the 2nd of September, 1899, the plaintiff wrote to the defendant company again, repeating his demand and referring to the previous correspondence. The defendant company refused to give the permission asked for, and a correspondence ensued, in the course of which the plaintiff's attorneys went considerably further in their demands than the plaintiff himself had gone in his letters. They now claimed that if the results of further tests, by means of trial pits, should be to show that the diamondiferous soil extends beyond such trial pits the plaintiff should be at liberty to sink a further series of pits at an unlimited distance from the underground workings. The High Court, however, ordered a definite area, of the size of twenty claims, in the immediate neighbourhood of the ascertained diamondiferous ground to be marked off, and ordered that the defendant

company do surrender this area to the plaintiff for the purpose of prosecuting his investigations, and that the plaintiff do have a period of six months wherein to carry on his investigations." Against this order the defendant company now appeals, its objection not being to the extension of time, but to any right being given to the plaintiff to test the ground except by means of underground working. In considering this appeal the Court must confine itself to the actual terms of the judgment. The Acting Judge-President expressed it as the opinion of the Court that "should the result of further underground investigations be to prove that the ground extends beyond such area so ordered to be surrendered, the plaintiff would be entitled to have a further order made for further surrenders, and that such rights shall continue for such time as is reasonable in view of the delay which has taken place." This opinion was not, however, incorporated in the judgment, and cannot be regarded as a subject of appeal. If it had been so incorporated and appealed against this Court would have been bound to carefully consider the very important question whether it could ever have been contemplated that the plaintiff should be allowed to sink trial pits beyond a defined area in the immediate neighbourhood of the underground workings. The form of the judgment, however, has prevented this question from arising, for the Court below has carefully defined the area within which the trial pits are to be sunk, and that area is in the neighbourhood of the ascertained diamondiferous ground. The plaintiff's counsel has contended for much greater rights than have been allowed to him by the order of the Court below, but as he has not appealed against the judgment the Court cannot modify it in his favour. It is clear from the correspondence and the pleadings that in addition to his other demands the plaintiff has all along claimed the right of access to the floors in question for the purpose of selecting and locating his claims by means of trial pits sunk in the immediate neighbourhood of his underground workings. This right is, in my opinion, conferred on him by the 9th article of the agreement, and practically awarded to him by the judgment of the Court below. That judgment, however, requires a "surrender" of the ground to the plaintiff, and mentions as the object of the surrender the "prosecution of his investigations." It would be advisable, however, not to intro-

duce into the judgment any terms not used in the agreement itself, and the order will be that "the plaintiff be at liberty to make trial pits within the area on the plan (exhibit 32) indicated by the rectangular figure ABCD, for the purpose of selecting and locating the claims not exceeding one hundred in number mentioned in the declaration, and that such claims be selected and located within six months from the 14th September, 1900. The defendant company to pay the costs of the action." This amendment was not suggested on behalf of the appellant, and does not substantially modify the judgment, and therefore, subject to the amendment, the appeal must be dismissed with costs.

Buchanan, J., and Maasdorp, J., concurred.

[Appellants' Attorneys, Messrs. Scanlen and Syfret; Respondent's Attorney, Mr. Gus Trollip.]

EPSTEIN V. EAST LONDON HARBOUR BOARD. { 1900.
Nov. 28th.
Dec. 7th.

Harbour Board—Bailment—Land-ing and warehousing goods.

The Harbour Board of East London having landed and warehoused a certain number of bags of grain consigned to the plaintiff by bills of lading which referred to the bags as being marked "M.E.," found that a considerable number were not so marked. Notwithstanding such knowledge, the proper officials of the Board received the rent and other charges for the full number, and gave the plaintiff a written receipt for the amount paid by him. Subsequently, however, the Board refused to give delivery of any bags not marked "M.E." without a guarantee of indemnity, although it was not alleged that any of them belonged to a third party. The Court having found, as a fact, that all the bags belonged to the plaintiff,

Held, that the Board was bound to deliver the unmarked bags or pay their value and were liable for damages for the delay.

This was an action brought by Moses Epstein against the East London Harbour Board for the delivery of certain goods, or in the alternative, for their value, and also for damages.

The plaintiff's declaration was as follows:

1. The plaintiff is a merchant carrying on business at King William's Town.

2. The defendant is the East London Harbour Board, which is a body corporate constituted under Act No. 36 of 1896, and endowed with the powers and charged with the duties set forth in the said Act.

3. Amongst other powers the Board has in terms of the said Act power to land and warehouse goods for account of those persons to whom they belong, or who are interested therein.

4. In the month of May, 1900, the Board landed and warehoused for account of the plaintiff, ex U.R.M.S. Norman, certain grain, the property of the plaintiff, to wit, 248 bags of seed wheat and 375 bags of seed oats, of the value of £625.

5. The plaintiff duly paid the duties of Customs in regard to the said grain, and cleared the same, and further paid charges to the Board in respect of its services, amounting to £10 3s. 7d., and is and at all times has been ready and willing, and has tendered and offered to pay any other charges to which the Board may be legally entitled.

6. It became and was and is the duty of the Board duly to deliver the said grain to the plaintiff, and the plaintiff in or about the month of May aforesaid, and thereafter on June 20, 1900, lawfully demanded delivery thereof, but the defendant wrongfully and unlawfully refused and neglected, and still refuses and neglects, to deliver the same to the plaintiff.

7. By reason of the delay on the part of the defendant in making due delivery of the said grain, the plaintiff has sustained special damage in the sum of £250, in that he has to a great extent lost the season's market.

Wherefore the plaintiff prays for (a) an order compelling the defendant forthwith to deliver to him the said grain, or in the alternative, to pay him the sum of £625 sterling, being the value thereof; (b) judgment for the sum of £250 as and for special damages, or that he may have such further or other relief as to the Court may seem meet, together with costs of suit.

The defendant's plea was as follows:

1. It admits paragraphs 1 and 2.

2. It does not admit paragraph 3, but craves leave to refer to the terms of Act No. 36 of 1896, and to the regulations framed thereunder with regard to its powers and duties in respect to the landing, warehousing, and delivery of goods.

3. It denies paragraph 4, but says that in the month of May, 1900, the Board landed and warehoused, ex U.R.M.S. Norman, certain grain which is now claimed by the plaintiff.

4. It admits that Customs duties were paid by the plaintiff and that charges to the amount of £10 7s. 3d. were paid by the plaintiff to the defendant Board, and that portion of the said sum of £10 7s. 3d. was in respect of charges upon the goods now claimed.

5. It says that the said portion was received by the defendant Board under the belief that the goods were marked and described in accordance with the bills of lading which were furnished by the plaintiff to the Board, but thereafter when it came to the knowledge of the Board that the said goods were not so marked and described the Board tendered and hereby again tender to refund such portion of the said charges.

6. The bills of lading presented by the plaintiff to the defendant Board in accordance with regulation No. 79, made under Act No. 36 of 1896, described the goods claimed, being grain, as marked M.E., but there was no grain landed by the defendant Board, ex U.R.M.S. Norman, bearing the said mark save certain four bags, delivery whereof has been tendered to the plaintiff, and the defendant Board again tenders to deliver the said four bags.

7. The defendant Board was at all times ready and willing and tendered and hereby again tenders to deliver to the plaintiff the goods claimed by him, being certain bags of grain landed ex U.R.M.S. Norman, but not marked M.E., upon his obtaining from the ship agents at East London an order for the release of the said goods, and on payment of all charges due for rent in respect of the storage of the same, but plaintiff has refused the said offer; it admits that the plaintiff demanded the said goods, but save as above, it denies paragraphs 5 and 6.

8. With regard to paragraph 7, the defendant Board does not admit that the plaintiff has sustained any damages as alleged, and refers to such proof as he may adduce thereof; it denies that it is responsible for the same; even if the said goods do belong to the plaintiff, which the Board does not ad-

mit, the 86th regulation, duly promulgated under Act No. 36 of 1896, provides that the Board will not be responsible for any loss or delay occasioned by insufficient or erroneous marking of goods.

Wherefore subject to the above it prays that the plaintiff's claim may be dismissed with costs.

In his replication, the plaintiff admitted that the bills of lading which he handed to the Board, and in virtue of the possession, of which the Board received the said grain, described the goods as marked M.E. He did not admit that any of the goods were when landed not so marked, but said that if the fact be proved to be the case his claim to his property in the hands of the Board was not prejudiced thereby. He said that the grain landed by the Board as aforesaid was so landed, and by the Board received into its custody ex U.R.M.S. Norman as agent for and on behalf of the plaintiff, and no other person, and was so landed and taken into custody as his property, and not as the property of any other person. The Board refused to deliver to him his property as aforesaid unless besides paying certain charges for rent he would either obtain such order as mentioned in paragraph 7 of the plea from the ship's agents, or would give such a guarantee of indemnity to the Board as the Board might consider adequate, which refusal was wrongful and unlawful on the part of the Board. As to the regulation mentioned in paragraph 8 of the plea, it either did not apply to the plaintiff's claim, or if and in so far as it might be intended to apply to his claim, it was *ultra vires*, and bad in law. Save as aforesaid, and save in so far as any of the allegations in the declaration were admitted in the plea, the plaintiff denied all allegations of fact and conclusions of law therein contained, more especially the conclusions of law that the Board might lawfully set up against him, the supposed right of some third unascertained and unknown person in regard to the said grain so landed and taken by the Board into custody as his agent.

For a rejoinder to the plaintiff's replication, the defendant Board said that save in so far as the plaintiff admitted any of the allegations in the plea, and save that it admitted that it offered to deliver the said goods to the plaintiff upon the latter giving it a satisfactory guarantee of indemnity, it denied all and singular the allegations and conclusions of law in the said replication contained, and joined issue thereupon.

Mr. Schreiner, Q.C. (with whom was Mr. Benjamin), appeared for the plaintiff, and Mr. Searle, Q.C. (with whom was Mr. Buchanan), appeared for the defendant Board.

The first witness called was

Moses Epstein, the plaintiff in the case, who said that for the past five years he had been a produce merchant at King William's Town. He had no office at East London, but he did his business through that port. He imported seed wheat and seed oats from Siberia. The grain about which this action was brought was shipped by the Indianapolis, but it was transhipped at Cape Town and brought to East London by the Norman. Witness did not at the time know that this grain had been transhipped, but he knew that now. Under a clause in the bill of lading the shippers reserved the right to tranship. On May 24 last witness received a telegram giving notice of the shipment, and made preparations for receiving the grain. He had his bills of lading, and went down to East London. One shipment which arrived at the same time he had received in full, although there were some bags short at first. At East London witness saw Mr. Maaschke, an official of the Harbour Board in charge of one of the stores, and the latter pointed out to him the Norman's cargo. Witness's cargo from that vessel was not then mixed with other cargo. Mr. Maaschke pointed out the goods as witness's. That was on May 29. Witness had prepared the delivery orders produced, and took the usual steps for clearing the goods. He then went back on the afternoon of May 29 and Mr. Maaschke said that some of the bags were not marked "M.E." He pointed out some of these bags. They were not marked "M.E.," but they had the running number from 1 to 375. From the other marks on the bags witness could easily recognise it as his shipment. Witness also pointed out to Mr. Maaschke that other bags lying alongside had "M.E." on them. Witness saw a large number of bags with the mark "M.E." on them. Witness asked Mr. Maaschke what he should do so that the goods might go forward, and he said witness should see Mr. Green, the representative of Dyer and Dyer, the ship's agents, and get a delivery order. Witness on May 31 got Mr. Green to sign the delivery orders, and he then handed them with the amount for charges payable to the Harbour Board officials, and received the receipt produced. After making arrangements for the delivery of a hundred bags of the grain to one Moyers as well as

for the delivery of several smaller lots, witness went back to King William's Town. On June 11 witness received a telegram from Moyers cancelling the order for fifty bags, as the grain had not been delivered, and subsequently he cancelled the order for the remaining bags. Witness then went to East London, and on making inquiries was informed that the bags could not be delivered, as they were not marked "M.E.," as described in the bills of lading. Proceeding, witness detailed the steps he took to endeavour to get delivery of the goods, but he found it impossible to do so unless he gave security to the ship's agents, which he would not do. Witness had lost the sale of this cargo through the Harbour Board's action. He could easily have disposed of the whole cargo. The actual cost of the cargo was £625. As to the special damages, he reckoned that owing to the goods not having been delivered at the end of May, he had lost £367 12s. He had only claimed £250 in his declaration because at the time the action was brought he had still the season in front of him, but even then they would not deliver the bags.

Another witness stated that the tally clerks in landing goods from the lighters did not always check the goods landed by their marks. Two other consignments of grain came by the Norman, and were not properly marked, but yet they were delivered. Another witness, in reply to the Court, stated that if a ship received goods without marks, although the bill of lading said there were marks, the ship would refuse to hand over the consignment without an indemnity. It was also stated that many more than four bags were marked M.E.

For the defence, it was alleged that only four bags were found to be marked M.E. Marks were never yet known to become obliterated. It was also stated that the plaintiff, on being informed that the bags were not marked, said he would go to the ship's agents and get a release of the cargo. Delivery orders were often given before the cargo was discharged, because it was impossible to check the cargoes before giving delivery orders. The bags could not have had the mark M.E.; they were second-hand bags. A director of the firm of Dyer and Dyer (Limited) said he was prepared to accept the personal security of the plaintiff, but the latter would not discuss the matter.

Mr. Schreiner, Q.C.: On the evidence the goods claimed belong to the plaintiff. Of the 623 bags lying at East London now the

plaintiff claims 621, four having been tendered by the defendant Board. As to the duties and responsibilities of the defendant Board, see sections 30, 31 of Act 26 of 1896. By the bill of lading, the ship's responsibility ceased when the goods were handed over to the lighters. The Harbour Board was the consignee's agent, being a statutory *negotiorum gestor* of the consignee. The plaintiff has paid the charges for the whole consignment. The goods clearly belonged to the plaintiff; they are not said to be the goods of anyone else. The plea of the Harbour Board was not *jus tertii* but *jus nullius*. They knew the goods were unmarked when the plaintiff paid the charges. They have no right to claim an indemnity either from the plaintiff or the shipping company. If it be subsequently shown that the plaintiff received the goods wrongly, then they have their common-law right. The ship gave no order for release, because, as they said, "they had done with the shipment." An agent cannot demand an indemnity from his principal. The refusal of the ship to give an order for release, and their reply when this was applied for, showed that they had safely delivered the goods over the ship's side. See *Everett and Strode on Estoppel* (p. 272); *Knights v. Wiffen* (L.R., 5 Q.B., 660); *Woodley v. Coventry* (2 H. and C., 164); *Alexander v. Perry* (Buch., 1874, p. 59). The regulation (No. 86) under which the Harbour Board wish to unreasonably keep back these goods is *ultra vires*. They cannot protect themselves under an unreasonable regulation. A reasonable construction must be put on this regulation, especially as it is made to protect a monopoly. The damages claimed, £250, are far below the amount sustained.

Mr. Searle, Q.C.: The Harbour Board performed a statutory duty, and did so reasonably. They did not know that the goods were the plaintiff's. The goods were not marked M.E. when they got possession of them. The charges were paid on information from the bills of lading and not from the goods.

[De Villiers, C.J.: They have received rent for goods, and if they cannot deliver those goods they are liable. How can they charge rent unless they are sure they have got the goods in their custody?]

The charges have to be paid before the Harbour Board sees the goods. Regulations 82 and 115.

[De Villiers, C.J.: The Harbour Board is merely an ordinary bailee.]

See sections 24 and 31 of Act 10 of 1872. In asking for a discharge from the ship or an indemnity from the plaintiff, the Board acted very reasonably. In the correspondence the plaintiff claimed goods marked M.E.; these the Harbour Board did not have. The plaintiff now says there are other ways in which he can distinguish the goods.

[De Villiers, C.J.: The Board, by accepting payment for these goods acknowledged the plaintiff as the owner.]

The Board has only followed the usual practice. The regulation is reasonable, and *intra vires* of section 31 of Act 26 of 1896. The plaintiff was negligent in not conforming to the practice of the harbour by refusing to give an indemnity, and in not having the goods properly marked.

De Villiers, C.J.: The evidence is not satisfactory as to whether all the bags of grain in dispute had been properly marked with the initials M.E. before the original shipment. It is certain that when the bags came into the possession of the defendants the marks on some of them had been obliterated, if they ever existed. The defendants received and kept the bags with the full knowledge that a considerable number were then unmarked. With such knowledge the defendants' officials informed the plaintiff of the arrival of the full number of bags, and requested him to take steps for their removal. The plaintiff, acting upon this information, went to East London and there paid to the proper official of the defendants what was owing for late orders, forwarding, rent, and weighing, in respect of the full number of bags, and received a written receipt of such payment. The plaintiff was thus recognised as the owner of the full number of bags, but when he came to demand delivery the defendants refused to deliver any bags not marked M.E. unless he would give security for repayment of the value in case a third person should prove to be the owner. The security thus demanded was more than the personal security of the plaintiff, for it is clear that the defendants would not have been satisfied with less than two sureties or a deposit of cash. The plaintiff refused to give such security, and the defendants retained the goods. In the meantime the season for the sale of seed oats was passing, and the plaintiff now claims the grain or its value and damages for the loss sustained by him in consequence of the delay. The 30th section of Act 36 of 1896 empowers the Board to land, warehouse, and deliver goods imported into the harbour, and the regulations framed by the Board under the Act

fix the charges to be made for such landing, warehousing, and delivering, and practically prevent the importer from himself handling the goods until the Board is prepared to give delivery. Under the Act, therefore, it was quite competent for the Board, through its proper officials, to enter into a binding contract of bailment, and the chief question to be determined is whether the defendants are bound to deliver the quantity of bags which they had acknowledged to have received, and for the rent and other charges in respect of which they have been duly paid. It is not suggested that the unmarked bags belong to or have been claimed by a third person. If such a claim had been made the proceedings in the present case might have been stayed pending the decision upon the claim. I would even be prepared to hold, under the circumstances of the present case, that the defendants would have been entitled, if a *jus tertii* existed, to set it up themselves. But the mere possibility that a third person may claim some of the grain at some future time does not give the defendants a right to require security after their acknowledgment—giving rise to a binding contract—that they have landed and warehoused the full quantity on behalf of the plaintiff. In my opinion all the grain has been proved to belong to the plaintiff, and he is entitled to claim it or its value. As to the question of damages, the amount claimed seems to be large, but the plaintiff has given chapter and verse for each item of damages, and his statements are uncontradicted. Judgment must therefore be given for the amount claimed, with costs.

Maasdorp, J., concurred.

[Plaintiff's Attorneys, Messrs. Godlonton and Low; Defendants' Attorneys, Messrs. J. and H. Reid and Nephew.]

KIFT V. CAPE TOWN COUNCIL. { 19 0.
Nov. 26th.

Negligence—Contributory negligence
—Town Council—Electric wires.

A wire capable of conducting electricity and belonging to the Town Council was hanging for a period of 48 hours a few feet from the ground across a public thoroughfare in a populous part of Cape Town. The plaintiff while lawfully passing came in contact with the wire and as a consequence sustained serious injuries caused

by the electric power in the wire. Held, that the failure on the part of the Council to ascertain that the wire was down and to repair it, amounted to negligence, and that even if the plaintiff did take hold of the wire he was not guilty of contributory negligence.

This was an action instituted by James Kift, duly assisted by his father and natural guardian, Robert Kift, against the Town Council of Cape Town for the recovery of £2,500 as damages sustained by reason of the negligence of the Council.

The plaintiff's declaration was as follows:

1. The plaintiff is a minor, and is duly assisted by his father, and resides in Cape Town.

2. On February 27, 1900, the plaintiff, while lawfully proceeding up Church-street, Cape Town, came in contact with a wire charged with electricity, which was hanging over the railings of a house at the corner of Long and Church streets, and which wire projected in the said streets.

3. The said wire formed part of a system of overhead wires in Cape Town for the purpose of lighting the streets of Cape Town, and was the property and under the sole control and management of the defendant.

4. It was the duty of the defendant to so place, keep, and maintain the said wire that it could not come into contact with any person, more especially when charged with electricity, such contact being dangerous to life and limb.

5. The said defendant, in breach of his said duty, negligently and carelessly allowed the said wire to become broken, and negligently and carelessly omitted to repair the said wire, and wrongfully and unlawfully and negligently allowed the said wire to project into and remain in the said public street, charged with electricity, and dangerous to life and limb.

6. By reason of the said wrongful and negligent conduct of the defendant, the plaintiff, by coming into contact with the said wire as aforesaid, sustained serious damage; he was severely burnt, and received other injuries and shocks to his person, was incapacitated for a long period, and is crippled for life, having permanently lost the use of his right hand, and altogether sustained loss and damage to the extent of £2,500.

The plaintiff claims:

(a) The sum of £2,500 as and for damages as aforesaid.

(b) Alternative relief.

(c) Costs of suit.

Defendant's plea:

1. The defendant admits the allegations in paragraphs 1 and 3 of the declaration.

2. As to paragraph 2, the defendant does not admit that when the plaintiff first came in contact with the wire mentioned, to wit, when he negligently took the said wire into his hand, the said wire was charged with electrical power, and specially says, further, that if the said wire was then charged with electrical power, that power was not derived from any work or undertaking of the defendant Council.

3. The defendant Council says that the electric lighting system established by it is a lawful undertaking for the public benefit, and in regard to the placing, keeping, and maintenance of the said system, including the said wire, the defendant Council is bound to exercise such care and diligence as the law requires, including reasonable care and diligence to prevent any of its wire from coming into contact with any person when charged by it with electrical power; but the defendant is not bound to make good consequence or damages due to accident, the act of others, or any cause, being the act or default of the defendant Council or its servants or agents.

4. Save as aforesaid, the defendant Council denies the allegations in paragraphs 4 and 5 of the declaration, and specially denies that the injury complained of by the plaintiff was caused by any neglect or careless act or default on its part or on the part of its servants or agents, or by any electrical current or power which was generated by or under the control of the defendant Council, or which was any part of its undertaking.

5. The defendant Council admits that the plaintiff was injured and sustained serious damage by an electrical shock transmitted through the wire of which the plaintiff laid hold as aforesaid on the date in question, but does not admit that the damage so sustained amounts to £2,500, and specially denies that the damage so sustained was caused by the wrongful and neglectful conduct of the defendant Council as alleged in the declaration, and more especially in paragraph 6.

6. With regard to the other allegations in paragraph 6, describing the consequences to the plaintiff of the said electrical shock, the defendant Council has no special knowledge, and therefore does not admit those allegations.

7. The wire referred to was carefully and diligently placed, kept, and maintained by

the defendant Council, and was fitted and adjusted with a fuse or fuses whereby upon a break occurring in the said wire the passage through the said wire of the electrical current or power generated by and under the control of the Council was stopped, and the defendant Council, so soon as it had notice that a break had occurred in the said wire, forthwith carefully and diligently caused the said wire to be duly replaced and repaired.

Wherefore the defendant prays that the plaintiff's claim may be dismissed with costs.

The replication was general.

Sir Henry Juta, Q.C. (with him Mr. De Villiers), for the plaintiff; Mr. Schreiner, Q.C. (with him Mr. McGregor), for the defendant.

The plaintiff, in his evidence, said that while he was proceeding home on Feb. 27, "something as it were caught hold of him" at the corner of Church & Long streets, throwing him on the ground and causing him to become unconscious. He saw a wire just before being seized, which was hanging across the railings in front of Nannucci's place. He denied having taken hold of the wire. Another witness deposed to finding the plaintiff entangled in a wire, which was fastened to an iron pole in Long-street, but the witness could not say whether it was fixed to a pole in Church-street. Two days previous to the accident he saw the wire hanging down. Being unable to get the wire from off the boy's hand he cut it with an axe as close to the pole to which it was fixed as he could. The wire was charged with electricity. The boy's hand was smoking at the time. Only one wire was hanging down. Other witnesses stated that they had made complaints about the wire hanging down in a dangerous position. Evidence was also led to show that the boy's right hand was permanently disabled. The electrical engineer of the Town Council stated that there were five wires, one of which was neutral, two for house lighting, and two for street lighting. During the day there was no electrical power in the wires. Four feet below these wires were the tramway wires, which were continually charged and if a Town Council wire came into contact with one of these it would fuse. A human being who seized a live lighting wire would receive a shock of a maximum of 220 volts. The wires were inspected once in every four days. No complaints were made before February 27. There was an indication on one of the tram line wires showing that it had burned. It was also stated that there were

two broken wires. Another electrical engineer stated that if the wire had been hanging down on the railing it would have fused and become dead. The injuries caused to plaintiff could not have been caused by a wire charged with 220 volts unless the wire was seized or firmly held. In cross-examination he said that the Town Council system was dangerous. The tramway wires were usually charged with a current of 500 volts.

Sir Henry Juta, Q.C., was not called upon.

Mr. Schreiner, Q.C.: Our defence is that we were carrying out a statutory undertaking under Acts 26 of 1893 and 42 of 1895. Some wrongful or negligent act must be proved. The mere fact that a wire was hanging down is not in itself proof of negligence. Negligence cannot be presumed against us. In a private undertaking anything done by the private person is done at his risk and peril; whereas in the case of a statutory undertaking, there must be clear and positive proof of negligence. Six months have elapsed before any action was taken. This, although not a bar in this case (it would be in a case against a Divisional Council), according to the Municipal Acts, would not be countenanced by the Court. The boy must have seized the wire, and so contributed to any negligence that may be found to exist against us. It must be proved that the wire broke through some fault of ours. We did everything that could be reasonably expected of us. If we had known the wire was down, and left it, there would have been negligence. *Mangan v. Atterton* (L.R.I., Exchequer, 239); *Hughes v. Macfie* (2 H. and C., 744, or 33 L.J., Exchequer, 177); *Clerk and Lindacell on Torts* (pp. 427-429); *Lynch v. Nordin* (1 Q.B.D., 29, or L.J., 10 Q.B., 73). The electricity was not generated by the Town Council; it was caused by contact with the tramline wires. The contact was caused by the plaintiff pulling the wire down on to the tramline wire. This was contributory negligence. *Newman v. East London Town Council* (5 Sheil, 41; 12 Juta, p. 61); *Clingen v. Ross* (9 Sheil, 105; 16 S.C.R., 162). The damages claimed are excessive. The boy is young, and can learn to use his left hand.

Sir Henry Juta, Q.C., on the amount of damages: The boy's parents are poor, and the boy will have to earn his living as an artisan or a mechanic. He should be given an amount which will secure to him an annuity of about £20 a year.

De Villiers, C.J.: Whatever else may be doubtful in this case, there is no doubt

whatsoever that the boy—the plaintiff—met with a serious injury. His right hand has been rendered practically useless; therefore the injury was a serious one. At the same time the Court cannot lose sight of the fact that the boy is still young, and will be in a much better position to accustom himself to the use of the other hand, than would be the case had he been older. Then his position in life and other circumstances must be remembered, and these are reasons for the damages not being so great as they otherwise would be. I agree that the Town Council could not be held liable for accidents if there was no proof of negligence. But in the present case there is proof of negligence. It was shown that the wire was slack on the Sunday, when it was hanging down within 18 inches from Nannucci's store. On the following day (Monday) it was observed by a telegraph linesman to be still slack; a man accustomed to notice such things. Not only did he notice that it was slack, but he reported the matter to his superior. Another witness residing in the Johannesburg Hotel opposite, had observed the wire to be slack. Now it is said that the Town Council was in the habit of inspecting the wires all round the town every four days, and that it was impossible to inspect all the wires oftener. In the opinion of the Court this argument cannot hold good. We cannot lose sight of the fact that in dealing with electricity the Council was dealing with a dangerous agent, and that they are bound to protect the public from that dangerous agent. In this case there is clear proof of negligence on the part of the defendants. The fact that they did not ascertain the circumstance that the wire was down is *prima facie* proof of negligence. The Court cannot lose sight of the fact that the wire had been broken in the same place before, and that this occurred in a populous part of Cape Town. Moreover in the present case forty-eight hours elapsed between the falling of the wire and its being remedied. Now it was urged that there was contributory negligence on the part of the boy. That I cannot admit. I do not see that it would have been contributory negligence on the part of a grown-up person, much less a boy, to take hold of the wire. No passer-by was to know that that harmless-looking piece of wire was charged with electricity, or think that it could possibly do any injury. Certainly on the part of this boy his swinging his hands cannot be taken as contributory negligence. He seems to have been swinging

his hands, and to have got entangled in the wire. There was no wrong in his touching the wire; any passer-by might have done it. It is not as if he went out of his way to touch machinery, for example. I think it has been clearly proved that there was negligence on the part of the Town Council, and that there was an utter want of contributory negligence on the part of the boy, the plaintiff. At the same time the Court does not want to give vindictive damages, and will award the plaintiff £400 damages, a sum that will give him a fair start in life.

Buchanan, J.: I concur with the foregoing judgment, but wish to add one point upon which the Chief Justice has not touched, and which I would like to emphasise. I consider it was a grave fault on the part of the Town Council in not taking precautions to prevent the contact of their wires with the trolley wires. Therein I consider the Council has been guilty of negligence.

Maasdorp, J., concurred.

[Plaintiff's Attorneys, Messrs. Van Zyl and Buissinne; Defendant's Attorneys, Messrs. Fairbridge, Arderne and Lawton.]

WOOLVEN V. WOOLVEN. { 1901.
Nov. 28th.

Judicial separation—Claim in reconvention—Divorce—Costs.

Where a wife sued her husband for judicial separation on the ground of cruelty, and he claimed in reconvention a decree of divorce, the Court, on being satisfied that the plaintiff had committed adultery, granted a decree of divorce, but, as the Court was also satisfied on the evidence that the defendant had been guilty of cruelty to his wife, ordered him to pay the cost of the action.

This was an action for judicial separation instituted by Ada C. Woolven against her husband, Stephen G. L. Woolven, who claimed in reconvention a decree of divorce on the ground of adultery.

The plaintiff's declaration set out that the parties resided in the Cape Division, and were married by ante-nuptial contract on May 16, 1894. That from and after the year 1898 the defendant frequently used violent

and abusive language towards the plaintiff, and violently assaulted her to such an extent as to make life with him intolerable. Further, that defendant was addicted to drink. On these grounds she claimed a decree of judicial separation and £15 per month as alimony.

The defendant in his plea denied having assaulted the plaintiff, but admitted that he ordered her out of the house. In a claim in reconvention he alleged that during the months of July, August, and September, 1900, the plaintiff committed adultery with William Pfister and George von Gootsicht, and consequently claimed a decree of divorce.

Sir Henry Juta, Q.C. (with him Mr. Close), for the plaintiff.

Mr. Gardiner for the defendant.

The plaintiff in her evidence said that frequent quarrels arose between her and her husband on account of the latter's daughter. As a result of this in June, 1898, the defendant struck her in the face and "knocked her about considerably." She complained to her father, and leaving her husband remained with her father some time, subsequently going back to her husband. Matters became as bad as ever, the defendant being intoxicated frequently, and while so intoxicated using her very severely. She denied the charges of adultery, but admitted writing anonymous letters to George von Gootsicht. The plaintiff's father bore out her statements with regard to the violent assaults complained of.

The defendant said the quarrels were caused by the plaintiff's bad temper and defiant attitude assumed towards him. She extravagantly contracted debts beyond their means. He admitted slapping her once when she assaulted his daughter. The plaintiff was addicted to drink.

Pfister and Von Gootsicht gave evidence to the effect that they had committed adultery with the plaintiff, and were corroborated by another witness who was present at the time the misconduct took place between Von Gootsicht and the plaintiff.

Buchanan, J.: There is clear evidence in this case that the defendant ill-treated the plaintiff. No doubt he may have received provocation, but he used violence in a way that nothing whatever disclosed in this case can justify. I think a great deal of the ill-treatment shown in this case, and also the subsequent misconduct of the plaintiff was due to the fact that both parties indulge too freely in intoxicants, and I think that

the plaintiff, having been ill-treated in this way, was thoroughly justified in leaving her husband. After the first assault, however, and before the second, and before the wife permanently left her husband, there is no doubt that she misconducted herself: The wife now sues for a judicial separation, and had there not been the evidence there is on the other side, she would certainly have been entitled to judgment. The question I have to decide is whether adultery has been proved against the wife. She wrote letters to the man Gootsicht, in which she addressed him as "Dear George," and made appointments with him, not at her father's house, where she was then staying, but at her sister's, and the plaintiff and her sister were not in their conduct very discreet. The letters, coupled with the other evidence, force me irresistibly to the conclusion that the plaintiff misconducted herself with the parties named in the plea, and judgment must therefore be given for the defendant (plaintiff in reconvention) on the claim in reconvention for divorce. The conduct of the defendant was, however, such that he, and not the plaintiff, should pay the costs. Judgment will be given for the defendant on his claim in reconvention, the defendant (the husband) to pay the costs.

SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), the Hon. Mr. Justice BUCHANAN, and the Hon. Mr. Justice MAASDORP.]

ADMISSION. { 1900.
 { Nov. 29th

Mr. M. Bisset moved for the admission of Arthur George Blake as an advocate of the Supreme Court.

Order granted and the oath administered.

PROVISIONAL ROLL.

BROWN V. SAMUEL SHORT.

Mr. Buchanan moved for a decree of civil imprisonment against the defendant, upon a debt of £30 with interest and £8 10s. 1d. costs and charges. Provisional judgment was obtained on August 23 last. A return had been made by the Deputy-Sheriff of Beau-

fort West to the effect that the goods and chattels of the defendant were insufficient to cover the costs of levy, and they were therefore released. A copy of the writ of execution and the return of *nulla bona* was put in.

There was no appearance for the defendant and a writ of civil imprisonment was granted as prayed.

PRINCE, VINTCENT AND CO. V. GEORGE T. GREEN.

Mr. M. Bisset moved for the final adjudication of defendant's estate as insolvent. Granted.

S.A. MUTUAL LIFE ASSURANCE CO. V. CHRISTIAN CORNELIUS CLOETE, JUN.

Mr. Benjamin moved for provisional sentence upon a mortgage bond for £200, together with interest. The bond had become due by reason of the non-payment of interest. It was also asked that the property specially hypothecated be declared executable.

Provisional sentence granted, and the property declared executable.

HOFMEYR AND ANOTHER V. COENRAAD W. J. M. STELSMA.

Mr. S. Solomon moved for the final adjudication of defendant's estate as insolvent. Granted.

BOLFES, NEBEL AND CO. V. ISIDOR MANCHESTER AND AARON AARONSON.

Mr. McGregor moved for judgment against the estate of Manchester (deceased) for sums amounting to £694 8s. 8d., for goods sold and delivered, and for £185 14s. 4d. on a promissory note, with interest and costs of suit.

Granted.

TENNANT, JUN. V. MARK PERCY, VAL MILNER.

Mr. Rubie moved for judgment, under Rule 329d, for £39 9s. 3d., with interest and costs of suit.

Granted.

ATTWELL V. C. P. H. MYBURGH.

Mr. Buchanan moved for judgment, under Rule 320d, for £33 13s. 3d., for professional services rendered and disbursements made by plaintiff on behalf of defendant, with interest *a tempore morae*, and costs of suit.

Granted.

DE WAAL AND CO. V. W. BARKER AND ANOTHER.

Mr. De Waal moved for judgment, under Rule 329d, for £4 8s. 10d., balance of account for goods sold and delivered, with interest *a tempore morae*, and costs of suit. Granted.

TOWN COUNCIL V. ESTATE OF STEER.

Mr. Schreiner moved, under Rule 319, for judgment in default of plea for two sums of £44 8s. 7d. and £22 respectively, being Municipal rates and Municipal water rates due on certain property in the insolvent estate. Granted.

MCLEROTH V. MCLEROTH. { 1900.
Nov. 29th.

This was an action instituted by Alexander McLeroth against his wife Maria Magdalena McLeroth, for a decree of divorce, on the ground of her adultery with one William Jones, of Woodstock. The declaration set out that the plaintiff joined the South African Light Horse in November 19, 1899, leaving immediately with that corps for Richmond-road, and returned to Cape Town, where his wife was, in August, 1900. On October 13, 1900, the defendant was delivered of a child, of which the plaintiff was not, and could not be, the father. There were two minor children of the marriage, of whom the plaintiff claimed the custody.

There was no plea, the defendant being in default.

Mr. Maskew appeared for the plaintiff.

Alexander McLeroth, the plaintiff, said he and his wife lived together until November 19, 1899, when he joined the S.A. Light Horse, and went to Richmond-road. Then he was ordered to Natal, and on December 28, 1899, passed through Cape Town on his way there. He then saw his wife, but only on the transport. On witness's return in August, 1900, he saw his wife. In consequence of her state he taxed her with having been unfaithful to him, and after a time she admitted that she had misconducted herself with a man called Jones, who lived at Woodstock and was employed at Atmore's mill. Witness immediately left, and instituted the present action.

Emma Dirks, a midwife, deposed to attending defendant on October 13 last.

The Court granted a decree of divorce, plaintiff to have the custody of the two minor children of the marriage.

[Plaintiff's Attorney, Mr. Paul de Villiers.]

KEYTER V. KEYTER.

{ 1900.
Nov. 29th.

This was an action instituted by Anthony Petrus Keyter against his wife Margaretha Dorothea Keyter for a decree of divorce, on the ground of her adultery with one White. The declaration set out that the parties were married in 1889, and thereafter lived at Calvinia until 1895, when the plaintiff went to Kimberley and the defendant came to Cape Town, where she committed adultery with the said White in 1896. There were two minor children of the marriage, one a boy and the other a girl. The plaintiff claimed a decree of divorce and the custody of the boy.

There was no plea, the defendant being in default.

Mr. Molteno appeared for the plaintiff.

F. H. le Sueur certified to the correctness of the copy of the certificate of marriage put in.

Anthony Petrus Keyter, the plaintiff, deposed that he was married to defendant in 1889, and after that they lived at Calvinia until 1895. There were two children born of the marriage, a boy, ten years of age, and a girl, seven years of age. The boy was with witness, and the girl with the mother. Witness went to Kimberley in 1895, and in 1896 he received a letter from his wife confessing that she had been unfaithful to him. He had since endeavoured to trace his wife, but unsuccessfully.

Rebecca Mouton deposed that in 1895 she was in the service of Mr. and Mrs. Keyter at Calvinia. In that year she came down to Cape Town with defendant and the child, and stayed at Woodstock with a Mrs. Staack. While there a man named White came to the house, and later on they went together to a station. Witness did not know the name of it where they alighted, and waited half the night for the following train. They all slept in one room. Proceeding, witness gave evidence as to defendant's misconduct. Witness asked her mistress if she was not ashamed of herself to behave in that way. Witness went on with them to Ceres, where she left them, White and defendant going on.

Decree of divorce granted, the plaintiff to have the custody of the minor boy as prayed.

[Plaintiff's Attorneys, Messrs. Walker and Jacobsohn.]

[Before the Hon. Mr. Justice BUCHANAN and the Hon. Mr. Justice MAASDORP.]

MASTER V. BOARDMAN.

{ 1900.
Nov. 30th.

Mr. Nathan appeared for the defendant in this matter, which was for the usual order upon the executor to file accounts and applied for a postponement, there having been some misunderstanding.

Mr. Howel Jones appeared for the plaintiff, and consented to the postponement.

The matter was ordered to stand over until December 12

REGINA V. GEYER.

{ 1900.
Nov. 30th.
Dec. 4th.

High treason—Domicile—Allegiance—Annexation.

G. was born in the Orange Free State in 1854, and resided until 1871 in a portion of the Orange Free State which was annexed to the Colony by Proclamation No. 67 of 1871. Since that year he continuously resided in the district annexed without, however, having at any time been formally naturalised as a British subject.

Held, that he owed allegiance to the Sovereign of Great Britain during a time when the civil and military administration of that portion of the district in which he resided had temporarily fallen into the hands of the Government of the Orange Free State, and committed the crime of treason against the laws of this Colony by joining the forces of his native country at such a time and by orders of the representatives of the Government of that country.

This was an argument on a point reserved for the decision of the Supreme Court. The point was reserved by Hopley, J., presiding judge at the trial of Geyer, who was charged at the Kimberley Criminal Sessions with the crime of high treason, convicted, and fined. The original indictment served upon the prisoner alleged that he was a

British subject at the date of the crime. The facts established by the evidence were briefly these: The accused was born on the farm Stinkfontein, Modder River, in the year 1854, his father being a Cape Colonist. In the same year the Orange Free State obtained its independence. Included in the Free State as constituted in 1854 was the farm on which the accused was born. This farm was by Proclamation 67 of 1871 annexed to Griqualand West, becoming thereby British territory. Prior to and subsequent to the annexation, the accused continued to reside on the farm Stinkfontein, remaining there until the farm was on the 14th October, 1899, occupied by the Republican forces, then invading the Colony, and annexed to the Orange Free State. The accused, who had not obtained letters of naturalisation as a British subject, but who was a registered voter, was commandeered by the Free State authorities for military service under the laws of the Orange Free State, and rendered military service. For so doing he was charged with the crime of high treason at Kimberley. At the hearing of the charge the Crown Prosecutor applied to have all words in the indictment which alleged that he was a British subject struck out, and the case was allowed to proceed on the ground that the accused owed local allegiance to the Queen. The accused, through his counsel, contended that not being a British subject, the duty of allegiance was owed by him only so long as the Crown was in a position to protect him, and that under the circumstances he could not commit the crime of high treason. On his conviction his counsel requested that this point might be reserved for argument before the full Bench of the Supreme Court.

The statement of the case by Hopley, J., which in conclusion sets out *in extenso* the point reserved, was as follows: "At the trial the Crown Prosecutor moved to have all the words which alleged that the accused was a British subject struck out of the indictment. This was allowed, and the case proceeded on the ground that the accused owed local allegiance to Her Majesty by virtue of his domicile in the district of Kimberley within her dominions. The evidence showed the accused to have been by birth a subject of the Orange Free State; that in 1871 he resided in a portion of the Orange Free State, which was annexed by the Proclamation 67 of 1871, and that though he had never been naturalised he had ever since 1871 resided with his family and all his pro-

perty in the district of Kimberley, where he had even been placed, presumably by inadvertence, upon the voters' roll. When the war between the two Republics and Her Majesty's Government broke out the forces of the enemy invaded the district of Kimberley and took possession of that portion of it in which the accused resided. They also issued proclamations professing to annex it to the Orange Free State. Thereafter, from about the end of October, 1899, to about the middle of February, 1900, the Orange Free State carried on the *de facto* Government of that portion of the country. They appointed a landdrost at Barkly West, who exercised civil jurisdiction, and their military forces were in complete possession of the territory in question. During the period of the Free State occupation of the ward in which he lived, the accused was 'commandeered' under Free State martial law, and served under the Free State military authorities until about the middle of February, when Kimberley was relieved, and the Republican forces retreated from the district, shortly after which event he was arrested. At the close of the case for the Crown prisoner's counsel moved that the case should be withdrawn from the jury on the ground that there was no evidence of any crime committed by the prisoner, whose duty of allegiance to Her Majesty, he maintained, ceased when the protection of her flag, upon which such duty was founded, failed. I refused the application, but reserved the point for the consideration of the Court of Appeal in criminal cases. The case proceeded, and the jury convicted the prisoner on the general facts, whereupon prisoner's counsel moved in arrest of sentence on the same grounds. I informed him that the point had been reserved, and would be forwarded as above stated. Thereafter the prisoner was sentenced. The point reserved for the consideration of the Court of Criminal Appeal is whether a subject of the Orange Free State by birth, who was in 1871 residing in a portion of the Orange Free State which was annexed by Sir Henry Barkly's proclamation, No. 67 of 1871, and who has since that year resided continuously in the district of Kimberley, without, however, having at any time been formally naturalised as a British subject, owed any allegiance to Her Majesty the Queen during a time when the civil and military administration of that portion of the district of Kimberley in which he resided had temporarily fallen into the hands of the Government of the Orange Free State, and

whether he committed any crime against the laws of this colony by joining the forces of his native country at such a time and by orders of the representatives of the Government of that country."

Mr. Burton, for the accused: The appellant is not a British subject, but a subject of the Orange Free State. Mere residence in the Colony for a number of years will not cast on him the duty of allegiance to England. The words which implied that accused was a subject of Her Majesty were, at the request of the Crown, struck out of the indictment. The accused was born in the Orange Free State.

[De Villiers, C.J.: Are we going beyond the point reserved? If we go into the question as to whether accused was a British subject or not, is there not ample evidence that he was? I think that if a country is annexed the inhabitants of that country, that is those who elect to remain, become British subjects. That was decided only recently.]

There are distinguishing circumstances in this case. The words in the indictment as to the accused being a British subject were specifically omitted in this case.

[De Villiers, C.J.: Is it necessary in an indictment for high treason to state that the accused is a British subject?]

That is essential. See *Foot* (48, 4, 4).

[De Villiers, C.J.: Mr. Ward, what position does the Crown take up in the matter?]

Mr. Ward (for the Crown): I will argue that the man was, and is, a British subject. The words were taken out of the indictment because there was a risk, if the accused were proved not to be a British subject, of the indictment being held to be bad.

Mr. Burton: The Crown has shifted its position. The point reserved is whether the accused owed local allegiance by virtue of domicile.

Mr. Ward: By section 34 of Act 36 of 1896, the Crown has no voice in the matter of a point reserved.

[De Villiers, C.J.: Mr. Burton, will you argue the question as to whether the accused is a British subject or not?]

Mr. Burton: The territory in which the accused resided was annexed to the Colony in 1871. Prior to that date, it was Orange Free State territory. Before the proclamation of 1871 he was a subject of the Orange Free State, and the question is what effect that proclamation had on his status. Ordinarily speaking, the subjects of a country which is conquered or ceded will, unless they removed, become subjects of the new

power. Here there was no conquest, and no cession, but mere annexation. See *Foot* (48, 1, 4). The proclamation under which this territory was taken over set forth that the territory was ceded by Nicholas Waterboer and the tribe of Griquas, whom the proclamation, issued on October 27, 1871, declared British subjects, and the territory acquired British territory. This chief and his tribe thus became British subjects. But the proclamation did not declare any people British subjects other than this chief and his tribe. This man was a Free State subject, and was in the position of an alien in this territory. Let us take, for example a foreigner in the Free State, who did not owe allegiance as a subject of the Free State Government. How can it be said that on the annexation of that country by Great Britain, everyone, not only Free State subjects, irrespective of nationality, would be obliged to transfer their allegiance to Great Britain? The Crown must go that length to establish their case. In this case there must be consent by the accused. The whole rationale of the transfer of allegiance is that the subjects whose allegiance is transferred are consenting parties. See *Wheaton* (3rd Edition, p. 233, section 151a) on the question as to whether domicile imposes the duty of allegiance. It is too much for the Crown to say that the transfer of the territory and allegiance of this chief and his tribe brought with it as British subjects every alien who lived in the territory. No extent of domicile can place any man in such a position as to bind him to allegiance as a subject. The Crown say that even if he were not a British subject and this was the position taken in the Court below, where they did not proceed with the charge that he was a British subject—he would owe allegiance by reason of of his domicile. On that point I would submit that, although he did owe a description of allegiance, it was not such as to compel him to take a course of conduct claimed from him by the Crown. See *Encyclopædia of the Laws of England* (Vol. 1, p. 235). The only allegiance owed by accused was local allegiance while he lived under the protection of a flag, and this was only owing so long as the protection of that flag was extended to him. *Wheaton* (p. 469, section 346); *Hallack* (Vol. 2, p. 450). The Republics had effective occupation of this territory, and the protection of the flag of Great Britain ceased. It is submitted that the Crown has not established that this man was a British subject, or that he has broken any allegiance owed by him in such a way as to

be able to charge him with this offence. The mere fact that the accused's name appears on the voters' list does not affect the question.

Mr. Ward: On the annexation of the territory in 1871 the prisoner became a British subject. There is absolutely no proof that he was other than a British subject. He was born in the territory known as the Orange Free State in 1854, the same year that the independence of that State was declared, and there is really nothing to show that he is not actually a British subject by birth. Further, people on British territory are presumed to be British subjects, until they show the contrary to be the case. On the annexation of Griqualand West, all residents therein became British subjects.

Regina v. Jizwa (11 Juta, 387).

[De Villiers, C.J.: The proclamation of 1871 annexed Waterboer's territory, and not Free State territory. The accused was an alien in Waterboer's country. Is there any authority for saying that aliens become subjects of the country annexing the territory in which they reside?]

The accused admittedly is a British subject. He enjoyed British protection for 25 years, and when war broke out he elected to remain until the enemy came, and after that he joined them. His name is on the voters' roll. There is no difference between the duties of a natural-born subject and one who owes temporary allegiance. See *Green's Encyclopedia of Scotch Law* (Vol. 12, p. 107). The occupation by the enemy was only temporary. As long as a country takes effective steps to maintain its sovereignty its subjects are bound by their allegiance. It is not necessary to aver that a person charged with high treason is a British subject. *Foster's Crown Law* (p. 826).

Mr. Burton in reply: If there was not effective occupation, there would be a difference, but in this case there was such effective occupation, and the protection of the British flag was no longer given to the accused. Only two or three days elapsed between the declaration of war and the occupation by the Republic of the territory. *Hall's International Law* (4th Edition, p. 497).

Curia ad vult.

Pantea (December 4).

De Villiers, C.J.: The accused man Geyer was indicted before the Hon. Mr. Justice Hopley and a jury on a charge of high treason, and the statement of the presiding judge in connection with the point reserved is as follows: "At the trial the Crown Prosecutor moved to have all the

words which alleged that the accused was a British subject struck out of the indictment. This was allowed, and the case proceeded on the ground that the accused owed local allegiance to Her Majesty by virtue of his domicile in the district of Kimberley within her dominions. The evidence showed the accused to have been by birth a subject of the Orange Free State; that in 1871 he resided in a portion of the Orange Free State, which was annexed by the Proclamation 67 of 1871, and that though he had never been naturalised, he had ever since 1871 resided with his family and all his property in the district of Kimberley, where he had even been placed, presumably by inadvertence, upon the voters' roll. When the war between the two Republics and Her Majesty's Government broke out the forces of the enemy invaded the district of Kimberley, and took possession of that portion of it in which the accused resided. They also issued proclamations professing to annex it to the Orange Free State. Thereafter, from about the end of October, 1899, to about the middle of February, 1900, the Orange Free State carried on the *de facto* Government of that portion of the country. They appointed a landdrost at Barkly West, who exercised civil jurisdiction, and their military forces were in complete possession of the territory in question. During the period of the Free State occupation of the ward in which he lived, the accused was 'commandeered' under Free State martial law, and served under the Free State military authorities until about the middle of February, when Kimberley was relieved, and the Republican forces retreated from the district, shortly after which event he was arrested. At the close of the case for the Crown, prisoner's counsel moved that the case should be withdrawn from the jury on the ground that there was no evidence of any crime committed by the prisoner, whose duty of allegiance to Her Majesty he maintained ceased when the protection of her flag, upon which such duty was founded, failed. I refused the application, but reserved the point for the consideration of the Court of Appeal in criminal cases. The case proceeded, and the jury convicted the prisoner on the general facts, whereupon prisoner's counsel moved in arrest of sentence on the same grounds. I informed him that the point had been reserved, and would be forwarded as above stated. Thereafter the prisoner was sentenced. The point reserved for the consideration of the Court of Criminal Appeal is whether a subject of the

Orange Free State by birth, who was in 1871 residing in a portion of the Orange Free State which was annexed by Sir Henry Barkly's Proclamation No. 67 of 1871, and who has since that year resided continuously in the district of Kimberley, without, however, having at any time been formally naturalised as a British subject, owed any allegiance to Her Majesty the Queen during a time when the civil and military administration of that portion of the district of Kimberley in which he resided had temporarily fallen into the hands of the Government of the Orange Free State, and whether he committed any crime against the laws of this colony by joining the forces of his native country at such a time and by orders of the representatives of the Government of that country." Now, Mr. Burton, in the course of a very able argument, contended that this territory was not really Orange Free State territory at the time of the annexation, but that it belonged to Waterboer, and that the accused was in the same position as if he had lived in Waterboer's territory at the time of the annexation. He also contended that if a hostile force came into the country, and took possession of it, and annexed it, he was justified in joining the forces of his own country, and could not be lawfully convicted of high treason, whatever other crime he might be convicted of. This contention referred to Waterboer's country, however, and not to Free State territory. The Court must confine itself to the point reserved for consideration. It was said therein that the territory at the time of the annexation was Free State territory. Well, if it was so, it would be probable that all persons who then resided in the territory and who chose to remain in that territory became British subjects. That point has been taken for granted in several cases, and several cases have been cited showing what is the law on the subject. The mere fact of annexation does not create the relationship of sovereign and subject, but as this man remained in the annexed territory we must assume that he elected to become a British subject. Applying that principle to the present case, we find that for eighteen or nineteen years after the annexation of this country, which was said to have been Orange Free State territory, the accused remained there. That amounts to his becoming a British subject. Then there is the further point in the present case that strengthened the contention very much that he was a British subject, viz., that his name actually ap-

pears upon the Voters' Roll, and a man cannot be on the roll without being a British subject. The counsel for the accused says that a person might not be aware that he was placed upon the Voters' Roll; he might have been placed there without his consent. But the accused himself admitted in his evidence that he was a registered voter, and he did not say that he was made one without his knowledge and consent. In these circumstances it was impossible to regard him as not being a British subject.

Buchanan, J., and Maasdorp, J., concurred.

The point reserved was accordingly decided against the accused.

[Attorney for Accused, Gus Trollip.]

MEYER V. BEYERS.

1900.
Nov. 29th.
30th.

The plaintiff's declaration was as follows:

1. The plaintiff is Willem Pieter Daniel Meyer, residing at Caledon; the defendant is Johannes Wilhelm Wessels Beyers, a farmer, residing at Kwartel Rivier, division of Caledon.

2. On or about September 24, 1900, and at Caledon, the plaintiff purchased from defendant, and defendant sold to plaintiff, a pair of bay horses, the property of the defendant, for the sum of £60 sterling; when the said pair of horses were purchased and sold as aforesaid, the defendant warranted and guaranteed that they were sound in every respect and free from disease, including diarrhoea.

3. The plaintiff paid the purchase price and took delivery of the said horses, but shortly afterwards discovered that one of the said horses was unsound and suffering from disease—to wit, diarrhoea—and was in consequence wholly unfit for the purpose for which they were purchased, whereupon the plaintiff sent back the said pair of horses to defendant and requested a return of the purchase price, but the defendant refused to receive back the said horses or to return the price.

4. The warranty and guarantee given by the defendant were not true, and by reason of the unsound condition of the said horse plaintiff is now entitled to demand a return of the purchase price, and payment of the sum of 7s. 6d. a day from the 2nd October, 1900, for the "keep" of the said horses, he tendering to return the said pair, but the defendant refuses to pay the said sum or to receive the said horses. The plaintiff claims:

(a) The sum of £60, he tendering to return the said horses to defendant.

(b) The sum of 7s. 6d. a day for the "keep" of the said horses, reckoned from October 2, 1900.

(c) Alternative relief.

(d) Costs of suit.

For a plea to the declaration, the defendant said:

1. He admits the allegations in paragraph 1.

2. He admits the sale to the plaintiff on the 24th September of the said horses, his property, for the sum of £60. He admits further that he warranted and guaranteed the said horses were sound and free from faults. He further says that he stated on the 24th September, and in connection with the said sale, that the horses had never yet purged. Save as above he denies the allegations in paragraph 2.

3. As regards paragraph 3, he admits the payment to him of the purchase price and the taking of delivery by the plaintiff; he also admits that the plaintiff sent back to him the said horses, and that he refused to receive back the said horses or to return the price. Of the further allegations in the said paragraph he has no knowledge, and refers this Hon. Court to such proof thereof as the plaintiff may adduce. He says that the horses were not sold by him for any specific purpose, but were sold in the ordinary way of business, and he craves leave to refer to the several matters or things in the last preceding paragraph set out, and he says that he is not liable for the diarrhoea, if any, which one of the horses, for reasons of which he has no knowledge, may have become subject to.

4. As to the warranty and guarantee given and statement made by him and referred to in paragraph 4 of the declaration, he refers again to paragraph 2 of his plea, and he says that the said warranty was given and the said statement made in good faith, and that they were true. He says specially that during the time he had had the horses, being a period of about seven months, they had never purged, and that the horses were sound when they were sold by him to the plaintiff. He admits the tender of the said horses, but denies the remaining allegations in paragraph 4, and denies any liability in respect of the aforesaid sale as in that paragraph declared. Wherefore he prays that the plaintiff's claim may be dismissed with costs.

The replication was general.

Mr. Searle, Q.C. (with him Mr. Maskew), for the plaintiff.

Mr. McGregor (with him Mr. Close) for the defendant.

The first witness called was the plaintiff, Willem Pieter Daniel Meyer, who deposed that he lived at Caledon, and owned horses and carts there. He carried on the business of conveying passengers to and from the station. On September 24 witness met Mr. Beyers in the village, and asked him if he still had the pair of horses he had in his possession some weeks before. He said he had, and on witness asking his price, said he would sell them for £60. Witness met him again that afternoon at Mr. Kleyn's office. In the presence of Mr. Kleyn's clerk, Mr. Le Roux, and one Esterhuyzen witness told defendant he could not use a horse that purged, was lame, or jibbed, and defendant said the horses were sound, and in case they showed any fault witness might send them back. Mr. Kleyn came out, and asked defendant if he could not sell the horses a little cheaper. Defendant would not reduce the price, and after witness had obtained another assurance that the horses were sound he agreed to take them, and the sale was concluded. The same afternoon witness went out to defendant's place (Quartel River), and got the horses, which appeared to be all right. On the way back he met Mr. Beyers, who guaranteed that the horses were sound. Thereupon witness paid him the money. A man, named Pfeiffer, was with witness. He took the horses next morning a short distance, and on the 27th used them for conveying passengers. One of the horses began to purge after having been driven for about an hour and a half. On returning, the horse again started purging, and was sick. Witness, on the 1st October, drove the Magistrate for a journey occupying four hours to the court, and the same horse started purging again. The same thing happened on returning the next day, witness having to walk the horse for three miles. Witness went to Mr. Theron, his attorney, whom he got to write a letter to Mr. Beyers demanding a refund of the money on account of the horse purging. When witness bought the horses he drove them home in front of his two other horses. After the letter was written witness sent the animals back, led by another horse. He saw Mr. Beyers, and told him he had sent the horses back. Beyers said it was a concluded sale, and the same day the horses were sent back to witness, one of them being very sick on arrival. Witness had kept the

horses in his stable ever since, but had not used them. A horse of that kind was of no use to witness. The cost of keeping the horses was about 7s. 6d. a day.

Cross-examined: Witness had seen the horses pulling in the street before he bought them. About five or six years ago witness was found guilty of indecent assault and was on the Breakwater. He was also convicted of stealing oats. Beyers did not say the horse had faults. When witness saw Mr. Beyers on returning with the horses immediately on purchasing them, he told Beyers that he was satisfied with the horses so far. He denied telling a man named Botha that it was the wheat which had made the horse bad.

Hendrik Breda, C.C. and R.M. of Caledon, corroborated the plaintiff's evidence as to the one horse having purged on the 1st and 2nd October. Other witnesses said that the defendant guaranteed that the horses would not purge, and that they saw the horse purging before, and subsequent to the sale. Another witness, Michels, stated that he was offered 10s. by the defendant to say he knew nothing about the horses.

For the defence,

Johannes Gerhardus Beyers, the defendant, stated that he had farmed at Quartel River, about sixteen miles from Caledon, since March last. The horses in question he had bought at the Paarl at the end of last year from John Carstens. Witness bought the horses as sound horses. Witness drove the horses at a fast rate from Paarl to a place beyond Caledon, and they stood the journey very well, showing no signs of diarrhoea. Witness had since then driven to Genadendal and back, three hours each way, and with three persons on the cart, and there were no signs of diarrhoea on the part of the horses. If there had been anything wrong with the horses they must have shown it then, as it was a very bad time for horses, influenza being prevalent. On his own farm witness worked the horses often, and they had never shown signs of anything wrong with them. As to the occasion referred to by the Bredekamps the horse had had a slight diarrhoea owing to witness having fed it on green barley and wheat with rust. Witness did not mention to the Bredekamps that green forage was the cause. Before the sale of the horses witness had only spoken to the plaintiff once, and that was nine days before the sale, when plaintiff remarked that the horses had improved very much. On September 24 plaintiff asked witness if he would sell the horses.

Witness refused to sell at first but afterwards as his forage crop was a failure he decided to sell, and offered the horses for £60, giving plaintiff the refusal until two o'clock that afternoon. Plaintiff asked if the horses had any faults, and witness said "Meyer, I drive about a lot; if the horses have any faults, everyone must know of them." He asked if they were sound horses, and witness said they were. He also asked if the horses had the fault of purging, and witness said no. At a quarter past one plaintiff said to witness in Mr. Hartford's bar that he would take the horses and asked witness to come to Mr. Kleyn's office, as Mr. Kleyn was to advance him the money. At Mr. Kleyn's office they wanted witness to reduce the price by 5 per cent., but he would not, and said he would rather cancel the sale. Mr. Kleyn asked if the horses had any faults, and witness said that in his service they were always good. After Meyer said he would take the horses, witness told him that if he found the horses had any broken knees, or such faults, he could bring the horses back. Plaintiff gave witness the money when he met him coming back with the horses, and plaintiff was then satisfied with the horses. On September 30, witness again met plaintiff at Caledon, and the latter said the horses were all right, that he had had them in to Houwhoek, and the one horse purged a little, but he did not think anything of that as he thought it was the forage. He also said he was satisfied, and that he could have sold the horses for more than he paid for them. On October 3, witness met plaintiff, and the latter just said: "Mr. Beyers, I have sent the horses back." Witness said: "Do you think I am a fool to take the horses back after you have used them for ten days." Witness then saw the horses, which were in low condition and clearly overworked. He refused to accept the horses, and sent them back. Witness denied generally the statements of plaintiff's witnesses as to the horse purging badly while it was in his (witness's) possession. Witness did not know the witnesses Salomons, Hendricks, and Michels. The last named had never been in witness's cart on the way to the hunt. There was absolutely no truth in Michels' statements. The story about witness, while with Mr. Krige, offering Michels ten shillings to say nothing about the horses was a deliberate untruth. The stories of the two boys who had been in witness's service were also untrue.

By the Court: Witness's case was that the horses had not the fault of purging when in his possession.

A number of other witnesses gave evidence as to the soundness of the horses during the time they were in defendant's possession, and Mr. Roome and one of his assistants gave evidence as to plaintiff having purchased some "smut" oats to give to his horses which the witnesses said they would not give to their horses.

Dr. Hutcheon, Colonial Veterinary Surgeon, said that among the diseases of horses was diarrhoea. Purging might be contracted suddenly, and one single journey would be sufficient to cause it to become permanent or chronic, even when the horses had been perfectly sound before, if they did not receive proper treatment and immediate rest.

After hearing Mr. Searle in argument, the Court gave judgment for the defendant with costs.

Buchanan, J., in giving judgment, said: It is common cause that these horses were warranted sound, and it may be a question whether the complaint objected to in this case comes under the definition of unsoundness or not. Dr. Hutcheon, who has been called, says that this complaint is more prevalent in this country than in any other, and that it is recognised as unsoundness if it goes beyond a mere functional stage, though even then he considers it a curable disorder. The evidence of defendant's witness, Stoffberg, is to the effect that it is a recognised fault in a horse. The question, however, whether or not generally it can be considered as within a warranty of soundness, need not be considered in this case, as the evidence supplements the admission in the plea, and shows that this defect has been expressly guaranteed against. The issue is, therefore, reduced to one of fact, namely, whether these horses, or rather one of them had contracted the fault before it was sold to the plaintiff. It is stated by several of the witnesses for the plaintiff that the horse had displayed the disorder before it was sold, mentioning particularly the time when it was being shod. There is no doubt that one of the horses did show the disorder at the time it was being shod, but I think the explanation given (as to the manner in which the horse had been fed just previously) is a reasonable explanation. After referring to the evidence of Mr. Roome's servants, which was contradicted by the evidence of Mr. Roome himself and another servant his lordship pointed out that the onus of proof that the horse was suffering from the complaint when sold was

on the plaintiff, and that unless that was sufficiently established the Court would be unable to assist the plaintiff. Proceeding, he referred to the evidence of the two boys who had been in the employ of the defendant, who, he said, certainly did not leave their master with very clear characters; one certainly did leave under not very reputable circumstances, and their evidence was contradicted by that of other witnesses. As to the man Michels, unfortunately he had a bad record, and the Court could not overlook that, when his evidence was contradicted by other witnesses. Taking that view of the evidence on the whole he thought that although it was a hard case for the plaintiff, judgment must be given for the defendant with costs.

Maasdorp, J., concurred.

[Plaintiff's Attorney, Paul de Villiers; Defendants' Attorneys, Messrs. Dempers and van Ryneveld.]

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G.) and the Hon. Mr. Justice LAURENCE.]

COHEN V. GROMAN. } 1899.
} Nov. 30th.

This was an action instituted by Myers Cohen against Harris Groman to recover the sum of £83, being the purchase amount of certain 50,000 bricks sold by the plaintiff to the firm of Cohen and Phillips, the payment of the purchase price being guaranteed by the defendant.

The declaration was as follows:

1. The plaintiff is Myers Cohen, of Cape Town, and the defendant is Harris Groman, of Green Point.

2. On or about the 12th October, 1899, the plaintiff sold to one Samuel Philips, a partner in the firm of Cohen and Philips, and as such representing the said firm, and the said Samuel Philips, acting in such representative capacity, purchased from the plaintiff 50,000 bricks for the sum of £97 10s., being at the rate of 39s. per thousand, and the plaintiff undertook to deliver 30,000 of the said bricks at Reform-street, and 20,000 at Bree-street, Cape Town.

3. On or about the 13th October, 1899, the defendant, in writing (hereunto annexed, marked A), guaranteed the payment to plaintiff of the purchase price of the said bricks.

4. Thereafter, on or about the 13th October, 1899, it was agreed between the plaintiff and the said Samuel Philips, acting for and

on behalf of the firm of Cohen and Philips, that the firm should remove and cart away the 50,000 bricks at their own cost, and that in consequence thereof the plaintiff should make a reduction in the purchase price at the rate of 7s. per thousand for the 20,000 bricks, and 5s. per thousand for the 30,000 bricks above referred to.

5. On or about the 17th October, 1899, the plaintiff informed the defendant of the agreement referred to in paragraph 4, and he expressed his satisfaction and approval thereof.

6. The firm of Cohen and Philips removed the 50,000 bricks and had the benefit thereof, but the plaintiff has, owing to the insolvency of the said firm, been unable to obtain judgment either in whole or in part of the purchase price of the bricks.

7. All things have happened, all times have elapsed, and all conditions have been fulfilled necessary to entitle the plaintiff to claim from the defendant the sum of £83, being the purchase price of the 30,000 bricks at 34s. per thousand, and 20,000 at 32s. per thousand.

Wherefore the plaintiff claims:

- (a) The sum of £83.
- (b) Interest *a tempore morae*.
- (c) Alternative relief.
- (d) Costs of suit.

A.

I, the undersigned, agree to deliver to Messrs. Cohen and Philips about 50,000 bricks, say 30,000 to Mr. Groman's property, Reform-street, and, say, 20,000 to Bree-street, within about two weeks (2) and agree to accept payment for same from Mr. Groman at 39s. per thousand in three months from date.

(Signed) H. GROMAN.

(Signed) M. COHEN.

October 13, 1899.

The defendant, in his plea, admitted the contract set out in paragraphs 1 and 2 of the declaration, except that he said the contract was made with Ephraim Cohen, the other partner in the firm referred to. He admitted his signature affixed to the contract, but said that, at the same time, it was agreed that tickets of delivery should be produced before payment was made. He further said that only 12,000 bricks were delivered, and tendered £24 13s. 6d. in full settlement. He also denied the allegations made in paragraphs 4, 5, and 6, and prayed that the plaintiff's claim might be dismissed, with costs.

Mr. P. S. Jones for the plaintiff.

Mr. Buchanan for the defendant.

The first witness was

Myers Cohen, the plaintiff, who said he had a brickfield at Zonnebloem. On the 12th October he saw Mr. Phillips, who called on him and asked if he had any bricks to sell. Witness said he had 50,000, and agreed to sell them to Phillips at 39s. He wanted credit, but as he was a volunteer and was called out, witness refused this. Phillips, however, said that Groman would stand security. Witness saw Phillips and Groman the following day, and went with them to an office in Adderley-street, where a document (produced) was signed. Afterwards Phillips came to him, and as a result witness again saw Groman. He told him that Phillips wanted to take over the bricks in his own wagon, and Groman, after speaking to Phillips, agreed to the arrangement, the price to be reduced 5s. on 30,000 and 7s. on 20,000. Groman said he would give witness a cheque, and witness afterwards took Phillips and showed him where the bricks were. He had no dealings with Ephraim Cohen. He had had transactions with the firm before, and had dealt with Phillips as representing the firm. The bricks had been removed.

Cross-examined: He did not see Ephraim Cohen at all in the matter. It was not arranged at the time that there should be delivery tickets. It was not true that witness could not get carts to deliver the bricks, and tried to get the new arrangements on this account. Cohen and Phillips had summoned witness in the Magistrate's Court for the non-delivery of the bricks. On receiving the summons, witness went to see Groman, who said he would let witness know whether the action was withdrawn. Plaintiff was in default when the action was called, but witness got his costs. The agreement was changed because Phillips asked that it should be. Witness never gave any delivery tickets nor did he instruct a man to do so.

Samuel Phillips said he was a partner in the firm of Cohen and Phillips, now insolvent. Witness was now a corporal in the Dukes. He bore out the plaintiff's evidence as to the new agreement being made by which the bricks were to be carted by the firm, and the reduction made in price. It was a sale to witness guaranteed by Groman. Witness did not know when the bricks were removed. Groman was financing the firm.

Another witness, by name Selitzsky, deposed to having been given 24,000 bricks by Ephraim Cohen and Mrs. Phillips, who held her husband's power of attorney, in lieu of

payment for work done. Groman knew that these bricks were being given him.

Another witness said he carted away, on instructions from the firm, 14,000 bricks.

Harris Groman, the defendant, was called. He admitted the original agreement, by which the plaintiff undertook to deliver the bricks. Witness never altered the agreement. About a month afterwards Cohen and Phillips summoned plaintiff for non-delivery of the bricks, and then Myers Cohen came out to see witness to get the action withdrawn. Witness told him that the action would be withdrawn if he delivered the bricks. Witness persuaded Ephraim Cohen not to go on with the case, and the latter did not therefore go to the court and had to pay the costs, as Myers was present. Witness got bricks from elsewhere to finish the work.

Cross-examined: Before the agreement witness went to Frank's house. Phillips then told witness the price of the bricks. The transaction, however, was with Ephraim Cohen, who was witness's cousin. He had never seen the man Selitzsky in his life until a fortnight ago. When witness promised that the action should be withdrawn, Myers Cohen undertook to deliver the bricks. Witness admitted having been sentenced to three years' hard labour for fraudulent insolvency, after being arrested at Southampton.

Saul H. Marcus gave evidence to the effect that the books of Cohen and Phillips did not show any debt to Selitzsky. Witness lived with defendant, and managed part of his business. He was present when Myers Cohen came to see Groman about withdrawing the summons from the Magistrate's Court. The plaintiff then said if the case was withdrawn he would waive his claim for the bricks already supplied. During the time witness kept the books of Ephraim Cohen and Phillips, bricks were supplied to the firm by other people.

Cross-examined: He did not examine all the books of the firm.

After argument,

De Villiers, C.J.: The original contract between the parties is in writing, and is fairly intelligible. Without any alteration in the document, it is quite clear that the plaintiff was bound to deliver the bricks at the places mentioned in the contract, and could not call upon the surety to pay on behalf of his principals unless they were so delivered. The question now is whether the Court will believe the witnesses for the plaintiff as to the subsequent alteration, or whether they will believe the defendant him-

self, who denied the alteration. By this alteration, it was agreed to take delivery at the place where the bricks were, and there was as consideration for this change a very considerable reduction in the price to be paid for the bricks. Now if the defendant was a consenting party to this alteration, it is clear that his suretyship would remain so long as the plaintiff performed his part of the agreement. The Court has come to the conclusion that the version given by the plaintiff is the correct one, that it was agreed that delivery should be given where the bricks were, and that the defendant consented to this, and consented, in consideration of the reduction, to remain surety. The bricks having been so delivered, the defendant is consequently liable. Judgment will therefore be given for the plaintiff, with costs.

Laurence, J., concurred.

[Plaintiff's Attorney, Mr. J. F. E. Bernard; Defendant's Attorneys, Messrs. Fairbridge, Arderne and Lawton.]

HENRY V. HENRY.

This was an action for divorce, defendant being in default.

Mr. P. S. Jones applied for a postponement till the 2nd February, as Mrs. Henry, the plaintiff, was at present unable to obtain the attendance of her principal witness.

Postponement granted, as prayed.

MOLL V. CIVIL COMMISSIONER { 1900.
OF F.A.A.B.L. { Dec. 1st.

Voters' list—Revision Court—Mistake—Rectification.

Although the Civil Commissioner may admit that he has made a mistake in inserting certain names in the printed voters' list which had been disallowed by the Revision Court, the Supreme Court will not rectify the mistake without giving the persons concerned the opportunity of showing cause to the contrary.

The Court will however rectify an error admitted by the Civil Commissioner to have been made in excluding from the list names which had been duly allowed by him at the Revision Court.

This was an application on notice calling on the Civil Commissioner of Paarl, in his capacity as Parliamentary Registering Officer for that district, to show cause why his decisions given in open court when adjudicating on claims and objections in connection with the Parliamentary Voters' List should not be carried out in framing the final list. The notice was originally served on the Attorney-General, but on the 22nd November the Court, on the application of the Attorney-General, substituted the Civil Commissioner of Paarl as respondent, and requested him to state to the Court whether any discrepancies existed between his decisions in open court and the voters' list as printed. The applicant's affidavit set forth that he was a registered voter in the electoral division of the Paarl. In 1899 a general registration of voters was made, and the Civil Commissioner, as registering official, held a court for the purpose of settling the list of voters. At that court certain claims for registration were allowed and some refused. The petitioner alleged that the decisions of the Civil Commissioner as registering officer in allowing and disallowing certain claims had not been given effect to in the printed official lists. The petition went on to state that since the registration of voters there had been no election of members of Parliament, but owing to the death of Mr. J. S. Marais an election was about to be held, the nomination of candidates having been fixed for December 11. On finding the alleged errors in the list the petitioner wrote to the Attorney-General, and the latter in reply admitted that there were some errors, though not so many as alleged, but said that such errors could not be rectified by him. How these errors arose it was impossible to say. The Magistrate was much occupied at the time, and there appeared to have been many changes on the staff while the lists were being compiled. The Attorney-General pointed out that the official list was signed by the Civil Commissioner, and if there were errors the errors could only be remedied in a court of law.

A list of the inaccuracies was attached to the affidavit of the applicant. These appear sufficiently from the revising officer's report.

The affidavit of Walter Rumbold Piers, Civil Commissioner of Paarl, was to the effect that he was revising officer in 1899, and adjudicated upon and settled the list of persons entitled to the Parliamentary franchise in that electoral division. In response to the order of

the Court of November 22, he stated that he had to adjudicate upon about 1,500 cases, and was engaged for a period extending over four weeks. On referring to the records, he was in a position to report that of the 16 persons whose names did not appear on the list, although their names were alleged to have been allowed, 3 ought to be on the list, 1 was withdrawn, 5 did not appear to have made claims at all, and 7 were contested and the objections allowed. Of the 27 persons whose names did figure although not qualified, 10 appeared on the Field-cornet's lists, and as no objection was taken, they did not come before him (the Civil Commissioner), 14 were contested, and the objections being dismissed, their claims were allowed, and 3 were mistakes, which were reported later. Of the 7 persons alleged to appear in more than one field-cornetcy, the Civil Commissioner said that it was impracticable to prevent mistakes of this nature, if mistakes they were, when so many persons bore almost identical names. Unless his attention was specially drawn to the facts, or a formal objection was lodged by the parties interested, they were not likely to be noticed. For him to strike off names under any pretext after the courts were closed would be, to say the least of it, a very bad precedent to establish. He had made some inquiry about a few, but not all, of the cases mentioned by the petitioner and thought that in two cases at least the petitioner was misinformed. As regards the 28 persons alleged to be entitled to vote as illiterates, the Civil Commissioner was not aware that any of them claimed exemption from the education test and to be registered as such, the majority were not on the 1891 list. Regarding the 23 individuals appearing as illiterates, but who were alleged not to be entitled to exemption from the education test, the Civil Commissioner declared that some were on the 1891 list, and appeared correctly in italics, and the others had been put on by the Field-cornet, presumably persons of the education qualification, and needed not to appear in italics. As regards the mistakes admitted, the Civil Commissioner stated that they seemed to be the result of clerical errors.

Mr. Currey, for the applicant: The list referred to is that mentioned in section 14 of Act 14 of 1887. Sections 10 to 27 of Act 9 of 1892 prescribe the way in which the lists must be framed. There is no appeal from any of the decisions of the Civil Commissioner. All the applicant asks is that the decisions of the Revision Court be given

effect to; that the names on the list that should not be there be struck off, and that the names not on the list that ought to be there be added.

[De Villiers, C.J.: We cannot strike off names without giving those people an opportunity of appearing to show cause why they should not be struck off.]

The applicant does not wish the Court to remove any names, but merely to order the lists to be printed as the Civil Commissioner directed. In any case, the list will have to be amended for faulty numbering of the names. One name is not numbered at all. This is not in accordance with the law. See section 43 of Act 9 of 1892. The list requires to be amended with regard to the illiterates. Twenty-eight persons, who claimed to be registered as such, have not been distinguished in accordance with section 34 of Act 9 of 1892. Again, some people appear on the list twice. Jesse Kimber, a jeweller, appears three times, viz., as 227 and 755 in the North and South Field-cornetries of Paarl, and as 1,495 in the Wellington Field-cornetcy. The Court has power to order the corrections to be made. See *Rogers on Elections* (Vol. 1, p. 354). Our Acts make no provision for the posting of the list before final printing. In a case cited in *Rogers*, at p. 354, the Court refused to order an amendment of a list, but there complainant had an opportunity of seeing the list before it was printed. See *Botha v. Garcia and Others* (6 Juta, 86); *New Gordon Diamond-mining Co. v. Du Toit's Pan Mining Board* (9 Juta, 150); *Moll v. Civil Commissioner of Paarl* (7 Sheil, 454).

Mr. Searle, Q.C. (with him Mr. Joubert), for the respondent: As regards the three people who the Civil Commissioner admits should be on the list, it is only a clerical error that they are not on, and I have no objection to their being put on. Nor have I any objection to the removal of the three who, according to the Civil Commissioner, should be struck off.

[De Villiers, C.J.: Then you will consent to the giving of an order that these people be called upon to show cause why their names should not be struck off?]

Yes. As to illiterates, I say it is difficult to distinguish people in a place such as the Paarl, where so many people have the same name. There are a number of people in Paarl who have the same name, but they are of different occupations. The Civil Commissioner cannot be sure that these are the same people. There is no duty placed upon the Civil Commissioner to in-

vestigate whether they are or not, unless there is an objection made to him in regard to any names. We trust to the law, that punishes a man who votes twice, to prevent abuse in this direction.

De Villiers, C.J.: As to the persons whose names appear on the list, and which the respondent admits ought not to be there, the Court can make no order striking off the names without giving an opportunity to the persons interested to show cause to the contrary. They are only three in number, and as the applicant's counsel does not insist upon a rule being served on them, no order will be made upon this part of the application.

As regards the persons whose names ought to appear but do not appear on the list, the respondent admits that he has made a mistake by excluding three names which had been allowed by the Court of Revision. These names ought certainly to be restored. The Registration Act does not provide for the rectification of such mistakes, but I do not understand that either the Attorney-General at the last hearing of this application, or the counsel for the present respondent, denies the power of this Court to rectify an admitted mistake so as to make the official printed list conform to the actual decision of the Revision Court. The petition states that there are many others whose names were allowed at the Revision Court, but excluded from the printed list. The respondent denies the statement. *Prima facie* the Court is bound to accept the official statement made by the Civil Commissioner as revising officer. If that statement is to be contested, a fuller investigation would have to take place than is possible by means of affidavits. The records kept by the Revision Court would have to be minutely examined, and the witnesses on both sides fully examined and cross-examined. For the present the Court must confine its order to the three admitted mistakes of omission. The names of the three voters will be inserted in the proper place in the list, and in order not to disturb the numbering of the other voters' names each of the new names will bear the number of the name immediately preceding, but with some additional letter, to distinguish it from such number.

There is a further objection that several names ought to have been underlined as being the names of persons whose qualification is reserved by the 3rd section of Act 9 of 1892. Four such names have been found, which will have to be underlined and when

printed will have to be placed in italics. The next objection is that the names of several persons appear on the list more than once, but although there is a similarity in names, there is not sufficient proof that the persons are the same. In every case there is either a difference of occupation or of residence, or of spelling, which justified the respondent in treating the persons as different persons although bearing the same names. No provision in the Registration Acts has been cited imposing on the Civil Commissioner the duty of seeing that the same person is not registered in different field-cornetcies. If, however, he knows as a fact that the same person is so registered in more than one field-cornetcy, it is by no means clear that he would not be justified in calling upon such person to elect in which field-cornetcy his name is to appear. Nothing of the kind has happened in the present case, and the last objection falls to the ground.

Buchanan and Maasdorp, J.J., concurred.
[Applicants' Attorney, V. A. van der Byl;
Respondent's Attorneys, Messrs. Van Zyl
and Buissinne.]

Ex parte BEKKER. } 1900.
In re BEKKER. } Dec. 1st.

Mr. Solomon moved to have one of the executors testamentary in the estate of the late J. J. Bekker, of Aliwal North, removed from his office as executor. The petitioner, J. N. Bekker, and one J. G. van Aardt, were executors testamentary in the estate, but on the invasion by the enemy of Aliwal North the latter went into rebellion, accepting the military office of commandant. On the re-occupation of the district he left with the enemy, and was last heard of at Delagoa Bay. The estate was not yet finally liquidated.

The order was granted as prayed.

In re D.R. CHURCH OF BURGHERSDORP

Mr. Close applied to have a rule *nisi* granted under the Derelict Lands Act made absolute.

Granted.

AHLBOM V. GROMAN. } 1900.
 } Dec. 3rd.

This was an action brought by C. Ahlbom v. Harris Groman, to recover the sums of £20 and £101 19s. 5d., being amounts due by defendant on a suretyship contract and for goods and materials supplied respectively.

1. The plaintiff, C. E. Ahlbom, carries on business as a timber merchant at Cape Town under the style or firm of Ahlbom, Gullander and Co., and the defendant resides at Sea Point.

2. On the 12th December, 1899, the plaintiff obtained the judgment of this Hon. Court against Ephraim Cohen and Samuel Philips, trading as Cohen and Philips, for the sum of £145 4s. 11d., with interest from the 24th November, 1899, and costs, subsequently taxed and allowed at £10 4s. 9d. The sum of £50 was paid on account on or about the 23rd December, 1899.

3. Thereafter the said Cohen and Philips made an offer to the plaintiff to liquidate the balance of the amount of the said judgment and costs by monthly payments of £10, commencing with the month of March, and on the 3rd February, 1900, the defendant offered to undertake and guaranteed to the plaintiff the due payment of such instalments if the plaintiff would accept the said offer.

4. On the 3rd February, 1900, the plaintiff accepted the offer, and the said Cohen and Philips on that date paid the further sum of £10 to the plaintiff on account of the said judgment, and costs.

5. Two monthly instalments of £10 became due for the months of March and April respectively, but the said Cohen and Philips failed to pay the same.

6. Proceedings were instituted in the Court of the Resident Magistrate for Cape Town against the defendant for recovery of the said sums, but upon an exception to the jurisdiction the cause was dismissed.

7. The estate of Cohen and Philips was on the 19th day of April, 1900, placed under sequestration as insolvent, and the plaintiff offers to cede to the defendant all his rights against the said insolvent estate and against the said Cohen and Philips and each of them and their estates since sequestrated, in respect of the amount due under the aforesaid unsatisfied judgment.

8. All things have happened, all conditions been performed, and all times elapsed necessary to entitle the plaintiff to demand payment by the defendant of the sum of £20, being the amount of the two aforesaid unpaid instalments, together with interest *a tempore morae*.

9. For a further claim, the plaintiff says that, during the month of February, 1900, and at the special instance and request of the defendant, he supplied to him, through one Nathan Pelanis, who was employed by the defendant to complete the work under

certain building contracts between the defendant and Cohen and Philips, wherein the latter made default, certain goods and materials to the extent of £101 19s. 5d. required for the purpose of completing the said work, and the defendant is indebted to the plaintiff in the said sum.

10. On May 17, 1900, the defendant tendered and offered to pay £56, with costs of the summons in this suit, in full settlement of the plaintiff's claim, but the said tender was refused as wholly insufficient.

Wherefore the plaintiff claims:

(a) Judgment for the sum of £20, with interest *a tempore morae*.

(b) Judgment for the sum of £101 19s. 5d., with interest *a tempore morae*.

(c) Alternative relief.

(d) Costs of suit.

The defendant's plea was as follows:

1. The defendant admits paragraphs 1, 2, 6, and 7 of the declaration.

2. As to paragraphs 3 and 4 thereof, the defendant says that he has no knowledge of any arrangement between the plaintiff and the said Cohen and Philips for the liquidation of the balance of the amount of the said judgment by instalments, as in those paragraphs set forth, and the defendant denies that he offered to undertake or guarantee, or undertook or guaranteed, to the plaintiff the payment of any such instalments.

3. The defendant has no knowledge of the matters referred to in paragraph 5 of the declaration.

4. The defendant denies paragraph thereof.

5. As to paragraph 9, the defendant says that he undertook and guaranteed to the plaintiff the payment of the goods and materials supplied to the said Pelanis, who was employed by the said Cohen and Philips, to the extent of £56; save as herein admitted, he denies the allegations in the said paragraph.

6. The defendant admits paragraph 10 of the declaration, and hereby repeats the tender in that paragraph referred to.

Wherefore defendant prays that the plaintiff's claim may be dismissed with costs.

Mr. Schreiner, Q.C. (with him Mr. Howel Jones), for the plaintiff.

Mr. McGregor (with him Mr. Close) for the defendant.

After some evidence had been heard, the Court granted judgment as prayed for the plaintiff, the defendant consenting thereto.

[Plaintiff's Attorneys, Messrs. Silberbauer, Wahl, and Fuller; Defendant's Attorneys, Messrs. Innes and Hutton.]

Ex parte DE JONG AND CO.

Mr. Close applied to have the firm of De Jong and Co. (Limited), merchants, of Cape Town and Belgium, placed in liquidation, and to have Messrs. De Jong (managing director) and Harry Gibson (secretary of the South African Association) appointed liquidators. Certain powers were also asked for under section 149 of the Companies Act of 1862.

Granted.

ALEMAN V. PARAZO.

This was an application made by the defendant in connection with an action for £112 in regard to a partnership between the parties, which was directed by the Court to be determined on December 3, 1900. The plaintiff Aleman had arrested the defendant, and on the 12th November applied for the confirmation of the writ of arrest. The defendant on that date offered personal security that he would remain in the Colony to meet the action to be instituted, and agreed to deposit with the Registrar of the Court certain passage tickets to Teneriffe. The Court granted an order in terms of the defendant's offer, and directed the action to be brought on December 3, 1900.

The plaintiff having taken no steps to bring the action, the defendant applied to have the action discharged, and the passage tickets returned.

Mr. Gardiner for the defendant.

The Court granted the order as prayed, the plaintiff to pay all the costs of the proceedings.

SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), the Hon. Mr. Justice BUCHANAN, and the Hon. Mr. Justice MAASDORP.]

Ex parte JESSIE MARGARET } 1900.
SANDELS. } Dec. 4th.

Mr. Nathan applied that a rule *nisi* granted under the Derelicts Lands Act to the petitioner as executrix testamentary in the estate of the late John Sanders, be made absolute.

Granted.

Ex parte STEYN.

Mr. Nathan applied that a rule *nisi* granted under the Derelict Lands Act in favour of the executor of the estate of the late H. R. Steyn be made absolute.

Granted.

Ex parte A. B. VAN DEN HOVEN.

Mr. Cloos applied for leave to the applicant to sell certain property, being portion of a farm over which he had passed a bond in favour of the children of his first marriage, by which he secured to them portions under the mutual will of himself and his first wife. He was now married a second time to a widow with six children. There was another bond on the property, and it was with the object of paying this off that he applied for leave to sell.

The Master's report was favourable.

Granted in terms of the Master's report.

REID V. REID.

Mr. Gardiner applied for the issue of a commission *de bene esse* to examine certain witnesses in connection with the above suit at Port Elizabeth, the Resident Magistrate of Port Elizabeth to be the Commissioner.

Granted.

In re BOTHMA.

Mr. Buchanan applied for an order confirming the sale of certain property in the estate of the late E. J. Bothma, to one of the executors in the estate. The sale took place after due advertisement, and at public auction. The major parties interested consented, and the Master recommended the confirmation of the sale as being in no way detrimental or prejudicial to the minors interested.

Order granted as prayed.

WOOD V. GILL. { 1907.
{ Dec. 4th.

This was an application on notice calling upon the respondent to show cause why an interdict should not be granted restraining him from allowing water to flow from his land on to the applicant's property.

The applicant's affidavit set forth that he was the owner of certain property at Muizenberg, on which he had recently erected a house. That this property was situate on the slope of the mountain. Behind this property was portion of the property belonging to the respondent. The applicant stated that directly above the two properties and in the

krantz of the mountain a stream of water took its rise, but did not flow direct on to the respondent's property, taking rather a northward course, and skirting the two properties. That the respondent diverted this stream and led the water to a tank which he erected directly above the applicant's property at a distance of some 80 feet. That this tank was not supplied with the proper apparatus for regulating the supply of water entering it, and consequently was continually overflowing. That the water which overflowed found its way by percolation on to the applicant's property, and was causing him considerable damage, having necessitated the pulling down and re-erecting of certain walls in his house, and other extensive works, which cost a considerable sum of money. That the applicant intended instituting an action against the respondent for damages.

An affidavit by George Colley, an expert, was filed, which set out that the damage was caused by the water from the respondent's overflow pipe, and that the overflow might be prevented by the expenditure of £5.

The respondent stated that the overflow water did not cause the damage complained of. That the dampness in the applicant's house was caused by reason of the fact that he built his house in an excavation made in the mountain side, which excavation served as an outlet for all the water contained under the surface of the mountain slope, which was very much waterlogged.

The applicant, in reply, said he was still prepared to submit the matter to a practical test, although the respondent had previously refused to agree to any such proposal.

Mr. Schreiner, Q.C., for the applicant.

Mr. Searle, Q.C., for the respondent.

De Villiers, C.J.: Upon the evidence as it stands, it is extremely doubtful whether or not the tank made by the respondent is responsible for the damage complained of, and the Court will not be justified in giving even a temporary interdict, unless there is strong *prima facie* evidence that the water from the tank causes the damage. At the same time, the offer made by the plaintiff to submit to the cause of the mischief being tested is a very reasonable one, and I hope that the respondent will comply with the proposal to have the test made. Mr. Colley, in an affidavit, said that the overflow from the tank can be remedied by the expenditure of a few pounds. I think the respondent might do well in consulting Mr. Colley on the subject, and accepting his advice. As to the costs of the application, that mat-

ter must stand over. Should it later appear that damage was done to plaintiff's property owing to a refusal to make the test, then respondent will be liable, not only to bear the costs, but also compensation for the damage done. The interdict will be refused, and no order would be made as to costs.

[Applicant's Attorney, Edmund Wood; Respondent's Attorneys, Messrs. Fairbridge, Arderne and Lawton.]

CARTER V. CAPE TOWN { 1900
COUNCIL. { Dec. 4th.

Municipal Regulations—Lease—Assignment.

This was an application on notice calling on the Town Council to show cause why it should not signify its approval of an assignment by the applicant to one Walder of his leasehold rights in respect of certain property leased by the Town Council to the applicant.

It appeared from the applicant's affidavit that the property was leased to him by the Town Council in 1897 for a term of 99 years, the applicant being bound to keep and maintain any buildings he might erect thereon in good and efficient order. He was bound to erect at least one building thereon within two years of the commencement of the lease. He might sublet all or any portion of the buildings erected, and might assign his leasehold rights subject to the approval of and conditions imposed by the Town Council.

The applicant erected eighteen houses on the land and constructed a road 24 feet wide and 100 feet in length, and was now desirous of transferring or assigning to Walder the leasehold rights to a portion of the houses and land, which has accordingly been sub-divided.

The respondent Council refused to allow the assignment according to the subdivisional plan, stating that the construction of the road did not proceed in accordance with certain regulations framed by the Council and promulgated in the "Government Gazette" on the 24th September, 1896. These regulations required written notice to be given to the Corporation before any new streets are made, and the sanction of the Corporation in writing. That by agreeing to the assignment as proposed, the Council will be approving of the subdivision of the property leased and will recognise the construction of a road which has not been made in accordance with its regulations. The proposed road was only 24 feet

wide, whereas it should, according to the regulations, be 40 feet in width. The Council further objected that if the road as constructed were recognised they could be compelled by Act 25 of 1897 to maintain such road. That at the expiration of the lease (99 years) all the land and buildings thereon became the property of the Council, and if such road were approved and any persons obtained a right of way over it the whole of the land as leased will not revert to the Council.

Mr. Searle, Q.C., for the applicant.

Mr. Schreiner, Q.C., for the respondent.

De Villiers, C.J.: There is nothing before the Court to show that the Town Council has to give reasons for its approval or non-approval in a case such as this. By the resolution of the Council dated December 24, 1896, there was a clear condition that consent had to be given by the Town Council, and that the lessee of the ground took over all the responsibilities of the previous lessees. One of these conditions was that he could not lease or assign without consent of the Town Council. I am not at all satisfied that this is an unreasonable condition. Therefore the application will be refused with costs.

Buchanan, J., and Maasdorp, J., concurred.

[Applicant's Attorneys, Messrs. Scanlen and Syfret; Respondents' Attorneys, Messrs. Fairbridge, Arderne and Lawton.]

SUPREME COURT

[Before the Hon. Mr. Justice LAURENCE and a Jury.]

MICHAU V. THE ARGUS PRINT- { 1900,
ING AND PUBLISHING CO. LTD. { Dec. 5th.
Libel—Damages.

This was an action brought by J. J. Michau against the Argus Company to recover the sum of £500 as and for damages for the publication of two paragraphs concerning him which were defamatory.

1. The plaintiff is, and was at all times, material to this pleading, a British subject, and is a Justice of the Peace and a duly admitted attorney and notary of the Supreme Court of this colony, residing and practising his profession in Cape Town; the defendants are a joint-stock company, duly incorporated

in this colony, carrying on their business therein, and having their head office in Cape Town.

2. The defendants are the proprietors and publishers of a newspaper called the "Cape Argus," which is published and printed in Cape Town, and circulates throughout the Cape Colony.

3. On or about the 3rd January last past the defendants falsely and maliciously published of and concerning the plaintiff, in their said newspaper, the following false, malicious, scandalous, and defamatory words, contained in a letter describing the siege of Kimberley by the forces of the South African and Orange Free State Republics, to wit: "All the news we got to-day was some meagre details of the fight at Modder River (meaning an engagement between the said Republican forces and those of Her Majesty), twelve days previously, the main facts of which we knew some time ago, but still satisfaction was expressed that the news was confirmed of those two Kimberley rebels, Messrs. J. J. Michau (meaning the plaintiff) and D. J. Maritz, who had been fighting with the Boers (meaning the said Republican forces), had been captured."

4. On or about the 1st March last past, the defendants falsely and maliciously published in their said newspaper the following false, malicious, scandalous, and defamatory words, to wit: "Our correspondent writes as follows: Last Wednesday (February 14) the notorious J. J. Michau (meaning the plaintiff) was here (meaning at Cradock, in the Cape Colony), and you should have seen the host of Boer friends and Bond members who were on the railway platform to see him off, and wish him good luck and so forth. We will not add our correspondent's remark as to what, in his opinion, should be the fate of such traitors and rebels as mustered to see Mr. Michau off," meaning thereby that the plaintiff had been guilty of treasonable practices and was not a fit and proper person for other than disloyal subjects of Her Majesty to associate with.

5. By reason of the aforesaid defamatory publications, the plaintiff has suffered damage to the extent of £500.

The plaintiff claims: (a) Five hundred pounds sterling (£500) as damages aforesaid; (b) alternative relief; (c) costs of suit.

For a plea to the plaintiff's declaration, the defendant said:

1. He admits paragraphs 1 and 2.

2. As to paragraph 3, he admits that he published on January 3 in the "Argus," as

portion of a letter received from a war correspondent, the words complained of, and that the said words refer to the plaintiff. He says that they were published *bona fide* and without malice, &c. a portion of war news.

3. As to paragraph 4, he admits that the words complained of were published on March 1 in the "Argus," and that they referred to the plaintiff; that the said words were published *bona fide* and without malice, being portion of a letter from a correspondent. He denies that the words are defamatory, and that they bear the construction placed upon them in the innuendo.

4. He admits that the words set out in paragraph 3 of the declaration are defamatory, but says that in no case has the plaintiff sustained any damages more than nominal damages by the publication as aforesaid, and he tenders the sum of one shilling in full satisfaction of any damages the plaintiff may have sustained in the premises, with costs to date. Save as above, he denies paragraph 5.

Wherefore subject to the above tender he prays that plaintiff's claim may be dismissed with costs.

Mr. McGregor (with him Mr. Rowson) for the plaintiff.

Mr. Searle, Q.C. (with him Mr. Gardiner), for the defendant company.

The first witness called was the plaintiff

Jan Johan Michau, who said that he was at present practising at Cape Town, and had been an attorney of the Court for seventeen years. For about ten years, until the end of last year, he had been a member of the firm of attorneys at Kimberley who were legal advisers to De Beers Corporation, and had been for several years a member of the Borough Council of Kimberley. He was and had been for some years a Justice of the Peace at Kimberley. He had a country residence at Modder River, about 25 miles south of Kimberley, and he frequently went there from Saturday to Monday. On Sunday, October 15, he left Kimberley for Modder River with his family. He went there by cart by a roundabout way because the Republican forces had pulled up the railway line. He believed the Boers were at Spytfontein, a station between Kimberley and Modder River, and he went some miles from there. He did not require a permit to leave, but he believed that martial law was proclaimed on that same day, and after that a permit was required. He arrived at Modder River the following morning, having slept for the night on the farm of some people he knew. He

remained at Modder River for some days. He had not intended remaining there, but after leaving his wife at that place had intended to return, along with his brother-in-law, Dr. Broadhurst, to Kimberley on the Tuesday. When he arrived at Modder River he found the place in possession of the Republican forces, and although he asked for a pass to return they would not grant it. Consequently he had to remain at his residence at Modder River. Later on he applied for a pass to come further south into the Colony, but that also was refused. They would not let him leave at all, so that his movements were somewhat circumscribed. On November 28 there was a battle at Modder River, and the place was occupied by British troops. Witness had left his house on that day because he was told there was going to be a fight, and he had better get out of the way. During the fight witness was with several others on a kopje about two or three miles below the railway line. He returned with his family to his house on November 29, and was arrested the following day. The Provost-Marshal, Captain Ross, was technically his captor, and all his communications were with him. By arrest witness meant that he was taken to his house, and told that he would be there under guard until taken away. He wanted to know what the charge against him was, but they would not tell him. Eventually he was told by Major Reid, who was in charge of the Intelligence Department, that he was charged with communicating with the enemy. Witness was kept under guard until December 2, when he was sent up to Cape Town on parole. He was told to come to Cape Town and see the Chief Staff Officer, who would make arrangements about his parole. On his arrival here he was taken straight to the Convict-station, and kept in custody there. There were some other prisoners on the same train, and they were under guard. After a time he was taken back, arriving at Modder River on Christmas Day. He was kept in custody all the time. When he got back to Modder River he was in the same position as before, being confined to his house. While there his attention was called to the publication in the "Argus" of January 3 of the first paragraph complained of. Three or four people, among them the Magistrate, Mr. Harrison, who was residing at witness's house, Mr. Franklin, Inspector of Claims at Barkly West, and Mr. Cummings, drew his attention to the paragraph in question. Either

the Magistrate or Mr. Franklin brought the paper to him. Just at that time witness was negotiating for bail, and his impression was that the paragraph undoubtedly affected his negotiations, and he would say that it was because of that that bail was refused. At that time there was no communication with Kimberley.

Mr. Justice Laurence: The correspondent at Kimberley could not have known very much about what you had been doing seeing that Kimberley was cut off.

Witness: I don't think so, my lord. Continuing, witness declared that to his mind this paragraph prejudiced his position at that time. On January 26 he was formally handed over to the civil authorities, and on that same day the Magistrate took a preliminary examination. Subsequently on February 20 he was formally committed for trial at Hope Town, but on February 17, in terms of an order of Court, he was released on bail, one of the conditions being that he should reside at Cape Town. At that time witness's family was at Cradock, and he got permission to see them, as he wished to bring them with him to Cape Town. He went there, saw his family, and brought them to Cape Town with him. He arrived here on February 23, and on March 1 his attention was drawn to a sub-leader in the "Argus," containing the second paragraph complained of. In the later editions certain portions of the paragraph were omitted. There was no foundation for the statement that he was a rebel, and was fighting for the Boers. There was no foundation in fact for these statements. In consequence of those paragraphs he had sustained injury. There was no truth in the correspondent's statement that a host of Bondmen came to see him off. Only his brothers and other relatives were there, about a dozen in all. As to the statement of January 3, there was no truth in it, and he had never been fighting in the Boer ranks. All these proceedings caused him discomfort, inconvenience, and loss. In consequence of that false report and other false reports, of which there were a good many at the time, he had suffered considerably in pocket. He had had to sever his connection with his firm in Kimberley. Clients of his had left him on account of these newspaper reports, he could not say on account of this particular report, but none of the libels he considered so serious as this libel. His practice in Kimberley was worth £2,000 a year to him, and as he

said, he had to give that up and start a new business. The partnership was dissolved by mutual consent. On March 23 witness received a communication from the chief clerk in the Attorney-General's office stating that the Attorney-General declined to prosecute on the charge of high treason against witness. He was not asking for vindictive or exemplary damages. He only wished to clear himself.

Cross-examined: The report of the preparatory examination in the "Argus" was incorrect. When he left Kimberley martial law was just proclaimed. He had no idea that Modder River was occupied by the Boers. He sympathised very much with the Boers. The Boer Landdrost of Jacobsdal called on him several times. He (witness) shook hands with De la Rey, a Boer General, and said "God be with you," not knowing, however, that he was just going to engage the British. He drove in a cart with De la Rey. He had done very well as an attorney since having taken up his residence in Cape Town. He made a speech at Paarl in which he gloried in being a rebel against martial law.

For the defence

Edmund Powell said he was the editor of the "Cape Argus," and had occupied that position for a great many years. The paragraph headed "Kimberley Siege" came from inside Kimberley. It came in a letter, portions of which were not used because some of the news was stale or had been superseded by other news. At that time all information passed through the hands of the censors.

By the Court: He forgot how the letters reached the paper. Mr. Rossiter was the correspondent in Kimberley of the "Argus," and the letter probably came by runner. When they published it they accepted that it was censored. Everything was censored. Even if it escaped censoring in Kimberley through coming by runner, and did not bear the mark of the railway censor it would have had to be censored at this end. They would not run the risk of not having it censored lest their correspondent should lose his licence in consequence. Everything was censored, and certainly many things were cut out at times which in his opinion could have been of no possible use to the enemy even if published.

Witness (proceeding) said their correspondent was an ordinary member of the "Star" staff of Johannesburg, who had been sent to Kimberley for special work on the shutting down of that paper, and to be war correspondent for the "Argus." Witness was

himself at Cape Town on January 3 as editor. The second paragraph referred to in the case was published in March. A private letter sent from Cradock was shown to witness by a colleague of his. He made the extracts which appeared in print. He saw Mr. Michau on the date of the explanatory paragraph in the paper. That was on March 2, the next day. When Mr. Michau came in he was very angry and excited. There was a queer mixture of friendliness about his manner. Then he began to speak about his attorney. Witness said to him: "Do you come as a friend or as an enemy." He said that because plaintiff began to speak of his attorney, and if he had come as an enemy witness did not wish to speak lest he should give his case away. Mr. Michau's statement in the box that he did not see the explanatory paragraph before it was printed was literally true. He certainly did not see the printed paragraph, but witness drafted it in shorthand, and then read the paragraph to him. Michau suggested some alterations, and witness made them. Witness asked him to say anything about his not being a rebel. Michau said no, he would stand by the decision of the Court in that matter.

By the Court: Michau said that witness had called him a rebel, and had done him damage. He understood Michau to be referring to the paragraph that had appeared in January.

By Mr. Searle: The explanatory paragraph was read to plaintiff before it was put in the paper. He seemed satisfied. Witness heard no more from Michau till May, when he got the demand for £500. Witness had no feeling against Mr. Michau, neither then nor now. He might have met him in public life at some Bond function or the like. He did not know Michau, and Michau did not know him when they met in witness's office.

By the Court: The Cradock letter was shown to witness by a colleague. They found that they had made a blunder, and the paragraph was withdrawn from the letter.

Other evidence was led to show that the plaintiff was frequently seen conversing with the Boer leaders.

After counsel had addressed the jury,

Laurence, J., summed up. He said that the plaintiff in this case sued for defamation of character. The question was whether the words used were defamatory in the sense meant by the law, viz., such as to bring him into contempt, hatred, or ridicule, and whether it was published by the defendant. If

the language used was libellous, and its publication by the defendant was proved then the defendant was liable, unless he could prove that the language was justified. No justification was pleaded by the defendant, and the real question to be decided was whether this was libellous, and if so, to what extent had the plaintiff suffered. His lordship then proceeded to review the evidence at considerable length, and said that if the plaintiff's case at his trial had been prejudiced by any comments made while it was *sub judice*, he would have had his remedy by taking action to cause the offender to answer for contempt of court. It might be said that a newspaper, in time of stress, would not have a proper opportunity of verifying its information. This would apply in the case of a batch of telegrams, but would it apply to a letter? It might also be urged that the responsible person on the staff of a newspaper would reason that from his knowledge of the correspondent he could rely upon him, but it appeared, in this case, that what he said in the letter must have been a matter of hearsay, and caution should have been exercised in the publication of such information, coming from such a source and at such a time. The question of damages was really ultimately the only question in the case, and he would suggest in dealing with this that the jury would take into consideration all the circumstances of the case, and bear in mind who the parties were. The plaintiff occupied a position in a profession which could be a good deal damaged by imputations of an injurious character appearing in a newspaper having a large circulation. The jury would also bear in mind that the circumstances were such as to make it possible that there was no want of good faith, and that there was no desire to do the plaintiff wrong. But that was not to be taken as being in any way a justification. His lordship told the jury not to allow themselves to be influenced by any feelings or prejudices they might have for one side or the other, and incidentally remarked that so long as jurymen were habitually actuated by the desire to do justice, the system of trial by jury would prove one of the most useful of the public institutions in relation to both criminal and civil cases. The jury would consider whether the publications were defamatory—this had been admitted in respect of the first, but denied in regard to the second—and if so, the amount of damages to which plaintiff was entitled.

The jury found a verdict for the plaintiff for £250.

Judgment was entered accordingly, with costs.

[Plaintiff's Attorneys, Messrs. Van der Byl and Van der Horst; Defendant's Attorneys, Messrs. Fairbridge, Arderne, and Lawton.]

SUPREME COURT

[Before the Right Hon. Sir J. H. DE VIL-
LIEPS, P.C., K.C.M.G. (Chief Justice),
and the Hon. Mr. Justice MAARDORP.]

In re COHEN AND PHILLIPS.

Mr. Buchanan applied on behalf of the trustee in the above-named insolvent estate for a commission to take the evidence of one of the partners, Phillips, in regard to the circumstances of the insolvency. Phillips, who was at present a Volunteer in the Colonial Forces, was about to leave for the front.

Commission granted, Mr. Howel Jones being appointed commissioner.

COMBRINCK V. BRITISH S.A. COMPANY.

Sir Henry Juta, Q.C., applied for a commission to take the evidence of one Pennant, in connection with this case.

Mr. Searle, Q.C., for the defendant company, consented.

Commission granted, Mr. Rubie being appointed commissioner.

In re MAARDORP.

Mr. Buchanan applied on behalf of C. H. Maasdorp for leave to raise certain money (£450 on a life policy for the purpose of supporting certain minors who were to be eventually interested in the life policy.

The Master suggested that only £400 be allowed to be expended in support of the minors, and the remaining £50 to be used in keeping the policy alive.

Order granted in terms of the Master's report.

IN THE MATTER OF THE MINORS } 1900.
EDINBERRY. } Dec. 7th.

This was an application for leave to sell certain property originally purchased by

Edinberry and then donated and transferred to his nine minor children. The property was worth about £600. Owing to his ill-health his income had decreased, and he could not afford to educate his minor children on the income derived from letting the property and paying the interest on bonds on his other property. He was prepared to pass a bond for the value of this property in favour of his children on other property owned by him.

The Master's report suggested that the course proposed be adopted.

Order granted in terms of the Master's report.

SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice). and the Hon. Mr. Justice BUCHANAN.]

CAPE TIMES LIMITED V. W. A. RICHARDS AND SONS. $\left\{ \begin{array}{l} 1900. \\ \text{Dec. 10th.} \\ 1901. \\ \text{Feb. 5th.} \end{array} \right.$

Libel—Newspaper company—Innuendo.

R., a newspaper company, published of C., which was also a newspaper company, and as such printed and published the daily “Cape Times,” and an annual record of the proceedings in Parliament styled “Hansard” the following passage:

“The ‘Cape Times’ is understood to supply the ‘Hansard’ reports which are expected to be correct productions of every member's utterances, irrespective of party or rank or personality. That they are nothing of the sort is notorious amongst the general body of honourable members. Nay, more, not a few of them are painfully aware that the ‘exigencies of space’ permit of a style of reporting which is nothing short of being scandalously one-sided, and which

consists of either wholly suppressing, or cruelly distorting in the process of shortening speeches of members who, for a variety of reasons, may be safely boycotted in the newspaper or ‘Hansard’ reports.”

C. sued R. for damages for libel, stating that the innuendo to be drawn was that C. carried on business in a dishonourable and dishonest manner, and for its own purposes wilfully suppressed and distorted the speeches of members and published false information. R. excepted to the declaration that it contained no ground of action.

Held, that the words were susceptible of a defamatory meaning.

Held, at the trial that as “Hansard” purported to be nothing more than a reprint, of the Cape Times Parliamentary Reports which did not pretend to be full reports of the proceedings of Parliament, R. had not gone beyond the limits of fair comment and was not liable in damages.

This was an argument on an exception taken by the defendant company to the declaration of the plaintiffs in an action in which they claimed £1,000 as damages for libel.

The plaintiff's declaration was as follows:

1. The plaintiff is a joint stock company, registered, with limited liability, and carries on business in Cape Town; the said company owns, prints, and publishes a daily newspaper called the “Cape Times.”

2. The defendants carry on a printing business in Cape Town, and print for publication a weekly newspaper styled “The South African Review.”

3. The plaintiff company has for many years past published a record of the proceedings of Parliament in a certain book issued annually, and styled “Hansard,” and the said publication purports to be, and is, a fair and impartial record of the said proceedings.

4. In or about July, 1900, the defendants printed for publication in the “South African Review” certain false, malicious, and de-

the language used was libellous, and its publication by the defendant was proved then the defendant was liable, unless he could prove that the language was justified. No justification was pleaded by the defendant, and the real question to be decided was whether this was libellous, and if so, to what extent had the plaintiff suffered. His lordship then proceeded to review the evidence at considerable length, and said that if the plaintiff's case at his trial had been prejudiced by any comments made while it was *sub judice*, he would have had his remedy by taking action to cause the offender to answer for contempt of court. It might be said that a newspaper, in time of stress, would not have a proper opportunity of verifying its information. This would apply in the case of a batch of telegrams, but would it apply to a letter? It might also be urged that the responsible person on the staff of a newspaper would reason that from his knowledge of the correspondent he could rely upon him, but it appeared, in this case, that what he said in the letter must have been a matter of hearsay, and caution should have been exercised in the publication of such information, coming from such a source and at such a time. The question of damages was really ultimately the only question in the case, and he would suggest in dealing with this that the jury would take into consideration all the circumstances of the case, and bear in mind who the parties were. The plaintiff occupied a position in a profession which could be a good deal damaged by imputations of an injurious character appearing in a newspaper having a large circulation. The jury would also bear in mind that the circumstances were such as to make it possible that there was no want of good faith, and that there was no desire to do the plaintiff wrong. But that was not to be taken as being in any way a justification. His lordship told the jury not to allow themselves to be influenced by any feelings or prejudices they might have for one side or the other, and incidentally remarked that so long as jurymen were habitually actuated by the desire to do justice, the system of trial by jury would prove one of the most useful of the public institutions in relation to both criminal and civil cases. The jury would consider whether the publications were defamatory—this had been admitted in respect of the first, but denied in regard to the second—and if so, the amount of damages to which plaintiff was entitled.

The jury found a verdict for the plaintiff for £250.

Judgment was entered accordingly, with costs.

[Plaintiff's Attorneys, Messrs. Van der Byl and Van der Horst; Defendant's Attorneys, Messrs. Fairbridge, Arderne, and Lawton.]

SUPREME COURT

[Before the Right Hon. Sir J. H. DE VIL-
LEPS, P.C., K.C.M.G. (Chief Justice),
and the Hon. Mr. Justice MAASDORP.]

In re COHEN AND PHILLIPS.

Mr. Buchanan applied on behalf of the trustee in the above named insolvent estate for a commission to take the evidence of one of the partners, Phillips, in regard to the circumstances of the insolvency. Phillips, who was at present a Volunteer in the Colonial Forces, was about to leave for the front.

Commission granted, Mr. Howel Jones being appointed commissioner.

COMBRINCK V. BRITISH S.A. COMPANY.

Sir Henry Juta, Q.C., applied for a commission to take the evidence of one Pennant, in connection with this case.

Mr. Searle, Q.C., for the defendant company, consented.

Commission granted, Mr. Rubie being appointed commissioner.

In re MAASDORP.

Mr. Buchanan applied on behalf of C. H. Maasdorp for leave to raise certain money (£450 on a life policy for the purpose of supporting certain minors who were to be eventually interested in the life policy.

The Master suggested that only £400 be allowed to be expended in support of the minors, and the remaining £50 to be used in keeping the policy alive.

Order granted in terms of the Master's report.

IN THE MATTER OF THE MINORS (1900.
EDINBERRY. } Dec. 7th.

This was an application for leave to sell certain property originally purchased by

Edinberry and then donated and transferred to his nine minor children. The property was worth about £600. Owing to his ill-health his income had decreased, and he could not afford to educate his minor children on the income derived from letting the property and paying the interest on bonds on his other property. He was prepared to pass a bond for the value of this property in favour of his children on other property owned by him.

The Master's report suggested that the course proposed be adopted.

Order granted in terms of the Master's report.

SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), and the Hon. Mr. Justice BUCHANAN.]

CAPE TIMES LIMITED V. W. A. RICHARDS AND SONS. $\left. \begin{array}{l} 1900. \\ \text{Dec. 10th.} \\ 1901. \\ \text{Feb. 5th.} \end{array} \right\}$

Libel—Newspaper company—Innuendo.

R., a newspaper company, published of C., which was also a newspaper company, and as such printed and published the daily “Cape Times,” and an annual record of the proceedings in Parliament styled “Hansard” the following passage:

“The ‘Cape Times’ is understood to supply the ‘Hansard’ reports which are expected to be correct productions of every member's utterances, irrespective of party or rank or personality. That they are nothing of the sort is notorious amongst the general body of honourable members. Nay, more, not a few of them are painfully aware that the ‘exigencies of space’ permit of a style of reporting which is nothing short of being scandalously one-sided, and which

consists of either wholly suppressing, or cruelly distorting in the process of shortening speeches of members who, for a variety of reasons, may be safely boycotted in the newspaper or ‘Hansard’ reports.”

C. sued R. for damages for libel, stating that the innuendo to be drawn was that C. carried on business in a dishonourable and dishonest manner, and for its own purposes wilfully suppressed and distorted the speeches of members and published false information. R. excepted to the declaration that it contained no ground of action.

Held, that the words were susceptible of a defamatory meaning.

Held, at the trial that as “Hansard” purported to be nothing more than a reprint, of the Cape Times Parliamentary Reports which did not pretend to be full reports of the proceedings of Parliament, R. had not gone beyond the limits of fair comment and was not liable in damages.

This was an argument on an exception taken by the defendant company to the declaration of the plaintiffs in an action in which they claimed £1,000 as damages for libel.

The plaintiff's declaration was as follows:

1. The plaintiff is a joint stock company, registered, with limited liability, and carries on business in Cape Town; the said company owns, prints, and publishes a daily newspaper called the “Cape Times.”

2. The defendants carry on a printing business in Cape Town, and print for publication a weekly newspaper styled “The South African Review.”

3. The plaintiff company has for many years past published a record of the proceedings of Parliament in a certain book issued annually, and styled “Hansard,” and the said publication purports to be, and is, a fair and impartial record of the said proceedings.

4. In or about July, 1900, the defendants printed for publication in the “South African Review” certain false, malicious, and de-

famatory words of and concerning the plaintiff company, to wit: "The 'Cape Times' is understood to supply the 'Hansard' reports, which are expected to be correct productions of every member's utterances, irrespective of party, or rank, or personality. That they are nothing of the sort is notorious amongst the general body of honourable members. Nay, more, not a few of them are painfully aware that the 'exigencies of space' (!) permit of a style of reporting which is nothing short of being scandalously one-sided, and which consists of either wholly suppressing or cruelly distorting in the process of shortening speeches of members who, for a variety of reasons, may be safely boycotted in the newspaper or 'Hansard' reports," and the said words were published in the issue of the "South African Review" dated July 20, 1900, as portion of one article styled "'Cape Times' and the 'Review': Startling Parliamentary Disclosures."

5. The paragraph above set forth was intended to mean, and did mean, that the plaintiff company carried on its business in a dishonourable and dishonest manner, and wilfully and deliberately under the pretence of exigencies of space, published false information by distorting the speeches of members of Parliament when reported in the said "Hansard" for its own purposes, and wilfully and deliberately under the like pretence suppressed the speeches of other members in whole or in part for its own purposes.

6. By reason of the above false, malicious, and defamatory words the plaintiff company has sustained damages in the sum of £1,000. The plaintiff company claims: (a) the sum of £1,000; (b) alternative relief; (c) costs of suit.

Defendants' exception and plea was as follows:

Before pleading to the declaration, the defendants except thereto on the ground that it discloses no cause of action, wherefore they pray that the plaintiff's claim may be dismissed with costs.

And for a plea we, the defendants, say:

1. They admit paragraphs 1 and 2.

2. They say that the plaintiff has for years published a reprint from the columns of a newspaper published by them called the "Cape Times," of the proceedings in Parliament as reported in that paper, and that this reprint is called by the plaintiff "Hansard." The defendants are not aware what it purports to be, and say that this paragraph 3 is irrelevant.

3. The defendants admit the publication in paragraph 4 set out, but deny that they did so falsely or maliciously, or that the words are defamatory. They deny that the words mean or were intended to mean that the plaintiff carried on its business in a dishonourable or dishonest manner, or that the plaintiff wilfully and deliberately published false information.

4. They say that the words complained of form part and portion of an article published in the "South African Review," dated July 20, 1900, to which the defendants beg to refer this Honourable Court at the hearing hereof.

5. They say that the said words are true in substance and in fact, and were published without malice, and in the public interest, and save as above, they deny the allegations in paragraphs 3, 4, 5, and 6.

Wherefore they pray that the plaintiff's claim may be dismissed, with costs.

Plaintiff's answer to the exception and replication to the plea was as follows:

For an answer to the defendants' exception, the plaintiff company prays that the same may be dismissed, with costs.

And for a replication to the defendants' plea, the plaintiff company says that, save in so far as the said plea admits any of the allegations in the declaration, and save that it admits that the words in the declaration complained of form portion of an article published in the "South African Review," dated July 30, 1900, it denies all and singular the allegations of fact and conclusions of law in the said plea set forth, and joins issue thereupon, and again prays for judgment, with costs of suit.

Sir Henry Juta, Q.C., for the defendant (exceptor): The innuendo is not well founded. The article is a comment on the reports of speeches of the members of Parliament, and does not hold the "Cape Times" up to hatred, contempt, and ridicule. No inference that the "Cape Times" carries on its business in a dishonourable or dishonest way can be drawn from the article. Every paper is more or less a party organ, and every paper cuts down the speeches of members of the party it does not support. "Hansard" is merely a reprint of the "Cape Times" reports of the proceedings in Parliament. It is difficult to see any imputation of dishonourable conduct in saying that some speeches are cut out altogether and others distorted by shortening them. There is no libel in saying that the reports of a party paper are scandalously one-sided. "Hansard" does not purport to be an official record of

the proceedings. The House of Assembly, in a debate on the subject of this "Hansard," complained of its reports. The mere statement in the article that they are not impartial reports is not libel unless the declaration alleges that there is some duty on the plaintiff company to be impartial.

Mr. Searle, Q.C. (with him Mr. Bisset), for the plaintiff company: The words are libellous, quite apart from any duty on us of being impartial. They are intended to and will injure the plaintiff company in the conduct of its business. The imputation here is that for a *malu fide* purpose, under the exigencies of space the reports are cruelly distorted or wholly suppressed. Quite apart from any duty in regard to any subsidy received, the words are libellous. The article amounts to a charge of *malu fide* manipulation of the reports for some ulterior purpose, and that therefore the company is carrying on its business in a dishonest and dishonourable way. See *St. Leger v. Rolls* (5 Cape Law Journal, 98); *Voet* (47, 10, Comments by De Villiers, late C.J., O.F.S., in his book on Injuries, pp. 59 and 94); *Odgers on Libel* (p. 28).

Sir Henry Juta, Q.C., in reply: There is a vital difference between charging a person in this way and charging a company. There is no person to injure, consequently some injury to the company must be alleged. Thus the case of *St. Leger v. Rolls* is not in point.

De Villiers, C.J.: The question to be decided at this stage is not whether the words complained of contain a gross libel, or even whether these words will ultimately be found to be libellous or not. The question is whether the words used are susceptible of a defamatory meaning. I do not know that they go so far as to impute dishonesty, but they are capable of the meaning that the conduct of the plaintiff company is dishonourable. At the trial the Court will be in a better position to decide as to the true meaning of the words, but at present the Court must decide that the words are susceptible of a defamatory meaning. Therefore the exception will be overruled, with costs.

Buchanan, J., concurred.

Postea (February 5, 1901).

The trial of the action was proceeded with.

Mr. Searle, Q.C. (with him Mr. Buchanan), for the plaintiff.

Sir Henry Juta, Q.C. (with him Mr. Upington), for the defendant.

Frederick L. St. Leger said he was the managing director of the "Cape Times"; "Hansard" was published as early as 1884, and was sold to the public and subscribers. In 1898, 1899, 1900 there were respectively 64, 130, 94 copies sold. A few copies were sold in England and America. Mr. Edwards, the sub-editor, compiled the book. It was a reprint of the "Cape Times" reports, speeches, however, very often being amended by members of Parliament. It was not subsidised by Government or Parliament. No complaint had been made by members of Parliament with regard to the "Hansard" as far as he knew.

Cross-examined: There may have been complaints which did not come to him. Complaints had been made of omissions in reporting speeches in the "Cape Times." Witness could not point out any differences between the reports in the "Cape Times" and the reports in the "Hansard." He knew that there was a debate in the House of Assembly about the "Hansard."

Eliseus James Edwards, the acting editor of the "Cape Times," said he was on the staff for ten years; "Hansard" was in existence when he joined, and had been under his control since and including 1895. It was compiled from the "Cape Times" reports, and was not entirely a reprint of these. The proceedings of the House were not reported verbatim. The practice was to report fully in the third person the speeches of members of the Ministry and former members thereof and leaders of acknowledged party groups. Other members were reported according to their status or value of their contributions to the debate. This was so whether the speeches were in Dutch or English. Members of the House were invited to amplify their speeches for the "Hansard." The gallery knew no politics. Each speech was reported in accordance with its deserts. There was no wish to boycott. There was no suppression or distortion of speeches for private, political, or personal reasons. There had been complaints from members that they were not reported at proper length. Mr. Zietsman complained, not about "Hansard," but about the newspaper reports. In "Hansard" he was reported in full. Complaints made were always attended to in "Hansard." If there was no complaint the report in "Hansard" was the same as in the "Times." If there was anything wrong he corrected it himself.

Cross-examined: The reporters were not instructed to take any political sides; no

difference was made between Bond and Progressive members. The reporters' notes were never cut down. He could not say if there was any material difference between the "Hansard" of 1899 and the "Cape Times" report; nor could he mention anyone who corrected members' speeches; nor any correction he himself made. He invited members to correct their speeches. Committee discussions being conversational, they were not reported in "Hansard." There was a discussion in the House about "Hansard," owing to complaints. Mr. Wienand, M.L.A., and others, being considered bores, were not reported.

William Henry Vos, reporter, gave similar evidence in regard to the reporting, and stated that scab discussions were usually not fully reported.

For the defence, Albert Cartwright said that the "Cape Times" Parliamentary reports were condensed though honest.

Mr. Zietsman, M.L.A., said some of his speeches were unduly abbreviated. His speeches were fully reported in the "Kokstad Advertiser," but were not fully reported in the "Cape Times" or "Hansard."

Alfred Palmer, the editor of the "South African Review," said he wrote and published the article in question after he had not had a seat in the gallery allotted to him. That was the result of a meeting of members of the press, to which he was not invited, and which he believed was called at the instigation of Mr. Edwards and Mr. Cartwright. The English "Hansard" was an official report. The Cape "Hansard" of 1899 and 1898 was a reprint of the "Cape Times" reports. No difference could be found. The speeches of the debates on the Redistribution Bill were reported in the following proportion: Progressives, with 24 speeches, occupied 70 columns; the Bond members, with 24 speeches, occupied 39 columns. The latter were in power. During the debate on the Parliamentary Voters' Act Amendment Bill, 51 Progressive speakers occupied 57½ columns; while 52 Bond speakers occupied 38½ columns. A speech of Mr. J. T. Molteno's on the field-cornetcy question was so cruelly distorted by contraction as to appear absolutely unintelligible. In another case, the reply of a Bond member was cruelly distorted in the process of contraction. The Progressive member's speech was fully reported. Witnesses instanced many other occasions on which speeches of Bond members appeared correctly and at full length in the

"South African News," while in the "Cape Times" and "Hansard" they were incorrect and very much cut down, with the result that members were reported as having said something totally different to what they did say.

Mr. Searle, Q.C.: The question is whether the article is defamatory, or whether it is true. If it is not true, it is certainly defamatory. The defendants say it is not defamatory, but the main defence is that it is true and in the public interests. The evidence for the plaintiffs goes to show that the reports were made fairly and irrespective of politics, rank, or personality. Reading the article in question with the note of interrogation after the words "exigencies of space," the fair and reasonable interpretation is that for some outside reason these reports were unfair and partial; that, under the pretence of exigencies of space—that not being the real reason—the reports were manipulated. The plaintiffs have been charged with "cooking" speeches. To say that the style of reporting was scandalously one-sided was clearly to say it was not impartial. See the case of *St. Leger v. Roules* (C.L.J., '98) decided in February, 1898. The statements are just as defamatory in the present case as in that one. Supposing there were a few errors in the reports, it would make no difference. The charge made here is against the system adopted by the "Cape Times," which was alleged to consist in deliberately suppressing and distorting opinions, which, for some reason or other, they did not want to put before the public. The point of the article is, that for some unworthy object, the plaintiffs deliberately pursued the course of stopping the mouths of certain people. The instructions given to the reporters are extremely important. Certain persons, such as Mr. Merriman, Mr. Sauer, Mr. N. F. de Waal, and others, whose opinions were as far as possible those of the "Cape Times," were most fully reported. There has been no complaint in regard to the speeches. Mr. Edwards said that he knew most of the members, and not one of them had ever complained that he was unfairly treated in the "Hansard." The point is: are the atrocities complained of libellous? According to the evidence, the reports are a correct reproduction of the speeches. In regard to "Hansard," it was said that the English "Hansard" contained more than the Cape "Hansard." In some respects it does contain more, but in other respects less. In any case the Cape "Hansard"

was never given out as a verbatim reproduction. The article complained of is simply a portion of a persistent attack that had been going on for a long time. Attacks are being repeatedly made upon the "Cape Times" and those connected with it. The present case is on all fours with that of *St. Ieger v. Rolfe*, and judgment should be given for the plaintiffs with costs.

Sir Henry Juta, Q.C., was not called upon.

Buchanan, J. : The parties in this action are, as plaintiffs, the Cape Times Limited, and as defendants, the firm of Richards and Sons, printers and publishers of the "South African Review" newspaper, in which the defamation complained of appeared. It is well to note at the outset that no person, no specific individual is concerned. It is not a case of libel alleged to have been committed by one individual against another individual. It is one company against another company, one newspaper against another newspaper. As far back as Lord Kenyon's time, when the rights and privileges of the press were perhaps not so clearly or definitely established as they are to-day, it was laid down in the case of *Heriot v. Stewart* (1 Esp., 437, see *Odgers on Libel*, 2nd Edition, p. 29), that: "It is no libel for one newspaper to call another the most vulgar, insignificant and scurrilous journal ever published in Great Britain, but it is libellous to add: 'It is the lowest now in circulation, and we submit that fact to the consideration of advertisers,' for that affects the sale of the paper, and the profits to be made by advertisements." Therefore, the principles that apply in the case of attacks made by one newspaper against another are different from those in a case where one individual slandered another person. In the former case it is not a question of character, but a question of business. An imputation of dishonesty or of dishonourable conduct in carrying on business would of course be actionable if made against a company, equally as when made against an individual. In this case what is complained of is a statement published in the "S.A. Review," which is called false, malicious, and defamatory. [His lordship read the paragraph in question, and then proceeded] When the declaration was filed, exception was taken on the ground that the declaration did not set forth any cause of action. The *innuendo* was that the plaintiffs carried on business in a dishonest manner. The learned Chief Justice, when the exception was heard, said that the

question was not whether the words complained of contained a gross libel or not, or whether or not they might ultimately be proved to be libellous, but as a matter of pleading, it was a question whether or not the words were susceptible of a defamatory meaning. It was then expressly stated that the Court would be in a better position to decide the true meaning of the words used when the case came up for trial. It was therefore left open to the Court now to decide that. The exception being thus disposed of, the defendants pleaded that the words made use of were a fair comment, that the words were true, and that they were a comment on a matter of a public nature. At the outset, plaintiff's counsel himself admitted that the issue depended on the correctness of the charge. This question turns mainly on what is meant by a "Hansard." The Court has not been referred to any definition of the term, but both parties seemed to understand that it indicated something on the lines of the "Hansard" reports published in England of Parliamentary speeches in England. These reports are published by authority, and contain all speeches on all subjects. There is thus a great difference between such reports and a newspaper report. As far as newspapers are concerned, it is admitted by the "Cape Times" officials, on the one hand, and the "South African News" officials on the other, that their respective reports are regulated by the exigencies of space and by other considerations. For example, while the "South African News" reports the members of one party at great length, the "Cape Times" does the same with the other party. Mr. Edwards has admitted that the fullness of the reports of speeches depended on the merit of the speakers, and Mr. Voss (the head reporter) acknowledged that the reports were regulated according to the speaker's "newspaper value." The newspaper reports may not be deliberately and wilfully unfair or distorted, when looked at from its party standpoint, but it is manifestly different if by a "Hansard" it was intended to supply the public with an impartial and full report of the speakers on both sides. Mr. Edwards admitted that, if a man was a bore, he was not reported in the newspaper, but "Hansard" does not consider whether a man was a bore or not. If this compilation was published as and purported to be merely a reprint of the "Cape Times" reports, it would have answered the description, but to call it a

"Hansard," if the Court adopts the meaning put by the parties on that term, was misleading. Mr. Edwards candidly admitted that complaints were made to him about the reports in the newspaper. After hearing the whole evidence, the Court is of opinion that the "South African Review" has not gone beyond the limits of fair comment. The "Cape Times" reports, as newspaper reports, are honest reports. The reports of the other newspapers are also honest reports. They give different sides, and the public can judge between the two, but they cannot be called a "Hansard." In the opinion of the Court, no damage or injury of business followed the publication of the words complained of. This is not a case where a private person has suffered injury or has to vindicate his honour. The case of *St. Leger v. Rowles* is very different. There the editor of a newspaper was specially pointed at and accused of a "suggestio falsi" and a "suppressio veri," and of having acted for corrupt and dishonest motives. In the circumstances the Court considers that judgment must be given for the defendants, with costs.

Maasdorp, J., concurred.

[Plaintiff's Attorneys, Messrs. J. and H. Reid and Nephew; Defendants' Attorneys, Messrs. Fairbridge, Arderne and Lawton.]

NOVELLA V EXECUTORS OF { 1900.
STEPHAN. { Dec. 10th

Will—Codicil—Legacy—Co-legatees
—*Jus accrescendi*—Joinder of
legatees *verbis tantum*.

S. by his will left £3,000 to E., and £1,000 each to M. and N., on the condition however that if E. died before attaining the age of 25 without issue, then the £3,000 "shall go to and devolve upon M. and N. in equal shares." M. died before S., and thereupon S. in a codicil revoked all bequests, inheritances and legacies to him, and also revoked the legacy of £1,000 to N. S. died and thereafter E. died without attaining the age of 25, and the executors in estate of S. awarded N. £1,500 and the estate £1,500 of the legacy of £3,000. N. claimed the whole £3,000 on the ground that the *jus accrescendi* operated in his favour,

Held, on a special case stated that the executors were correct in their award, there being no right of accrual when the legatees were joined *verbis tantum*.

— — —
This was an argument on a special case submitted to the Court in the following terms:

1. The plaintiff is Joseph Novella, residing in Cape Town.

2. The defendants are Henry Rudolph Stephan and Johannes Henoch Neethling Roos, in his capacity as secretary for the time being of the Board of Executors; they reside in Cape Town, and are sued in their capacity as executors testamentary of the estate of the late Johan Carel Stephan, and hereinafter styled the testator.

3. On or about November 9, 1898, the testator executed his last will and testament, and thereafter on or about January 17, 1899, he executed a codicil thereto; and on February 6, 1900, he died without having revoked the same, and leaving the same of full force and effect.

4. The testator, in clause 11 of the said will, bequeathed to one Elizabeth Novella the sum of £3,000, and to the plaintiff, and one Samuel Novella, brothers of the said Elizabeth Novella, each £1,000, the said bequests being subject to the following conditions: (a) Should Elizabeth Novella predecease the appearer or, having survived the appearer, but die before having attained her twenty-fifth year, or without having left lawful issue before attaining her twenty-fifth year, then and in that event the said sum of £3,000 sterling shall go to and devolve upon her brothers Joseph and Samuel Novella in equal shares; should she have a lawful issue then the said sum of £3,000 shall devolve upon and go to such issue; (b) the said Elizabeth Novella, Joseph Novella, and Samuel Novella, should they not have attained the age of twenty-five years at the death of the appearer, shall not be entitled to their legacies until they shall have attained respectively the age of twenty-five years, but shall in the meantime be entitled to draw half-yearly the interest which may accrue and be due upon the legacies aforesaid, the executors of the appearer being hereby empowered to put out the said legacies on mortgage of immovable property until the said legatees shall have attained their twenty-fifth year.

5. The testator further provided that the said legacies amongst others should be paid

free of succession duty, and that, should one or more of the legatees die before having received the whole amount, which has to be paid in monthly instalments to such legatee or legatees, then and in that event the balance still due, and in the hands of the testator's executors should revert and fall back into his estate.

6. The said Samuel Novella died before the 17th January, 1899, and by the said codicil the testator provided that, on account of the death of one of his heirs, to w^t, the said Samuel Novella, he revoked and cancelled all inheritances, bequests, and legacies made to him.

7. In the said codicil he also revoked the said bequest of £1,000 to the plaintiff.

8. The said Elizabeth Novella survived the testator, but died before her 25th year without lawful issue, having in the meantime drawn only the interest on the aforesaid legacy of £3,000, as provided in the will.

9. Thereinafter the defendants, on September 17, 1900, framed a distribution account of the said legacy.

10. In the said account the defendants awarded one-half of the said legacy to the plaintiff, and the other half to the estate of the testator.

11. The plaintiff contends that he is entitled to the whole of the said legacy of £3,000, the share of his brother Samuel accruing to him.

12. The defendants contend that the plaintiff is entitled to half the legacy of £3,000, less eight shillings expenses, and that the other half of the said legacy belongs to the testator's estate.

Mr. Searle, Q.C. (with him Mr. De Villiers), for the plaintiff, quoted *Steenkamp v. De Villiers* (10 Juta, 57, at p. 61), as an authority that there is no right of accrual when the joinder of legatees takes place *verbis tantum*. There is no such joinder *verbis tantum* here. See *Grotius* (2, 23, 5); *Van der Keel* (Th. 326); *Pothier on Legacies* (chapter 3, section 18); *Wentzel v. Brink's Executors* (9 Juta, p. 221, at p. 331); *Mijet's Executors v. Ava* (14 S.C.R., p. 511).

Mr. Schreiner, K.C. (with him Mr. Benjamin) was not called upon.

De Villiers, C.J.: The two sons were joined in the will *verbis tantum*. When the testator revoked the one-half to Samuel, the testator did not intend to give it to Joseph, or he would have said so. As far as Joseph is concerned, he cannot claim more than one-half, and the other will go back into the estate. The contention of the defendants

therefore appear to me to be the correct one. Judgment will be for the defendants; the costs will be paid out of the estate.

[Plaintiff's Attorneys, Messrs. Van der Byl and Vander Horst; Defendants' Attorneys, Messrs. Van Zyl and Buissinne.]

MICHAU V CAPE TIMES } 1900.
LIMITED. } Dec. 10th.

Libel—Defamatory letter.

Where the defendants took an exception to a declaration by the plaintiff, that a letter published by the defendants containing a statement that the plaintiff was arrested and on his way to Cape Town, and that two rifles and a magazine containing expanding bullets and engraved with plaintiff's name, which were taken at the Modder River fight were, also being sent to Cape Town as evidence against the plaintiff, was not defamatory.

Held, that the words were capable of having a defamatory meaning attached to them, and that therefore the exception must be overruled.

This matter came before the Court in the shape of an argument on an exception to a declaration, in which was claimed the sum of £500 as damages for a defamatory libel. The defendants, before pleading, excepted to the declaration that it disclosed no cause of action.

The plaintiff's declaration was as follows:

1. The plaintiff is and was at all times material to this pleading a British subject, and is a duly admitted attorney and notary of the Supreme Court of this Colony, residing and practising in Cape Town; the defendants are a joint stock company, duly incorporated in this colony, carrying on their business therein, and having their head office in Cape Town.

2. The defendants are the proprietors and publishers of a newspaper called the "Cape Times," which is printed and published in Cape Town and circulated throughout the Colony.

3. On or about the 19th December, 1899, the defendants falsely and maliciously published of and concerning the plaintiff in their

said newspaper, the following false, scandalous, malicious, and defamatory words, contained in a letter addressed to the editor of the said newspaper and signed by one John Bennett Stanford, to wit: "I have just returned from Modder River, at which engagement (meaning an engagement between the forces of Her Majesty and those of the South African and Orange Free State Republics) I was busily employed. I came down in the hospital train and saw in an edition of yours that was handed in at Victoria West, a letter from J. J. Michau (meaning the plaintiff), who is now a prisoner in Cape Town, saying that he had taken no part in the fight at Modder River, but that he had watched the battle from a kopje some distance away. Firstly, I beg to inform you that there is no kopje within three miles of Modder River. Secondly, that we (meaning the British forces) took at the battle two sporting .303 rifles engraved with the name of J. J. Michau, and a magazine, also engraved with his name, containing some 600 Jeffery patent expanding bullets. Our mounted infantry were encamped near a nice house at Modder River, with some good gardens round it, which belonged to this man, who appeared there after the battle, and very much objected to the horses and men of the mounted infantry being placed there, saying that it was very rough on him, being a loyal Englishman, that he should have his gardens damaged by the men. Major Milton, who was then commanding them, said to him: 'If you continue to talk so much about loyalty we shall soon begin to think you are disloyal.' Luckily a magistrate from some neighbouring town arrived in camp the next day, and informed the General Officer Commanding that there was a warrant out for Michau's arrest in Kimberley. He was promptly sent down here under arrest, and his guns and ammunition have been sent down as evidence against him," meaning thereby that the plaintiff had taken up arms against Her Majesty, and that he had been actually engaged in fighting against her forces, and had been guilty of treasonable acts and practices.

4. By reason of the said defamatory publication the plaintiff has suffered damage to the extent of five hundred pounds sterling (£500).

The plaintiff claims: (a) £500 as damages aforesaid; (b) alternative relief; (c) costs of suit.

Defendant's exception and plea was as follows:

Before pleading to the declaration the defendant company excepts thereto on the ground that the same discloses no cause of action, inasmuch as the words complained of as having been used by the defendant company concerning the plaintiff are not defamatory, and do not bear the meaning that the plaintiff had taken up arms against Her Majesty's forces, and had been guilty of treasonable acts and practices, as alleged in the declaration. And for a plea to the declaration in case the above exception be overruled, and this Hon. Court is of opinion that the said words are defamatory, but not otherwise, the defendant company says:

1. It admits paragraphs 1 and 2.

2. It admits the publication in its issue of December 19, 1899, of the letter referring to the plaintiff, which was addressed to the editor of the "Cape Times," and signed by the said John Bennett Stanford, and which is set forth in paragraph 3; the said letter was published *bona fide* and without malice.

3. It denies that the plaintiff has sustained damages in the sum of £500 or in any greater sum than £5, which sum it hereby tenders to pay to plaintiff, with taxed costs to date of this plea. Wherefore, subject to the above tender, it prays that plaintiff's claim may be dismissed with costs.

Mr. Searle, Q.C., for the defendant (the exceptor): The innuendo drawn is wrong. The letter makes no charge of treason. No prejudging of the plaintiff's case was made. The statement that the two guns were found on the field of battle is not libellous.

[De Villiers, C.J.: The letter must be read as a whole. In conjunction with those words read, the sentence which states that the guns are being sent as evidence against him.]

The statement that two guns belonging to plaintiff were found does not amount to a charge of treason. It is not actionable to call a man a rebel. *Odgers on Libel and Slander* (p. 129). No accusation is made in the letter that the plaintiff was arrested for high treason; the letter amounts to nothing more than a statement that the plaintiff was suspected.

Mr. McGregor, for the plaintiff, was not called upon.

The Chief Justice, in giving judgment, said: I have very little to add to the remarks recently made in the case of the "Cape Times" against W. A. Richards and Sons. (*Supra*, p. 727). The question to be decided at this stage is whether the words used are susceptible of a defamatory meaning, and in order to decide that we must look at the letter as a whole.

I am satisfied that an ordinary, reasonable reader of the letter might reasonably come to the conclusion, after reading it, that there was a distinct charge of treason against the plaintiff. It is not necessary to go into the details, but the statement to the effect that rifles with the name of J. J. Michau on them were found at the battle cannot be lost sight of, nor the statement at the conclusion of the article that the guns and ammunition had been sent down as evidence against him. At the trial it will be for the whole question to be considered, but at this stage it is sufficient to say that the words are susceptible of a defamatory meaning. The exception will be overruled, with costs.

Buchanan, J., concurred.

On the 12th January, 1901, February 8, 1901, was fixed as the day for trial by a jury, the defendant company consenting. On the 29th January, 1901, the case was withdrawn.

[Plaintiff's Attorneys, Messrs. Van der Byl and Van der Horst; Defendant's Attorneys, Messrs. J. and H. Reid and Nephew.]

REGINA V. RANKIN. { 1900.
{ Dec. 11th.

Employer—Natives—Permit—Act 28 of 1898, section 4.

R. a checker in the Cape Government Railways, was charged with contravening section 4 of Act 28 of 1898, in that he gave permits to obtain liquor to two persons alleged to be natives. He raised the defence that being the European employer of these two men he was entitled to give them the permits.

Held, on appeal, that as the persons to whom the permits were given were engaged for employment under himself by the accused, and that as he could dismiss them, he was their European employer, and so could not be convicted of contravening the section.

This was an appeal from a decision of the Resident Magistrate of Tulbagh in a case in which Louis Rankin, a checker in the Cape Government Railway employ, was

charged with the crime of contravening section 4 of Act 28 of 1898, in that, on the 25th August, 1900, and at Piquetberg-road, he did wrongfully and unlawfully, as the agent for and on behalf of one Frederick Herbert and one David Absalom, both native porters, buy or receive four bottles of beer and half a bottle of brandy from Horatio Plumby, a licensed holder there residing, by means of certain two orders in his own handwriting which he handed to these two natives, which liquor could not have been legally obtained by the two native porters under the conditions of the licence; nor was the accused the European employer of these natives.

He was convicted and appealed.

The restrictions on Plumby's licence were that no liquor was to be sold to natives between the hours of 7 a.m. and 5 p.m. on Mondays and Fridays inclusive, and from 7 a.m. to 12 noon on Saturdays, and that all liquor sold to natives was to be consumed on the premises. In his evidence, David Absalom said he took his orders from accused, who was his master, although he obeyed the orders of the stationmaster as well. Accused was a checker. He asked accused for an order for beer on Saturday, August 25, and by virtue of the order purchased three bottles of beer, which he drank at his house. He was a Malay born, and was engaged by the accused, who could of his own motion engage or dismiss employees. Herbert said he was a Bastard, and was not a Kafir, Fingo, Basuto, Damara, Hottentot, or Koranna, but was a registered voter. It was about five o'clock when he got the liquor on presenting the order. The police-constable said it was ten minutes past five. The barman said he only supplied the liquor to the two persons on production of the order because it was after canteen hours, and the purchasers were coloured people. He thought the liquor was for accused, and that the purchasers were accused's servants. The stationmaster said that accused was a checker, and was only an agent employed by the Railway Department to engage labour to discharge the work in the goods shed. The accused was not liable to the men for their wages. He could engage and dismiss men without reference to anybody, and was their master to all intents and purposes.

The Magistrate held that, "as the accused was in the service of the Cape Government Railways as 'checker' in the goods shed, and subordinate to the stationmaster, he is, in my opinion, not a European employer within the meaning of section 4 of Act No. 28

of 1898. That at least one of the men is a native, and that the barman believed the liquor he supplied to be for the accused." It was not known until after the case was decided that the Distributor of Stamps had made a mistake in endorsing the restrictions on the licence, although it appears that the restrictions fixed by the Licensing Court were duly observed by the licence-holder.

The restrictions imposed by the Licensing Court read "that liquor be sold," leaving out the "no" mentioned on Plumby's licence, and said nothing about the supply of liquor to natives without notes.

The grounds of appeal were:

1. That as there was no restriction adopted at the Licensing Court to debar hotelkeepers from supplying natives without a note from their masters, the proceedings were groundless.

2. The licence put in shows that the endorsement is not the same as passed at the Licensing Court.

3. That accused is virtually the master.

4. That the giving of the note did not empower persons to obtain liquor who could not otherwise have obtained it.

5. That neither of the men were natives.

Mr. Schreiner, Q.C., for the appellant: Primarily the ground of appeal is that neither of the boys has been proved to be a native, and one of them is a registered voter. Another point taken is that according to the endorsement on the licence the liquor was not sold during prohibited hours. The licence is so endorsed as to prohibit the sale of liquor to natives during the hours in which it was intended that they should be served. The endorsement is that no liquor should be sold to natives from seven a.m. to five p.m. from Mondays to Fridays inclusive, and from seven to two on Saturdays. The introduction of the word "no" gave the licence a meaning wholly different to the conditions prescribed by the Licensing Court, which were that liquor should be sold during the hours indicated. On the face of the words of the licence there is no crime at all, because the sale took place after the hours prescribed by the endorsement on the licence. Respecting the nationality of the two alleged natives, Absoloni, said in evidence that he was a Malay boy, born in Cape Colony, his father having been born in Turkey, and his mother in Madagascar. Herbert swore that he was not a Kafir, and that he did not belong to any of the races to which the restrictions applied. He

is also a registered voter. The Magistrate said in giving judgment that at least one of the men (Herbert) was a native. According to the endorsement of the licence, the sale did not take place during prohibited hours.

[Buchanan, J.: That was clearly a clerical error.]

It is a minor point, but I suppose in a criminal case the Court will take cognisance of it. The appellant was really in the position of employer of these natives, whom it was proved he had authority to discharge at any time, and who were under his authority and direction. See section 5 of Act 28 of 1898, and section 1 of 38 of 1887.

Mr. H. Jones, for the Crown: I cannot press the conviction in regard to Herbert, who was a registered voter. An half-caste having the blood of any of the particular natives to which the law applied was just as liable to its operations.

[De Villiers, C.J.: The man himself says he is a Malay.]

The man is not a good witness as to his nationality. The stationmaster was the proper person to have given these men a permit. It is not necessary that the person should be a pure-blooded Kafir, Bushman, etc., to be considered a native. A half-caste having the blood of any of the classes of persons enumerated in the Acts 28 of 1898 and 38 of 1887 is a native. The accused was not the employer of these men. He is himself an employee of the Government, and is directly under the control of the stationmaster. He is only a checker in the goods shed, and as such has no authority. The wages of these men did not come out of his pocket.

De Villiers, C.J.: It is quite clear that if the defendant was a European employer of these men he cannot be found guilty of a contravention of the section. The question therefore is whether he was their employer, and the evidence on this point is all one way. The stationmaster was called for the prosecution, and said that the defendant engaged and dismissed men without reference to anybody, and that in his (the stationmaster's) opinion, Rankin was the proper person to give a permit of this nature. The stationmaster further said that, if they had applied to him, he should have referred them to Rankin, by whom all the labourers were paid with Government money. I think that the defendant was a person who could, under the Act, give the necessary authority. The appeal must therefore be allowed, and the conviction quashed.

[Appellant's Attorney: Mr. D. Tennant, jun.]

QUEEN V. NTOTO VIYANA. } 1900.
Dec. 11th.

Scab Act—Inspector—Reasonable assistance—Sheep.

A scab inspector gave notice to certain sheep-owners that he would inspect their sheep on a certain day, and directed the appellant to bring his sheep to a particular spot for inspection on that day. The appellant collected his sheep in a valley within half a mile from the spot thus indicated.

The Court, being of opinion on the evidence that it would have been a matter of great inconvenience to the appellant to bring his sheep to the spot indicated, and that it would not have been quite convenient to the inspector to proceed to the valley, Held, that the appellant had been wrongly convicted of refusing to tender every reasonable assistance to the inspector in the execution of his duties.

This was an appeal from a decision of the Resident Magistrate of Idutywa, given on October 4, 1900. Accused was charged with contravening section 1 of Proclamation No. 67 of 1893, in that upon or about the 24th day of September, 1900, and at or near Salem, in the district of Idutywa, he did wrongfully and unlawfully neglect to render every reasonable assistance to the Inspector of Sheep when inspecting the accused's sheep. He was convicted and fined £5.

From the record it appeared that W. H. Gerber, a duly appointed Scab Inspector, on September 22 warned the headman of the area in which accused resided to tell the residents to have their sheep ready for inspection at a certain spot on the 24th September. He found all the flocks ready except that belonging to the accused, and while he was making an inspection of these, he was told by two messengers from accused that the latter's sheep were down in a valley about two miles away from the spot indicated for inspection. The accused said that the inspector must come to the valley. The inspector told them to inform the accused to bring his sheep up. The sheep not arriving, he went to accused's kraal and found

him sitting down beside a fence. He ordered accused to kraal his sheep, which he did after about two hours' waiting. Accused said he did not bring the sheep to the appointed place because they were lambing, and it would be detrimental to them to drive them to the spot indicated.

The accused, in his evidence, said that he did all in his power to assist the inspector. He drove his sheep to the valley, which was a short distance from where the inspector was. He did not take them up to the spot indicated, because as the sheep were lambing it would have harmed the sheep and lambs when in a weak state to go up the ridge.

Mr. McGregor, for the appellant: The accused did all that he could be expected to do; he brought his sheep as far as he could without doing them any harm. If he brought them nearer to the spot indicated great inconvenience and perhaps loss would have been occasioned. The 9th section of Act 20 of 1894 imposes a burden on owners of sheep, and so must be very strictly interpreted.

[De Villiers, C.J.: Is there any regulation which obliges the sheep-owner to bring his sheep to any place indicated by the inspector?]

Not that I know of.

Mr. Howel Jones, for the Crown: The Court will look at the general tenour of the Act and proclamation. It is necessary for the inspector to arrange that all the sheep in one area be brought to one spot for inspection. The place chosen was the one indicated by the headman as being the most convenient for owners and the inspector alike. Everything points to the fact that the accused took up a hostile position and was negligent. In fact, he was insolent and callous. He must render all the assistance he possibly can. He did nothing to help the inspector. After being told by the inspector himself to drive the sheep up, he took two hours to bring them half a mile. He failed to prove that the sheep were lambing, and that was the basis of his defence.

De Villiers, C.J.: The Magistrate had to decide whether the appellant had rendered every reasonable assistance to the scab inspector in the execution of his duties. The inspector had requested the owners of sheep in the neighbourhood to give him such assistance on the day of his inspection, and to that extent acted within his rights. After receiving such a notice no owner of sheep would have been justified in allowing his sheep to be scattered over the length and breadth of his land on the day of inspection. What the appellant did was to collect his

sheep and drive them to a valley within half a mile of the spot to which the inspector, in the further alleged exercise of his powers, had directed the sheep to be sent. That spot was a highly inconvenient one for the appellant to drive his sheep to, whereas the valley in which the sheep were grazing was, as I have said, less than half a mile from the spot, and within a convenient and reasonable distance for the inspector to visit. He insisted, however, that the sheep should be driven to the inconvenient spot selected by himself, and the appellant refused. The appellant, in my opinion, rendered every reasonable assistance in terms of the 9th section of Act No. 20 of 1894, and of the proclamation under which the prosecution took place. The appeal must therefore be allowed, and the conviction quashed.

Buchanan, J., concurred.

[Appellant's Attorneys, Messrs Walker and Jacobsohn.]

REGINA V. DE KLERK. { 1900,
 { Dec. 11th

Hawker—Travelling trader—Act 13 of 1870, section 6.

K. travelled about in a wagon offering for sale pictures of foreign manufacture without holding a licence in accordance with section 6 of Act 13 of 1870. He was charged with contravening the section and convicted.

Held, on appeal, that the number of pictures in accused's possession at the time he offered them for sale was immaterial.

A hawker is a travelling trader, and any one who while travelling offers foreign goods for sale becomes a hawker.

This was an appeal from a decision of the Resident Magistrate of Frasersburg. Accused was charged with contravening section 6 of Act 13 of 1870, in that he wrongfully and unlawfully exercised the trade or occupation of a hawker without having the licence in that behalf required by Tariff 15, Act 20 of 1884, Schedule II. The evidence showed that the accused travelled throughout various districts of the Colony in a wagon, on which he had some pictures, which were "chromos." At Williston, in the district of Frasersburg, he entered the shop of

one Robinsky, and offered him a number of pictures at a certain reduced price; but Robinsky thought the reduction of 5s. off each picture which the accused offered was not sufficient. It was proved that he also told the sergeant of police that he had pictures for sale, a few of which the sergeant saw and took possession of. Other witnesses also were offered pictures by accused. One at least of these pictures, when taken out of its frame by the sergeant, bore the words: "Made in Germany. Hoog Edele, S. J. P. Kruger, President, S.A.R. M. and C."

The accused, in his evidence, said he was not offering the pictures for sale. He was merely taking orders, the pictures being taken round as samples. He was not the agent of anyone. As soon as he got an order, he communicated with Taborski and Co., Cape Town. He always thought the goods were made in Cape Town, and had he thought they were not, he would have taken out a licence. He had offered to take out a licence after he saw the sergeant the first time. He was convicted, and appealed on the ground that the onus of proving that the goods were not of Colonial manufacture lay on the prosecution, and that the evidence was insufficient to support a conviction.

Mr. Close, for the appellant: See section 6 of Act 13 of 1870, and Tariff 15 of Act 20 of 1884. Accused was not a hawker. He does not fall under the clauses of the Acts. The accused was travelling about taking orders for pictures, and was not offering to sell. When he used the word sell in connection with his negotiations, he merely meant "give me an order, and you will get your goods to order later on." The things he was carrying were samples. On the question of the definition of hawker, see section 8 of Ordinance 11 of 1846, and section 1 of 10 of 1869. Articles of Colonial manufacture may be "hawked" about without a licence, and consequently anyone merely travelling with samples for orders cannot be convicted of hawking, especially as the goods were not proved by the Crown to be of foreign manufacture. The onus of such proof is on the Crown. See also section 1 of Act 11 of 1871, which seems by its wording to throw the onus of proof on the Crown. It has not been proved that this man had the goods with him to complete the offer of sale alleged to have been made to Robinsky. It has only been shown that he had a few pictures with him.

Mr. Howel Jones, for the Crown: According to my learned friend, this man required no licence at all until he was detected selling foreign goods. I quite admit that if he was travelling for someone else, the licence of his principal would cover his sales. But he himself says he was not the agent for anyone else. The words hawker and travelling trader used in the different Acts quoted are synonymous. A hawker includes anyone who goes about selling goods, whether he has them with him or not. In *Regina v. Shortle* (5 Juta, 203), the accused was acquitted because he sold Colonial produce. The evidence here shows that the accused offered the goods which he was carrying for sale. In an English case, *Regina v. Turner* (4 Barnowell and Alderson), it was held that it was not necessary to carry about the goods offered for sale in order to be a hawker. The production of the goods in this case showed that they were "made in Germany." Even if the onus of proving that the goods offered for sale were foreign was on the Crown, that onus has been discharged.

Mr. Close, in reply: The English cases do not apply, as the English Act is differently worded to ours.

De Villiers, C.J.: The question is whether there was anything to justify the Magistrate in finding that the appellant was a hawker. By hawker is meant a travelling trader, a person who travelled with goods for sale. If in the course of his travels the appellant sold goods he became a travelling trader, and I do not see how the Court can draw any distinction between pictures and any other articles of merchandise. If the goods were foreign in manufacture, a person who travelled with and traded in them was a hawker within the meaning of the Act. The number of pictures in his possession is hardly material, if he was prepared to sell those he had. The appellant himself said he was under the impression that the pictures were made in Cape Town, from which it can be gathered that had he thought they were made in Germany, he would have considered it his duty to have taken out a licence. I am of opinion that the appellant was trading as a hawker, and the appeal must therefore be dismissed.

Buchanan, J., concurred.

[Appellant's Attorneys, Messrs Findlay and Tait.]

SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), and the Hon. Mr. Justice BUCHANAN.]

ADMISSIONS. } 1901.
} Dec. 12th.

Mr. Searle, Q.C., moved for the admission of James Langton Brown as an advocate of the Supreme Court.

Order granted and the oaths administered.

Mr. Howel Jones moved for the admission of Harold Jones as an attorney, notary, and conveyancer.

Order granted and the oaths administered.

Mr. Buchanan moved for the admission of Harold Collier Bennett as an attorney and notary.

Order granted, and leave given for the oaths to be taken before the Registrar of the Eastern Districts Court.

ROBERTS V. RICHARD DEVLIN.

Mr. De Waal moved for provisional sentence for £6 13s. 4d., being balance of purchase price of certain lots of ground at New Muizenberg, with interest at the rate of 6 per cent. from September 2, 1900, plaintiff tendering transfer of the lots.

Granted.

MASTER V. ESTATE OF BOARDMAN.

Mr. Ward moved for an order upon the executor in the above estate to render an account of his administration.

The usual order was granted.

VAN WYK V. GREEF.

Mr. Buchanan moved for provisional sentence upon a mortgage bond for £1,000. The bond had become due by reason of the non-payment of interest and also under certain two agreements by which an extension of time had been granted and a previous case withdrawn from Court, defendant undertaking to pay the costs, which were also asked for now. Interest on the bond at the rate of 6 per cent. from October 1, 1900, was also asked for, and further that the property specially hypothecated be declared executable to the judgment under the bond.

Granted.

S.A. BREWERIES V. MELCHIN GRASER.

Mr. Benjamin moved for the final adjudication of defendant's estate as insolvent. Granted.

SOLOMON V. R. C. OOSTHUISEN.

Mr. Maskew moved that the provisional order for the sequestration of defendant's estate be superseded. Granted.

MASTER V. ESTATE OF COETSER.

Mr. Ward moved for the usual order on the executor dative in the above estate for an account of his administration. Granted.

JOSEPH V. HAHNE. { 1900.
{ Dec. 12th.

Arrest—Rule of Court 8.

Where the Court was not satisfied that the form of contract under which an alleged debt was said to exist was one that would be recognised in a Court of law, A writ of arrest founded on such debt was discharged.

This was an application for the confirmation of the arrest of the defendant who was arrested on the 7th of December, 1900, for an alleged debt of £55, being 5 per cent. commission on £1,100, the purchase price of the goodwill, etc., of the Brooklyn Hotel. There was also a cross application by the defendant for the discharge of the writ.

The affidavit of the plaintiff, S. B. Joseph, a broker and estate agent, carrying on business in Cape Town, stated that the £55 were liquidated damages due under a certain agreement or option, by which the defendant, if he sold the Brooklyn Hotel, or revoked the authority he gave plaintiff to sell the hotel, was to pay him 5 per cent. on the purchase price. It was alleged that the defendant, having sold the hotel, was about to leave the Colony, while the debt was not secured in any way.

This agreement was to the effect that for a consideration of 1s. the defendant gave the plaintiff the exclusive right to sell the Brooklyn Hotel, and promised not to dispose of the same through any other person. Further, that should the property be sold through any other person or the agreement revoked, defendant was to pay plaintiff 5 per cent. on the purchase price.

The affidavits of two private detectives who had been employed by plaintiff to visit the hotel were also read. In these they stated that defendant had told them that he had sold the hotel for £1,100, and was proceeding to Europe.

Defendant, in his affidavit, said that he was now lodged in the Cape Town gaol. About October 4 he gave the plaintiff the option of selling the Brooklyn Hotel, which was then his property. By reason of the plaintiff not finding a suitable purchaser, and his belief that he was not attempting to do so, he gave him notice that he had cancelled the option given him. He denied that he was indebted to the plaintiff in any sum of money, or that he intended leaving the Colony. He also stated that he was the registered owner of unencumbered landed property of considerably more value than the debt which was alleged to be due.

In an answering affidavit the plaintiff said that he had made every endeavour to sell the property, and he mentioned one offer of £700 that had been made. He contended that the defendant had no right to cancel the option, and said defendant must abide by the terms of the agreement.

Mr. Currey for the plaintiff.

Sir Henry Juta, Q.C., for the defendant.

De Villiers, C.J.: I am of opinion that this writ of arrest should be discharged, because I am not satisfied that the defendant intends to leave the Colony. I will go further, and say that I am not satisfied that this is a *bona fide* claim at all. I am not satisfied that there is any cause of action. There is a paltry consideration of 1s., for which the defendant is alleged to have given the plaintiff the sole right of selling the property, and if it was sold through anyone else, 5 per cent. was to be paid for the agency. It is a recognised principle that any agency under a power of attorney is revocable at any time unless it is coupled with an interest. I confess that in this case I do not see what interest there is beyond this payment of one shilling, and any possible trouble the plaintiff might have taken in trying to sell the property, but it is not a form of contract the Court would in any way wish to countenance. I entertain very grave doubts whether upon this contract, if the case went to trial, the plaintiff would succeed at all. There is the further fact that the defendant has immovable property unencumbered in this colony, and the plaintiff

could have ascertained that by reference to the Deeds Office. The writ of arrest will therefore be discharged, with costs.

Buchanan, J., concurred.

[Plaintiff's Attorneys, Messrs. Fairbridge, Arderne and Lawton; Defendant's Attorney, J. F. E. Bernard.]

EBERT AND CO. V. GOLDMAN. { 1901.
Dec. 12th.

Jurisdiction — Summons — Attachment—Domicile.

The defendant while resident in the Orange Free State accepted certain bills of exchange payable there. After maturity of the bills he was expelled by the military authorities of Great Britain, which was then at war with the Orange Free State, and he came to the Colony, where he was alleged to carry on some commercial business.

Held, that this allegation might have afforded a good ground for attaching his property ad fundandam jurisdictionem, but that in the absence of proof that he had permanently changed his domicile, the objection to his being sued in this Court without such an attachment was a good one.

This was an application for provisional sentence upon four bills of exchange for £49 17s. 6d., £68 7s. 3d., £11 10s. 4d., and £96 6s. 5d. respectively, made payable to the plaintiffs at Bloemfontein, and accepted by the defendant.

The defendant alleged in his affidavit that he was a refugee, having before the war carried on business along with his brother as Goldman Bros. at Viljoen's Drift. He left there as a refugee, and afterwards was informed that the goods in his store there had been looted, while the store, dwelling-house, and furniture had been destroyed. On April 19 last he left Port Elizabeth, where he had been temporarily residing, and proceeded to Bloemfontein, where he carried on a business; but in August last for some reason unknown to him he was expelled from the Orange River Colony by the military authorities. He said he was residing at Port Elizabeth temporarily, and it was

his intention so soon as the restrictions were removed to return to Bloemfontein. He had no assets in the Cape Colony, and was not domiciled here.

The plaintiffs' manager, in an answering affidavit, denied that the defendant was a refugee, and said that he had for good and substantial reasons been expressly expelled from the Orange River Colony by the military, and there was no prospect of his being allowed to return while military government continued. They further stated that the defendant's banking account at Bloemfontein had been closed, and that his business connection with the town had been severed, and also that he had set up business as a barber and tobacconist at Port Elizabeth.

Mr. Schreiner, Q.C., for the plaintiff, moved.

Mr. Howel Jones, for the defendant: The Court has no jurisdiction. None of the grounds specified in the case of *Kincaid v. German West African Co.* (5 Juta, 86) apply. The question is purely one of domicile. He says he intends going back to the Orange Free State, where his wife and family are. This raises a presumption in favour of a domicile in the Orange Free State. The contract was entered into in the Orange Free State, and was to be performed there. *Diccy* (pp. 132, 142). 'This man is a refugee, and cannot, according to *Foote*, acquire a domicile in the place to which he has been exiled. *Foote's Private International Law* (Part I., chap. 2, p. 30).

Mr. Schreiner, Q.C.: The defendant has a commercial domicile in this country, as is shown by the fact that he has set up a large barber shop at Port Elizabeth, where he is doing a good business. There is a difference between a civil and a commercial domicile. See *Diccy* (p. 337). *Prima facie* evidence of a civil domicile is afforded by residence; *a fortiori*, the residence in this case, raises a stronger presumption of defendant having acquired a commercial domicile. See *Schunke v. Taylor* (8 Juta, 70). If there is a commercial domicile in this case the Court can exercise jurisdiction. The fact that the goods were sent from Port Elizabeth, where they were sold, makes Port Elizabeth the *locus celebrationis*. The contract itself gives the Court power to exercise jurisdiction. The maxim *actor sequitur forum rei* can be carried too far. There must be some limit to it. Surely we can summon the defendant to pay this money or defend the action, seeing that a man's person and goods can be attached to found jurisdiction. Rule of Court 8 allows a plaintiff to arrest anyone *suspectus de fuga*,

if then the defendant is not *suspensus de fuga* he may be summoned to appear. The ordinary doctrines of domicile cannot be enforced during war in regard to exiles and refugees. *Drey*, at page 142, does not go so far as to say that an exile cannot acquire a commercial domicile. *Foot* (Private International Law, p. 24) and *Westlake* (p. 322) both draw distinctions between civil and commercial domicile.

De Villiers, C.J.: The bills of exchange were accepted by the defendant, payable at Bloemfontein, at a time when he resided there. When they fell due the proper *forum* in which to sue him was in the Orange Free State, but it is said that he has been expelled by the military authorities, who are in occupation of that country, and that he is now resident in this colony, and may be sued here. Such a compulsory residence would not constitute a domicile which implies an intention to remain here permanently. It is stated further that he is actually carrying on some sort of business at Port Elizabeth, but the evidence upon this point is very vague. It is certainly not sufficient to justify the issuing of a summons against him without a prior attachment of his person or property to confirm the Court's jurisdiction. It is by no means clear that if an application had been made for the attachment of his property *ad fundandum jurisdictionem*, the Court would have refused it, but without such an order the objection to the jurisdiction is a good one and must be allowed, with costs.

Buchanan, J., concurred.

[Plaintiffs' Attorneys, Messrs. Godlonton and Low; Defendant's Attorneys, Messrs. Findlay and Tait.]

MASTER OF SUPREME COURT V. } 1900.
BRUGMAN AND ANOTHER. } Dec. 12th.

Executor's account—Executor's fees
—Master of Supreme Court—
Ordinance No. 104.

Where an executor has failed, without lawful and sufficient excuse, to lodge his account of administration with the Master within the time prescribed by the 33rd section of Ordinance No. 104, the Master is justified in refusing to assess or allow any fees in respect of such administration, such refusal however being subject to an appeal to the Supreme Court.

This was an application made on behalf of the Master for an order calling upon C. J. Brugman, secretary of the Midland Agency and Trust Company (Limited) and T. N. G. Auret, executors testamentary in the estate of the late Regina Catherina Auret, to render a proper account of their administration of the estate. An account had been rendered, but rejected, as the acquittances of the legatees were wanting, and the executors having failed to render a proper account, supported by vouchers, within six months from the date of their appointment, without excuse, their remuneration had been disallowed. The contention in the affidavit of the defendant Brugman was that the account now in the hands of the applicant was a sufficient account, and such as the applicant was bound to accept.

The Master's report on the matter was as follows: When it became my duty to sign the notices calling upon executors under section 1 of Act 14 of 1864 to lodge accounts in estates under their administration, I was struck by the large number of circulars which had to be issued every month. On looking into the matter, I found that it was the exception that an executor lodged an account as directed by the Ordinance until notice had been given him that unless an account was lodged in terms of the notice legal proceedings would be taken against him. Under this section of the Act the Minister is empowered to sue for an account at the end of twelve months from the date of the executors' appointment, but notice must be given him of not less than one and not more than three months; and as the full period of three months is as a rule allowed to run before proceedings are taken, an executor has the estate in hand for at least fifteen months. Frequently an extension of time is then applied for, so that very often an account is not rendered within a period of eighteen months. This was quite contrary to the provisions of Ordinance 104. I therefore directed my attention to the 33rd section of the Ordinance, and on carefully reading it in connection with section 37, I came to the conclusion that that section provided a remedy. Thereupon I had a notice published informing executors that the provisions of the 33rd section of the Ordinance would be enforced from January 1, 1899. This notice was published in every "Gazette" from August 17 to December 31, 1898, and every executor was supplied with a copy. In thinking the matter over,

it occurred to me that the executors employed the estates' moneys for their own purposes. My suspicions were confirmed a few months ago, when an old and experienced country practitioner told me that I was quite right in disallowing the remuneration of executors, because they speculated with the money. This is a serious state of affairs. A testator may appoint any person as an executor testamentary, and from such an executor no security is demanded. If the estate is satisfactorily accounted for after fifteen or eighteen months nothing more serious happens than that the executor, if the estate is of the value of, say, £1,000, has probably made £60 or £80 out of it, according to the rate of interest he exacts, in addition to the commission which he expects to get, while creditors and heirs have been kept out of their money and the Government out of its revenue. As regards institutions whose business it is to administer estates, it is not a difficult matter to show that with a low average, say, of twenty such estates to administer per annum, a large floating capital for investment becomes available, and a handsome profit is derived therefrom in addition to the remuneration allowed as executors. The question now arises, who is to apply the provisions of the 33rd section of Ordinance 104, which directs that every executor who shall fail to lodge an account within the prescribed time shall forfeit his commission unless he shall have a lawful and sufficient excuse for such failure. In *Wessels v. the Master of the High Court* (Juta 9, page 18) his lordship the Chief Justice remarked: "It is true that under the 33rd section of the Ordinance (104) an executor who fails without sufficient excuse to lodge his account in proper time forfeits all claim to executor's fees, but it is a fairly debatable question whether there should not first be an order of Court declaring such forfeiture." The Judge-President of the High Court remarked: "That the executors' commission was clearly not allowed," but this question was not then before the Court. But in *In re Liquidators of the Union Bank v. King's Trustee* (Juta 10, p. 101), the Court pointed out that there exists no legal provision for the confirmation of an executor's accounts. And in *re Brown*, in discussing the duties of executors and the Registrar of Deeds (7 Juta, p. 237), referring to the executor, his lordship the Chief Justice said: "His duty under the 32nd section of the Ordinance 104 is to pay off and discharge the debts of the deceased according to their legal order of

precedence so soon as the funds necessary for that purpose shall have been realised out of the estate. A definite time is fixed within which he must file an account of his administration." The provision in section 33 is very explicit. It directs that every executor who shall fail to lodge such account as aforesaid, and who shall have no lawful or sufficient excuse for such failure, shall forfeit all claim to any fees which he might otherwise be entitled to receive. Under section 37 the Master is empowered to tax the remuneration to be allowed to the executors. It provides no tariff, but says the Master shall allow a fair and reasonable remuneration, and no executor shall be entitled to claim, receive, or retain any other reward whatsoever for his trouble. Even under this section the Master has the power to disallow commission. Now bearing in mind what his lordship the Chief Justice said in *Van Rooyen v. Werner* (9 Juta, p. 425), viz.: "The instructions of Governor De Mist, of the year 1804, served as a guide to the old Chamber until it was abolished by the Charter of Justice, when a new code of regulations was introduced for the guidance of the Master of the Supreme Court by Ordinances 103, 104, and 105," it appears conclusive that section 33 is an instruction to the Master, and directs in what cases he shall not allow any remuneration to executors, leaving it to the parties who are dissatisfied to appeal to the Court, under section 37. If it were otherwise, who is to apply to the Court? Take an instance which is by no means an extreme case, for it happened frequently. Take the case in which the heirs are all minors; they cannot apply to the Court, but it is the Master's duty to protect their interests. This applies equally to absent heirs. In such, the most important cases, then there would be no application to the Court if the Master did not exercise the power conferred upon him by the 33rd section, and these are the very cases in which estate moneys have to be carefully watched. One such case happened not three months ago, where the heirs, who are all in England, complained about the executor's conduct, and in which an executor, when asked for an explanation, reported that through this "miserable war" he was unable to liquidate the estate. On investigation, it appeared that he had received all the moneys six months before war was declared. His commission was disallowed. Another such case occurred last week, in which an executor forwarded powers of attorney to the heirs in England in favour

of his partner to draw their inheritances from him, with a view to his partner drawing commission thereon, in addition to his own commission as executor, instead of remitting the money direct to them. I submit it is only reasonable to assume that the official who appoints the executors who sees in detail what occurs until the final liquidation of the estate; the official to whom the complaints of the creditors and heirs are addressed; whose duty it is to watch over the interests of minors and absent heirs; the only official who is authorised to allow remuneration to executors, subject to an appeal to the Court, is the proper person to whom that instruction is directed by the 33rd section of Ordinance 104. Executors have their remedy. If they lodge their accounts complete in every respect within the proper time, their position would be unassailable; if they have a good and sufficient excuse for not being able to do so, the matter is very carefully considered, and if they are not satisfied with the decision of the Master, they have the right to appeal to the Court.

Mr. Ward (for the Master) referred to section 34 of Ordinance 104 of 1833 and section 28 of Ordinance 105 of 1833.

(He was stopped by the Court.)

Mr. Searle, Q.C., for the respondent: The important point is whether the Master has power to disallow the fees without a formal application to the Court to give judgment upon the matter. The Master cannot decree these forfeitures; it is a matter for the Court to decide upon the application of someone interested in the estate. The Master must in any case assess a compensation (section 37 of Ordinance 104 of 1833). No Master has as yet decreed these forfeitures. According to section 37, the executor must receive something, and this can only be declared to be forfeited by the Court. See *Wenels v. Master of High Court* (9 Juta, 18). By Act 14 of 1864, the executor is entitled to twelve months within which to file his account. The two Acts must be read together.

De Villiers, C.J.: It is, as was remarked in the case cited by the Master, a fairly debatable question whether there should not be a decree of forfeiture of an executor's fees before the Master can disallow them. After hearing the Master's report read, and considering the terms of the 33rd and 37th sections of Ordinance 104, I am of opinion that the Master acted within his powers in refusing to allow any compensation to the respondent. The 33rd section enacts that every executor who shall fail to lodge his account within the prescribed time, "and

who shall have no lawful and sufficient excuse for such failure, shall, by reason thereof, forfeit all claim to any fees which he might otherwise be entitled to receive in respect of his administration of such estate." The word "forfeit" is a somewhat unfortunate one, but the context shows that it was intended to deprive the executor of the right to claim his fees. Being deprived of that right, it could hardly be held that he can, under the 57th section of the Ordinance, insist upon the Master's assessing and taxing his fees. No fees are payable without due administration, and there is no due administration where, without lawful and sufficient excuse, the executor's account has not been lodged with the Master within the time prescribed by law. The Master's refusal to allow any fees is of course, subject to review, in the same way as his assessment may be appealed against. In the present case there has been no such appeal, and the Master asks that an account, omitting the charge for fees, be filed. The application must be granted as prayed.

Buchanan, J., concurred.

[Attorneys for the Master, Messrs. J. and H. Reid and Nephew; Defendant's Attorneys, Messrs. Van Zyl and Buissinne.]

SMYTHE V. COLIN HUDSON. } 1900.
Dec. 12th.

Mr. Searle moved for a writ of civil imprisonment on an unsatisfied judgment of the Supreme Court for £100 with £17 costs. There was a levy of £12 15s. according to the Sheriff's return.

Defendant appeared in person, and stated on oath that he had no means. Cross-examined by Mr. Searle, he said he only earned enough to live on, his earnings being about £10 per month. His business card said that his address was 25, Atkinson's Chambers, and Westerford Stables, but he had no interest in the business beyond receiving a commission for introducing customers.

In answer to the Court, defendant said the plaintiff owed him more money than the debt, but he could not prove that until he got his books down from Johannesburg. He intended then to try to re-open the case.

The Court granted an order as prayed, with costs, but stayed execution of the writ pending the payment of the debt by instalments of £1 per month, the first instalment to be paid on January 1 next. Leave was given to the plaintiff to apply again for an increase of the amount of the instalments.

SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), and the Hon. Mr. Justice BUCHANAN.]

HOGSETT V. W. J. VAN HEERDEN. { 1900.
Dec. 13th.

Mr. Close moved for the final adjudication of defendant's estate as insolvent.
Granted.

CARTWRIGHT V. C. A. HORNE.

Mr. Buchanan moved for judgment, under Rule 329, for £51 10s. 6d., for goods sold and delivered during the years 1896, 1897, 1898, and 1899, with interest, *a tempore morae*, and costs of suit.
Granted.

STAPELBERG V J. M. DE WET.

Mr. Buchanan moved for judgment, under Rule 329d, for £410, money lent, with interest at the rate of 5 per cent. from September 6, 1899, with costs of suit.
Granted.

MYBURGH V. CHRISTOFFEL MYBURGH.

Mr. Buchanan moved for judgment, under Rule 329d, for £930, money lent, with interest at the rate of 4 per cent. from May 31, 1899, with costs of suit.
Granted.

HEATHCOTE V. DE WET. { 1900.
Dec. 13th.

Practice—26th Rule of Court—Affidavit of merits.

Special circumstances preventing a defendant from instructing his attorney held sufficient to justify the postponement of a case in order that an affidavit of merits might be filed.

This was an application for judgment, under Rule 319, for the sum of £200, being the balance of an amount due. The declaration stated that in or about the month of September or October, 1899, the defendant received the sum of £300 for the use of the plaintiff, or to be expended on his property, the defendant, however, being entitled to deduct from that amount the sum of £100,

D 6

being money lent by defendant to plaintiff, and that the defendant refused and still refuses to pay over the balance of £200 or expend the same on the property.

There was also an application by the defendant for leave to purge his default and file a plea. An affidavit made by the defendant's attorney was to the effect that the defendant was confined to his farm by the military authorities, and consequently had been unable to communicate with the attorney in time to give him instructions for the purpose of having a plea filed.

Mr. Benjamin, for the plaintiff: There is no affidavit on the merits. The practice is to file an affidavit on the merits, stating the defence. See Rule of Court 26. In the case of *Buyskes v. De Murillac* (10 Sheil, p. 597), the Court insisted on an affidavit on the merits.

Mr. Gardiner for the defendant.

De Villiers, C.J.: The circumstances in this case are very special, seeing that the defendant was confined to his farm, and it does not appear that he has been able to communicate with his solicitors. I think the case should be postponed, so as to enable defendant to file an affidavit of merits. The Court will therefore order the application for judgment to stand over until January 12, and in the meanwhile the defendant can apply for the removal of bar and file an affidavit of merits.

OHLSSON V. JOHAN H. CARLSSON.

Mr. Buchanan moved for judgment for £3,440 14s. 3d., being balance of account due by defendant to plaintiff for cash advanced and goods sold and delivered, with interest thereon, less certain payments made on account; further, for interest on the sum of £2,600, balance of capital reckoned at 6 per cent. per annum from 15th November. Payment of the aforesaid sums was secured to plaintiff by a certain deed of hypothecation, dated April 7, 1888, hypothecating certain erven or share in the institution known as the Mercantile Establishment at Port Beaufort, and it was asked that this property be declared executable.

Judgment granted as prayed, and property declared executable.

GRANT AND CO. V. ANDREW AND GEORGE REID.

Mr. Benjamin moved for judgment, under Rule 329d, for £85 3s. 11d., against the defendants jointly and separately, being balance of account due.

Granted.

ROSENBERG V. PIETAR F. VAN STRAATEN.

Mr. Gardiner moved for judgment, under Rule 329d, for £68 15s., goods sold and delivered and moneys lent, with interest from November 1, 1899, and costs of suit.

KINGSWOOD V. W. H. OBREE.

Mr. McGregor moved, under Rule 319, for judgment in default of plea. The claim in the declaration was (a) that the defendant be ordered to quit and give up possession of certain premises; (b) judgment for the sum of £20 for rent; (c) the defendant to pay the plaintiff as and for use of the said premises the sum of £20 from September 30 last.

Granted.

PAGE V. ZUIDMEER.

1900.
} Dec. 13th.

Practice.

Service of intendent and notice of trial on the wife of a defendant who was on commando with the Boer Forces held sufficient under the circumstances.

Mr. Buchanan moved for provisional sentence on a promissory note made in the territory now known as the Orange River Colony. Leave had been given to sue by edictal citation, and the matter had been several times before the Court. The Deputy Sheriff's return showed that service had been effected upon the defendant's wife at Thaba 'Nchu on November 6, and she had stated that her husband was still on commando, and she could do nothing.

The Court granted provisional sentence, but stayed execution for two months; notice to be served upon defendant's wife that such provisional sentence had been granted, costs of such notice not to be allowed; writ of execution not to issue until proof that such notice had been served.

[Plaintiff's Attorneys, Messrs. Walker and Jacobsohn.]

REHABILITATIONS.

Mr. Buchanan moved for the rehabilitation of the insolvent estate of M. P. Janse van Rensburg. Application had been made on December 12, 1899, but refused, and leave given to apply again in twelve months.

Order granted as prayed.

Mr. M. Bisset moved for the rehabilitation of the insolvent estate of Emmanuel Kruger.

The application was refused, but leave was given to apply again in three months.

Mr. M. Bisset moved for the rehabilitation of the insolvent estate of John George Meiring.

Order granted as prayed.

Mr. Buchanan moved for the rehabilitation of the insolvent estate of Johannes Cornelis Dreyer.

The application was refused, but leave was given to apply again in three months.

IN THE MATTER OF THE PETITION OF WILLIAM ALEXANDER WAKEFIELD.

Mr. Alexander moved that the rule nisi granted under the Derelict Lands Act be made absolute.

Granted.

IN THE MATTER OF THE PETITION OF J. F. WEBBER.

Sir Henry Juta, Q.C., moved for leave to sue one Richard Douglas by *edictal citation*.

Granted.

THWAITES V. SOUTH AFRICAN COLD STORAGE COMPANY.

Mr. Schreiner, Q.C., moved to have judgment signed against plaintiff for not proceeding with his case.

Granted.

IN THE ESTATE OF THE LATE N. J. J. BREED.

1900.
} Dec. 13th.

Executor—Removal.

Mr. Close moved for the removal of the executor dative in this estate, and for an order authorising the Master to call a meeting of creditors for the purpose of electing another executor.

It appeared that on October 6, 1899, J. G. Breed was appointed executor dative of the estate, the petitioners in the present case becoming his sureties. The said J. G. Breed had taken no steps to liquidate the estate, although called upon to do so by the Master. On or about November 30, 1899, the district of Aliwal North, in which the estate is situated, was invaded by the forces of the then Orange Free State under Commandant Olivier, and about the month of December last the said J. G. Breed, a

British subject, accepted the position of Field-cornet under the then Free State Government. About 10th March last the Orange Free State forces left the district, and J. G. Breed left with them, and when last heard of was residing at Lourenco Marques. It was believed that his wife and others had written and telegraphed to him asking him to return to his farm, but he had intimated his intention of not returning.

Order granted as prayed.

IN THE MATTER OF C. C. E. WATSON.

Mr. Buchanan moved for the appointment of a curator for the person and property of the respondent, Mrs. Watson, owing to her intemperate habits having caused her to lose all self-control.

Order granted as prayed, J. A. Maine being appointed curator, but leave was reserved to the respondent to apply to the Court at any time for relief.

IN THE MATTER OF THE MINOR NIEUWOUDT.

Mr. Buchanan moved for the appointment of a *curator ad litem* to represent the minor in connection with certain transfers.

Mr. Peter van Ryn was appointed for that purpose.

OHLSOHN CAPE BREWERIES, { 1900.
LIMITED V. POWER. { Dec. 13th.

Liquor licence—Lease.

P. signed an agreement of lease by which he agreed at the termination thereof to hand over to C. the licence attached to the premises leased. He stated that the agreement was signed by him in ignorance of its terms with regard to the handing up of the licence which he said was his own property.

On an application by C. at the termination of the lease for an order on P. to deliver up the licence,

The Court granted the order as prayed, holding that the document signed by P. gave rise to a clear case for relief.

This was an application on notice calling on the respondent to show cause why he

should not be ordered to deliver up to the applicant company a certain liquor licence in respect of the Dublin Castle Hotel, Cape Town, and to sign all documents necessary for the purpose of assigning the said licence to Mary Ellen O'Reilly.

The affidavit of A. Bultitude, manager of the applicant company, set forth that the company was the owner of the Dublin Castle Hotel, and let it to the respondent on March 20, 1899, under certain conditions. That the liquor licence attached to the premises was transferred to the respondent at the same time, and the company continued to renew the licence in the respondent's name. The conditions of the lease were that the respondent should on the determination of the lease hand over to the applicant company the liquor licence, together with the premises. The lease having come to an end, the respondent handed over the premises and signed a power of attorney in favour of the manager of the company authorising him to take up, renew, or transfer the licence, but refused to deliver up the licence. The company was desirous of assigning the licence to Mary O'Reilly, to whom the premises were let, but could not, owing to the neglect of the respondent. Since December 1, 1900, the premises had been closed in respect of the sale of liquor, owing to the retention of the licence by the respondent, the result being damage to the company. The respondent alleged on affidavit that in 1884 he purchased from one Joransen, the lessee at the time of the premises, all his right, title, and interest in the premises for £200, the licence then existing being transferred to him, and having remained and been renewed in his name ever since. That in March, 1899, the applicant company purchased from one Byrne, the owner of the premises, the hotel, but could not purchase the licence because it never belonged to Byrne. He also said he had no knowledge of having signed the agreement of lease, and that if his signature was affixed thereto it must have been obtained by misrepresentation, because he received no consideration whatever for having signed the document. He was an uneducated man, and advantage must have been taken of his ignorance. That he would not sign away his right to a licence for which he paid £200 without receiving some consideration. The goodwill was now worth £1,000, and he refused a *bona fide* offer of £800 for it few months back. The applicant company sold the goodwill to Mary O'Reilly for £900. He claimed that the licence was

his sole and absolute property. With regard to the power of attorney in favour of the manager of the applicant company, he said it must have been signed under the same circumstances as the lease.

The manager of the company replied on affidavit that the company purchased the hotel, the bar fixtures and fittings, and the licence. He denied having made any misrepresentation, the whole agreement of lease and the power of attorney being thoroughly explained to and understood by the respondent.

A clerk in the employ of the company said he saw the respondent sign the agreement of lease.

Sir Henry Juta, Q.C., for the applicant: By keeping the licence and thus forcing the applicant to keep the place closed, the respondent is doing injury to the applicant and doing no good to himself. If he can prove fraud he can bring his action.

Mr. Schreiner, Q.C., for the respondent: The proceedings should have been by action instead of motion. By signing a document which compelled him to give up the licence, the respondent was losing really the goodwill, which was of considerable value to him. Under the Act of 1891, the applicants could scarcely get a new licence in view of the local option difficulties. The licence is of great value to the respondent because he has the power to apply for a removal of it to another place within a mile.

De Villiers, C.J.: Where a clear case has been made out for relief, the Court will grant an order on motion. In the present case it has been made out. The applicant produces a document signed by the respondent, which contains a clause that the respondent should, at the expiration of his tenancy, deliver, assign, or transfer to the landlord or his nominee, all and every of the licence or licences belonging to the premises as the landlord may direct. The respondent also gave powers of attorney to the applicant to apply for the licence at the Licensing Court. It has been stated that there was no consideration, but in my opinion there was, though it may not have been great. The consideration was that the agreement provided that the tenancy could not be terminated till a month after the 1st of April, which was the date on which it otherwise would. The defence is that the respondent did not understand the document he signed, but every presumption is against that. At the same time the Court, in ordering the licence to be delivered up, will reserve to the respondent any right

he may have to claim damages against the applicant for any injury he may have suffered by reason of entering into this agreement without knowing its purport. The order as asked for must be granted. In the event of the respondent bringing an action, he may ask for the costs of this application.

Buchanan, J., concurred.

[Applicant's Attorneys, Messrs. Fairbridge, Arderne and Lawton; Respondent's Attorneys, Messrs. Van Zyl and Buissinne.]

VAN DER MERWE V. VAN DYK. { 1901.
Dec. 13th
Servitude — Prescription — Interdict
—Flow of water—Refuse water
—Irrigation water.

In the absence of any right acquired by agreement or by prescription, the proprietor of an upper tenement is not entitled to an interdict restraining the proprietor of a lower tenement from obstructing the free flow of refuse water from a dwelling house on the upper tenement or of surplus irrigation water brought from elsewhere.

This was an application which was originally made through the Chamber-book, without notice to the present respondent. The application was refused, and the applicant ordered to apply to the Court. The application was accordingly made to the Supreme Court, the matter having been postponed from December 7 until December 13, to enable the respondent to file affidavits. The applicant stated that he was the owner of certain property at Worcester; that the respondent owned another portion situate below that of the applicant; that from time immemorial a watercourse or drain to carry off surplus water, which was used for irrigation and household purposes, flowed over his (applicant's) property on to respondent's. The watercourse was not used for drinking purposes, other provision having been made by the Worcester Municipality. That on the 6th October, 1900, the respondent blocked the watercourse, but opened it on receipt of a legal demand. He, however, blocked it again on the 5th November, at the spot where the watercourse entered his land, and refused to open it, with the result that the water, by standing, had become stagnant

and offensive, constituting a nuisance. The matter caused, and was still causing, damage to the applicant; consequently he applied for an order on the respondent to remove the obstruction, and an interdict restraining him from again obstructing the said watercourse.

An affidavit by one De Wet was to the effect that sixteen years ago the watercourse, which at present skirted the property of the respondent, ran through the middle thereof, and to deponent's knowledge, did so for seven years previous to that.

One W. van der Merwe stated that the watercourse was there to his knowledge for over forty years.

For the respondent, the Field-cornet of the district said that the water which the applicant allowed to come down the stream in question was not surplus irrigation water, but foul water. That the original course of the present watercourse could be traced across the property of the Misses Van der Merwe, and not through the respondent's property. In this he was corroborated by an original owner of respondent's property.

The respondent himself denied that the water flowed across his property from time immemorial, and stated that in 1883 he obtained a clean transfer of the property from the applicant, there being no servitude over it in favour of the applicant's property. He objected to the applicant sending down the stream foul and dirty water, alleging that it passed within 15 yards of his dining-room window, and caused a nuisance. He suggested that the applicant should send his drainage water along the original course, which was still visible, and where it would not cause a nuisance to anyone. That the applicant could send his water down the other course, which was the more natural course according to the slope of the ground.

Mr. Schreiner, for the applicant: I cannot at present ask for more than an order to operate as a temporary interdict, as the evidence is very conflicting. It is not a question of servitude. Our application is based on the nature of the place and the custom of the village. A lower proprietor is bound to receive the house water of an upper proprietor just as he is bound to receive surplus irrigation water, provided no nuisance is created. See *Ludolph v. Wegner* (6 Juta, 193). Ancient custom, even though it may not amount to prescription, gives a right of this kind.

Sir Henry Juta, Q.C., for the respondent, was not called upon.

De Villiers, C.J.: If the application had been for an interdict to restrain the obstruction of surface water flowing naturally from the applicant's land on to that of the respondent, the rules established in *Ludolph v. Wegner* (6 Juta, 193) would have been applicable. The application is to prevent any obstruction to refuse-water flowing from the applicant's dwelling-house and to surplus irrigation water brought on to the applicant's land from elsewhere and thence flowing on to the respondent's land. The right to discharge such water on to the respondent's land may be acquired by agreement or by prescription, but it does not exist *natura lori*. There is no agreement in the present case, nor is there any question of prescription, seeing that within the period of prescription both tenements have belonged to the same proprietor. The application must therefore be refused, with costs.

Buchanan, J., concurred.

[Applicant's Attorneys, Messrs. Van Zyl and Buissinne; Respondent's Attorneys, Messrs. Walker and Jacobsohn.]

BRITISH SOUTH AFRICA COM- { 1900.
PANY V. FURBER. { Dec. 14th.
Practice—Pleading—Amendment.

This was an application on notice made by the plaintiff in an action pending between the parties. In this action the plaintiff was claiming £14,000, the summons and the declaration claimed the payment of that amount. The plaintiff now wished to amend the summons and declaration by inserting a claim for £24,000 instead of £14,000, stating that when the summons and declaration were drawn there were not sufficient instructions to hand. These instructions now being at hand the plaintiff made the application as stated instead of taking out a new summons and then applying for a consolidation of the actions.

The defendant's attorneys objected, stating that the second claim did not fall under the same basis as the first, and that as the defendant himself was absent they did not feel justified in consenting to the proposal which was now made, and which had been made by letter before notice of the application was served.

Sir Henry Juta, Q.C., for the applicant company.

Mr. Schreiner, Q.C., for the respondent.

De Villiers, C.J.: If both claims are to be sued for it seems a matter of convenience that they should be disposed of in the same action. The defendant has authorised his

attorneys to defend the one claim, and I think that they will be quite justified in defending this additional claim, which is proposed to be included in the declaration. The Court will grant the order as prayed, costs to be costs in the cause.

[Applicant's Attorneys, Messrs. Scanlen and Syfret; Respondent's Attorneys, Messrs. J. and H. Reid and Nephew].

WARD V. WARD'S TRUSTEES. } 1901.
Dec. 14th.

This was an application to take the evidence of certain witnesses on commission, in connection with a case pending between the parties. The wife of an insolvent (Ward) was suing his trustees for £1,100, being money advanced by her to him, and wished to have the evidence of several witnesses taken on commission. The names of the three witnesses mainly wanted were a certain Rex, now on his way to Pretoria, a Mr. Nash, who had to report himself at Bulawayo on January 1, and a certain Rosettenstein, who was in Johannesburg. There were also, it was alleged, other witnesses residing near Uitenhage who could prove the payment of rent to the insolvent as the agent of his wife.

Sir Henry Juta, Q.C., for the applicant.

Mr. Schreiner, Q.C., for the respondents, objected to the granting of the application, on the ground that the expense of such an extensive commission would be great, and the witnesses could not be cross-examined.

De Villiers, C.J.: So far as one can judge from the affidavits, the three witnesses first named are material witnesses. They cannot be compelled to come down to Cape Town for the trial, therefore in the interests of justice, quite apart from the question of expense, their evidence will have to be taken on commission. The evidence of John Douthey Rex will be taken before Mr. E. Rooth, at Pretoria, the evidence of John Edwin Nash before Mr. Tredgold at Bulawayo, and the evidence of Albert Victor Rosettenstein before Mr. Douglas Forster, at Johannesburg, the costs to be costs in the cause.

Buchanan, J., concurred.

[Applicant's Attorneys, Messrs. Van Zyl and Buissinne; Respondents' Attorneys, Messrs. Scanlen and Syfret.]

KAPLANSKY, STERN AND CO. } 1901.
V. HOLT AND OTHERS. } Dec. 14th.

Lease—Evidence.

A contract of lease not in writing must be established by the clearest evidence or the Court will not give effect to it.

This was an application on notice, calling on the respondents, Albert Holt, Frank de Jong, and H. W. Stockham, and also Messrs. D. Isaacs and Co., to show cause why the three first-named respondents should not be interdicted from taking possession of the Masonic Hotel, which was purchased by them from the second-named respondents, and why the applicants should not be allowed to remain in possession of the premises, pending an action; further, why the second-named respondents should not be interdicted from removing the applicants from the premises on the 31st December, 1901.

From affidavits filed on behalf of the applicants, it appeared that by the terms of their lease with the second respondents, the owners of the Masonic Hotel, the latter had the right to cancel the lease by giving one month's notice on certain terms. The owners (respondents) sold the hotel in November, and on the 12th of that month informed applicants that they would have to vacate the premises on December 31. The applicants then went to Stockham, one of the first respondents, and the purchaser of the hotel, with a view to arranging a continuance of their tenancy after the 31st inst. He asked them what rent they were paying. They said £83 a month. Stockham said that De Jong, one of the partners in the venture, was on his way from England, and until his arrival it would be impossible to say how long it would be before the premises were pulled down and new buildings erected, but at any rate that would not happen for the period of six or twelve months. He (Stockham) thereupon agreed to accept applicants' tenancy at the rate of £83 for a period of not less than six months from January 1, 1901. Stockham said it was not necessary to see Holt or De Jong before the matter was considered as final because he (Stockham) had full power to act. He guaranteed possession to applicants for six months. Kaplansky asked him if it was necessary to have anything in writing. Stockham replied "No, amongst honest people writing is not necessary. You may

rely upon my word." On November 26, applicants called on respondent De Jong by appointment, the latter having returned a week previously. They told him in reply to his question that they were paying £83 a month. He characterised this as absurd, and said it cost them—him and his partners—about £2,250 per annum. Applicants asked him if he meant that they should pay rent at that rate. He replied in the affirmative. They told him that they would not vary the arrangement made with Stockham, and would insist on their right to hold the premises for six months from January 1 next at £83 a month. De Jong arranged to see them the following Thursday. He did not keep the appointment, so they called on him. He said he was not going to let the hotel under any consideration, but intended to run it himself. They repudiated his right to do so, and insisted on the arrangement made with Stockham being carried through. Applicants now intended instituting an action against the first respondents to vindicate their rights, and if compelled to give up possession of the said hotel on the 31st instant they would suffer irreparable loss.

For the respondents, there was an affidavit by Horatio W. Stockham, one of the first respondents, to the effect that the Masonic Hotel was purchased by Albert Holt on behalf of Stockham and De Jong from D. Isaacs and Co. subject to confirmation by De Jong upon his return from England. De Jong confirmed the sale on his arrival from England on November 19. Previous to De Jong's return the applicants called on him (Stockham), and asked for a renewal of the lease they held with Isaacs and Co. He told them that until De Jong's return he could settle nothing, and De Jong had already left England. He denied saying that the buildings were coming down, though he might have said that it was in contemplation to build a music hall. It was distinctly understood that until De Jong arrived nothing would be done. He denied agreeing to allow them to remain in possession of the hotel for six months from January 1, 1901. De Jong on his arrival refused to allow the lease to continue after December 31. He first offered the place to them at £230 a month, but they declined to accept it on these terms. On December 8 Kaplansky offered to pay him (Stockham) £200 a month. He referred Kaplansky to De Jong, as he had the whole control of the matter. Kaplansky said he did not care to see De Jong, as he was a very hard man to do business with. He

(Stockham) and De Jong bought the Masonic Hotel for £37,500, and if the applicants alleged that he (Stockham) agreed to lease them the place at £83 a month, it would mean a total loss to himself and De Jong of £1,254 per annum. He emphatically denied having let the premises on the terms sworn to by the applicants.

A further affidavit by Archibald Bultitude, manager of Ohlsson's Cape Breweries (Limited), was to the effect that De Jong told him about November 20 that he wanted a lessee for the Masonic Hotel at £230 a month. Stern came to him (Bultitude) the next day and asked him to try and get De Jong to grant a continuance of the lease of the Masonic. He said, however, he could not take it at £230. Other interviews followed, and De Jong repeated his intention to run the hotel himself unless he could get £230 a month for it, and finally told Stern that he must have the premises on January 1. Stern asked for easier terms, but De Jong insisted that he wanted the premises himself.

An affidavit by Frank de Jong set forth that he returned to the Colony from England on November 19, and that during his absence Stockham purchased through Holt and subject to his (De Jong's) confirmation, so far as his share in the transaction was concerned, the Masonic Hotel. Deponent confirmed the sale. He told Bultitude that he would let the place for £230 a month. Bultitude later said that the present lessees (the applicants) would not agree to give that sum. On November 26 the applicants called on deponent and asked for the refusal of the hotel. Deponent was busy, and said he would let them know on the following Thursday. On Thursday he could not keep the appointment, but applicants came to him, and he told them he would not lease the hotel to them. He would not let the hotel unless he could get £230 a month for it. On December 8 deponent heard for the first time that the applicants claimed that Stockham had let the hotel to them. Never on any occasion previously had the applicants set up such a claim, nor had they referred to any agreement with Mr. Stockham.

In a replying affidavit by Kaplansky and Stern, they denied that they offered to pay £200 rent for the hotel. On December 8 they called on Stockham and told him that De Jong had refused to allow them to continue the tenancy, but that they would continue the tenancy, and that they would rely upon the arrangement made with him

(Stockham), and if necessary institute an action to enforce the same. Kaplanaky said to Stockham: "Surely an old man like you will not go behind what you have done, and swear falsely"; to which Stockham replied, "No, certainly not, I shall state fairly everything I have promised you, and deny nothing." The respondent Stockham informed them shortly after De Jong's arrival in the Colony that he was afraid De Jong would not be satisfied with the amount of rental fixed, and might possibly ask them to pay a few pounds more rent, whereupon Kaplanaky said that they would not fight over a question of a few pounds, and to please him they might agree to a slight increase of rent, but at the same time he did not waive applicants' legal rights, and the offer was made distinctly without prejudice. They further denied asking De Jong for the refusal of the hotel. They told him they had definitely arranged with Stockham, and recited the terms. They admitted that after De Jong refused to accept them as tenants they did endeavour to persuade Bultitude to use his influence on their behalf, in order to save any trouble, but by doing so they did not intend to waive any legal rights or regard their contract with Stockham cancelled. Their chief object was to avoid trouble, and to get an extension of the lease for twelve months in writing, and they promised Bultitude if he could secure this extended period they would pay him £200.

Mr. Schreiner, Q.C., for the applicants.

Mr. Searle, Q.C., for the first-named respondents.

Mr. Currey, for the second-named respondents.

Mr. Schreiner, Q.C.: It is clear that De Jong was put out with Stockham, and the latter, instead of adhering to his position, filed the affidavit now before the Court, which, I submit, is most unsatisfactory. The statements are extremely vague. Kaplanaky's statements, on the other hand, are clear and definite. The interdict should be granted, pending an action.

Mr. Searle, Q.C., and Mr. Currey were not called upon.

De Villiers, C.J.: The applicants in this case rely upon an oral lease alleged to have been given to them by Stockham for six months. It does not appear what authority Stockham had to enter into such a lease, but even if he had any authority, there must be the clearest possible proof of such a lease before the Court will give effect to it. The Court has insisted that when a lease re-

garding land is relied upon, there must be the clearest and most satisfactory evidence as to the existence of such a contract. Everyone knows how easy it was for persons to misunderstand a conversation. Persons are very anxious to retain possession of a property, and they gather from a few remarks made by the lessor that they are entitled to remain in possession. The lessor probably never intended to give an undertaking, but the applicants took it for granted in their eagerness that they had got it. It is possible to attempt to fix an opponent with liability upon a few uncertain expressions. It is for these reasons that the Court considers it advisable that there should be a written contract, and if there is not, the Court will refuse to give assistance unless it is satisfied of the existence of such a contract. In the present case I am not at all satisfied that there is such a contract. The respondents deny what is alleged by the applicants, and the respondents allege facts which lend considerable probability to their statement. Perhaps, however, it is not advisable to say too much on the matter of credibility at present. The application will be refused, with costs, but the Court will reserve to the applicants the right to bring an action for damages, and to include in that action the amount of the costs ordered to be paid in this application.

Buchanan, J., concurred.

[Applicants' Attorneys, Messrs. Silberbauer, Wahl and Fuller; Respondent's Attorneys, Messrs. Van Zyl and Buissinne.]

IN THE ESTATE OF THE LATE ABSOLOM.

Mr. Buchanan moved for an order authorising the executors to sell certain property, and to distribute the proceeds among the heirs. The property was bequeathed in 1838 to the children and grandchildren of the deceased. It was now in a state of ruin.

Granted, the net proceeds to be distributed by the Master.

IN THE MATTER OF THE MINOR ANDREW DIRK JACOBUS LOUW.

Mr. Benjamin applied for an order authorising the executors to pay out certain money for the use of the minor, the money being due to him under his father's will. The petitioner wished to start in business, being nineteen years of age.

Granted.

IN THE MATTER OF THE MINOR ELIEZER
DU PLESSIS.

Mr. Buchanan applied for an order authorising the Master to pay out certain instalments from money standing to the credit of the minor in the Guardians' Fund, to meet certain expenses incurred and to be incurred in connection with an accident to the minor. Granted.

IN THE ESTATE OF THE LATE ANTHONY
GEORGE ELIOT VAN VELDEN.

Mr. Schreiner, Q.C., moved for the appointment of a *curator ad litem* and for an order compelling the Master to accept a certain distribution account.

Sir Henry Juta, Q.C., was appointed *curator ad litem*, the hearing of the other part of the application being postponed till January 12.

IN THE MATTER OF THE PETITION OF
NATHAN LAMPA.

Mr. Close made application for leave to sue the Union-Castle Steamship Company *in forma pauperis*.

The Court referred the matter to Mr. Close for certificate.

IN THE MATTER OF THE PETITION OF
CHARLES BLETTERMAN ELLIOTT.

Mr. Benjamin moved for authority to the Registrar of Deeds to pass transfer of certain property which was left by petitioner's mother in 1883 by will for the support of his sister. The rent was now insufficient for that purpose, and the petitioner wished to sell the property for her benefit.

Granted.

In re HOFFMEESTER. { 1900.
{ Dec. 14th.

Presumption of death—Distribution
of estate—Curator—Security.

The wife of H. applied for an order declaring that her husband to whom she had been married in community was dead, and for the appointment of executors on the grounds that, if alive, he would be 80 years of age, and that although repeated inquiries had been made he had not been heard of for thirty years.

Application refused, but ordered that applicant be appointed curator to administer her husband's estate, with power to transfer one half to herself, and the remaining half to the children of the marriage, and security to be given for the restoration of the property in case he should prove to be alive.

This was an application made by Maria Hoffmeester for an order declaring her husband, Hendrik Hoffmeester, to whom she was married in community of property, to be dead, and for the appointment of an executor dative to administer his estate.

The applicant's affidavit set forth that her husband left his home at Ceres, in the Cape Colony, and proceeded to the Diamond Fields about thirty years ago, and had not been heard of since, despite frequent and searching inquiries. The present age of her husband, if he were alive, would be eighty years.

Mr. Bisset, for the applicant: The petitioner's husband might have died in the early days of the Diamond-fields, and nothing more be heard of him. In the early days a great many diggers and speculators died when the country was very unsettled, and their deaths passed unnoticed. There is a very strong presumption of this man's death. See *In re Kanne-meyer* (9 Sheil, 440); *In re Kirby* (9 Sheil, 217); *In re Fernandez* (3 Sheil, 293); *In re Safadien* (3 Sheil, 145); *In re Booysen* (1 Foord, p. 187); *In re Nelson* (Buchanan, 1876, p. 130).

De Villiers, C.J.: The Court is prepared to give the applicant every possible assistance short of declaring a man to be dead who may possibly still be alive. It is true that if now living, he would be eighty years of age, and that inquiries have failed to find a trace of him, but under similar circumstances people have afterwards been found to be alive. There are not in the present case such circumstances of shipwreck or disease, which in the cases cited have justified the conclusion that the man was dead. The facts would, however, justify the Court in appointing the petitioner as curator to administer her husband's estate, with leave either to transfer half the property to herself and the other half to the children, or to sell the property and distribute the proceeds in the same proportion, but in either case the personal security of the petitioner

and her children must be given that they will restore the property in case the petitioner's husband should prove to be alive.

Buchanan, J., concurred.

QUEEN V. KONING. { 1900.
Dec. 14th.
" 17th.

Master and servant—Minor—Contract of service—Prejudice to minor.

A minor who has attained the age of sixteen years and is not under articles of apprenticeship may enter into a valid contract of service terminable at a month's notice provided that such contract is not to his prejudice, and in determining as to the validity of the defence that such contract is to his prejudice, his age and position in life, the wishes of his parents and such like matters must be taken into consideration.

This was an appeal from a decision of the Assistant Resident Magistrate of Durbanville. The accused was convicted on a charge of contravening sub-section 6 of section 4 of Act 18 of 1873, in that on October 3, 1899, he departed from the service of his master, Jacobus Theunissen, without leave or lawful cause, with intent not to return. The trial took place on September 17, 1900.

The evidence of the complainant showed that accused was a monthly servant of his, and on September 28 borrowed 10s. as an advance on his wages, obtained a day's leave, and did not return again. He gave no notice. It was the custom in the district of Koeberg to advance money to the servants on the understanding that the servants remain in the service of the person making the advances until the servant work off the amount owing. He owed the complainant £4 12s. 6d., which he could work off in about four months.

The defence is fully discussed by the Magistrate in his reasons. He said:

Accused relied on two main points for his defence. (1) "That as a monthly servant he had given the required notice, and was entitled to leave at the expiration of the same." That notice was given is admitted by the prosecution, but it was con-

tended that the accused having received an advance on his wages tacitly agreed to work in the amount, and could therefore not give notice to quit until he had squared the advance. It is admitted by the accused that he received advances from his master in small sums, and that there is an amount due to his master, but not the sum claimed. Further, that he received the advance for his own special benefit, and that the amount was spent on himself. It is further also admitted by the witness for the defence that when advances are made to servants, it is an understood thing that they must work in the amount. This confirms the evidence of Mr. Van der Spuy, as to the prevailing custom in this district for the last twenty-eight years. I am therefore of opinion that accused did receive advances for his own special benefit, that when he so received the advances, he tacitly agreed to work in the amount, and that by so doing he placed himself within the provisions of the Masters and Servants Act, and as I can find nothing in the said Acts to oppose such a contract, the accused can be convicted for desertion should he abscond from his master's service before liquidating the advance, which, in this case, he has not done, and therefore he is guilty of deserting his master's service. Secondly, that as accused was a minor, he could not enter into a contract of service. The complainant engaged the service of accused, together with that of his father, which was a legal contract under the Masters and Servants Act. *Regina v. Kruger* (7 Juta, 71). Should the first points be deemed insufficient to convict on, there is a further point which ought to be considered against the accused, viz., that he remained in his master's service about seven days after the expiration of his month's notice, whereby he waived his notice. (Chapter 2, section 8, of Act 15 of 1856.) On this point I think the fact that accused obtained a further advance of 10s. on the day he went on leave, shows that the notice was waived or withdrawn, and that it was understood by the parties that things would remain as they were, and therefore he is guilty of contravening sub-section 6 of section 4 of Act 18 of 1873 in absconding in the way he did. I am also further of opinion that as the accused was a minor, and had no legal right to hire himself, he could not have the right to give notice, and therefore the notice given on the 21st August was rightly refused by the Master.

Mr. Close, for the appellant: The conviction cannot be upheld in law. There was no

contract of service in the first instance, the accused being a minor. There was no apprenticeship. Even if there was a contract of service, that was broken by the notice given. This notice was sufficient to put an end to the contract, even though the system of "advances" and subsequent "working off" is found to be the custom. Such a custom cannot be upheld by any court. See *Regina v. Kruger* (7 Juta, p. 71), and section 12 of chapter 2 of Act 15 of 1856.

There was no appearance for the Crown
Cur. ad vult.

Postea (December 17).

The Court delivered judgment.

De Villiers, C.J.: The question whether a minor can enter into a binding contract of service was incidentally considered in a case reported in Buchanan's Reports for 1879, p. 288, and in another case reported in 7 Juta, 71. In the former case the father of the minor had refused to allow his son to serve at the rate of wages agreed upon, and the minor was—although this fact does not appear in the report—only fifteen years of age. In the latter case the minor was only fourteen years of age when he was apprenticed by his father under an oral agreement. The Court held that in neither of these cases was there a contract binding on the minor, and that he consequently could not be prosecuted for a contravention of the Masters' and Servants' Act. In the present case the appellant is twenty years of age. He was originally engaged to the master by his father at the same time when the father contracted for his own services, but he afterwards entered into an independent contract with his master and received his wages on his own account. There is nothing to indicate that such contract of service in any way prejudiced him; on the contrary, at his age it was manifestly to his advantage that he should earn his own livelihood, and in so doing, should acquire a knowledge of a farm labourer's duties. His contract was not one of apprenticeship, but the ordinary engagement for a service from month to month, with liberty to either side to put an end to the engagement by giving a month's notice. After a careful consideration of the common law relating to minors and of the Masters and Servants Acts, I have come to the conclusion that a minor who has reached the age of sixteen years may enter into a contract for monthly service provided that it is not in any way to his prejudice. In determining the validity of the defence that the contract is to his prejudice, his age and position in life,

the wishes of his parents, the nature of the service, and such like matters must be taken into consideration. Of course, where a minor of sixteen or more is already legally apprenticed under the Act 15 of 1856, he is bound by the contract of apprenticeship, which, in the case of a male agricultural servant, is valid until he attains the age of eighteen years. But where there is no such pre-existing engagement, there is nothing to prevent a minor above sixteen from entering into a valid contract of service which is for his benefit, and if, after having entered into such a contract he is guilty of desertion, he can be punished for a contravention of the Act. A further defence was raised in the Court below that the accused had given a month's notice of his intention to leave, and could not therefore be prosecuted for leaving his master's service after the expiration of the month. The evidence shows that such notice was given, but it also shows that the accused remained in his master's service after the day on which, according to the notice given, the contract should expire. There was consequently a tacit relocation of the services of the accused in terms of chapter 2, section 8, of the Act. I do not attach the same weight which the Court below attached to the fact that after the expiration of the month the accused received an advance from his master. The receipt of such an advance by a servant may be valuable evidence of an undertaking on his part to remain in service until the amount is paid, but it is not conclusive proof. Evidence was given in the Court below of a custom among Koeberg farmers by which a servant who has received advances is bound to remain in service until the advances are fully repaid, but the existence of such a custom could not create a contract which would not otherwise come into force. The intention of the parties must be gathered from the circumstances of each case quite independently of the alleged custom. Moreover, in the case of a minor it is by no means clear that it is for his benefit that such advances should be made and that he should remain in his master's service so long as he owes anything to him. In the present case, however, there is evidence that the accused remained in his master's service after the expiration of the month's notice, and he could not therefore leave without a fresh notice. The appeal must therefore be dismissed.

Buchanan. J.: The Magistrate in his reasons dealt with three grounds for con-

victing the accused. In the first he said it was admitted that notice to leave the service was given, but the Magistrate held that the boy having received advances from his master, had tacitly agreed to what he called "work in" the amount, and could therefore not give notice to quit until he had squared the advance. In support of this finding he relied on the evidence of a Field-cornet as to custom, in the course of which he said: "If a boy gives me notice it is accepted, and at the termination of the notice we balance accounts, and if there is any money due to me the boy must work in the amount." And the witness adds: "Boys must remain in service for ever until the advances are paid off." If the case rested on this ground alone, I should unhesitatingly have quashed the conviction. This is not a doctrine which the Court can uphold. In his second ground the Magistrate deals with the question of minority, and, after consultation with his lordship the Chief Justice, we are agreed that the law allows a minor over sixteen to enter into a contract of service for his own benefit. If such a contract is made, and is improperly broken, the parties render themselves liable to the provisions of the Masters and Servants Act. The third ground the Magistrate deals with is the question of tacit relocation, and it is on this ground alone that this appeal is dismissed. The evidence shows that after the expiry of the notice the servant remained on in service. The fact that he obtained after that a further advance is evidence of a renewal of the service, which would then require fresh notice to be given before it could be terminated. I therefore concur in dismissing the present appeal.

[Appellant's Attorney, John Ayliff.]

QUEEN V ADAMS. { 1901.
Dec. 17th.

Police Offences Act—Penalty—Driving vehicle upon a side walk which accused has the right to use—Proclamation—Evidence—Judicial notice.

The appellant was a wagon driver in the employment of C., who had for a period of 45 years as of right used a sidewalk in Cape Town for driving wagons to his store, and had thus acquired a right by prescription.

Held, that the appellant could not be convicted of a contravention of section 5, sub-section 6, of the Police Offences Act, 1882, which imposes a penalty on any person "driving a vehicle upon any foot-path or sidewalk."

The Act enacts that the first part thereof shall apply to any town in which the Governor shall by Proclamation declare such part to be in operation. Such a Proclamation had been duly published in the "Government Gazette" in regard to Cape Town, but was not put in as evidence in the Court below.

Held, that the Court might take judicial cognizance of the Proclamation without such production.

This was an appeal from a decision of the Resident Magistrate of Cape Town, in a case in which the accused was charged with, and convicted of, contravening section 5, sub-section 6, of Act 27 of 1882, in that he did, on the 20th August, 1900, wrongfully and unlawfully drive a vehicle on the public footway in Sir Lowry-street, Cape Town.

The evidence for the prosecution was to the effect that the accused drove 7 or 8 yards along a footpath situate in front of the premises of Collison and Co. (Limited). That the Town Council repaired, and kept in good order, the said footpath, which was public property. It was last repaired on the 25th August, 1900.

For the defence, a director of Collison and Co. said that the accused was in the company's employ at the time of the alleged contravention, that the Town Council had done nothing to keep the so-called footpath in repair, and that the owners of the premises had used the footpath for upwards of 68 years for wagons, and no complaints were made by the authorities. In cross-examination, he said that the Council kept the part driven over as a roadway, and not as a footway. He claimed a prescriptive right to use the round. Other old employees of the firm corroborated the above evidence.

The Magistrate convicted the accused, and the latter now appealed.

Mr. Schreiner, Q.C., for the appellant: The one ground on which this appeal is brought is that no proof was adduced be-

fore the Magistrate that the part of the Police Offences Act 27 of 1882 alleged to have been contravened has been proclaimed to be in force in the Municipality. The record shows no such proof.

[De Villiers, C.J.: If the proclamation is put in now, the Court will take cognisance of it.]

Mr. Jones: It was not anticipated that this point was to be raised. If there is such a proclamation, there will be no difficulty in placing it before the Court.

The proclamation should have been put in at the trial.

[De Villiers, C.J.: If this was stated as a ground of appeal, then the Crown would have been prepared with the proclamation.]

There was no necessity to give notice of such a point. The appeal is brought on the merits; we appeal on the ground that the accused had a right to use the path; even if the Act is in force in Cape Town, it cannot take away previously acquired rights. It is not clear that this is a footpath. The statute cannot take away private rights unless it was expressly passed for that purpose. *Maxwell on the Interpretation of Statutes* (p. 399). Here there is a prescriptive right such as was not present in the case of *Battray v. Stellenbosch Municipality* (10 Sheil, p. 557). The Magistrate should never have tried this case; the defendant raised a *bona fide* defence, founded on a servitude, which ought to have ousted the Magistrate's jurisdiction. *Visagie v. Booysen* (Buchanan, 1869, p. 317).

Mr. Howel Jones, for the Crown: I put in proclamation No. 236 of 1883, making this portion of the Act applicable to Cape Town. The Magistrate was quite right in taking judicial cognisance of the proclamation. By section 7 of Act 27 of 1882 it is clear that this proclamation was not required to be produced. The only question is whether this is a footpath. If so, it is clear that the accused contravened the Act. The land is vested in the Town Council, they had the control of it, and used it as a footpath, exclusively for foot passengers. The defence raised is that the firm of Collison and Co. and not the accused has a servitude or prescriptive right. It is practi-
wagons upon its own property, because it is said that all wagons have driven there without being interfered with. If this is a footpath since 1882 the user has been against the statute. If not a footpath, it was waste land, and user cannot affect the control of the Municipality to set it apart for footpaths. There is no claim against any particular person;

prescription must be claimed as of right against someone. How can the public claim against themselves? There is no evidence of necessity.

De Villiers, C.J.: The objection has been taken by appellant's counsel that no proclamation was produced in the court below declaring the first part of the Police Offences Act, 1882, to be in operation in Cape Town. Such a proclamation has, however, been produced in this court, and as it was duly published in the "Government Gazette," I am of opinion that the Court below could take judicial cognisance of the proclamation without its being actually put in as evidence. The real question is whether, under the circumstances disclosed by the evidence, the appellant was rightly convicted of a contravention of section 5, sub-section 6, of the Act. The offence he was charged with was "driving a vehicle upon a footpath or sidewalk." The offence could, however, only have been committed if he had no legal right to drive upon a particular sidewalk. Had the appellant such a right? The evidence shows that he had. He was a wagondriver in the service of Collison, and was driving a wagon to the store of Collison's store. The sidewalk adjoining had been used as of right by Collison and his predecessors in title for 45 years. As against individuals, a right by prescription to the use of the sidewalk had been acquired, and no legal reason exists why the right should not have been acquired as against the Town Council. The appeal against the conviction must therefore be allowed.

Buchanan, J., concurred.

[Appellants' Attorneys, Messrs. Van Zyl and Buissinne.]

Er parte BENNETT. } 1900.
} Dec. 17th.

Mr. Searle, Q.C., moved for the admission of the applicant as an advocate.

Granted, and the oath administered.

REGINA V. ROOS. } 1900.
} Dec 17th

Liquor Licence—Condition - Prohibition—Act 28 of 1883 Act 44 of 1885, section 5.

R., the holder of an hotel liquor licence on which was endorsed the following condition, viz., "any licensee who serves or sells to any recognised habitual frequenter of

a canteen at his hotel bar after the prescribed hours for the closing of canteens shall not be entitled to a renewal of his licence at the next meeting of the Board," sold liquor to two habitual frequenters of his canteen and was convicted of contravening section 5 of Act 44 of 1885.

The Court, on appeal, quashed the conviction, holding that the condition did not amount to a prohibition, although it subjected the accused to a penalty at the hands of the Licensing Court.

This was an appeal from a decision of the Assistant Resident Magistrate of Stellenbosch in a case in which the accused was convicted of contravening section 5 of Act 44 of 1885, in that he did wrongfully and unlawfully contravene the conditions of his licence, imposed by the Stellenbosch Licensing Court, on the 1st March, 1900 by serving or selling brandy to two recognised habitual frequenters of canteens, at his hotel bar after the prescribed hours for the closing of canteens. The evidence showed that the accused did sell the liquor to the two persons, who admitted that they were frequenters of the canteen, the one saying that he played the concertina at the canteen—for which he got drink from his friends. They, however, said that they frequently went to the hotel bar, but preferred the canteen. The hour at which the liquor was sold was after the hour at which the canteen closed, the men having gone from the canteen when it was closed to the hotel bar. The material words of the licence were "and any licensee who serves or sells to any recognised habitual frequenter of a canteen at his hotel bar after the prescribed hours for the closing of the canteens shall not be entitled to a renewal of his licence at the next meeting of the Board."

The Magistrate convicted the accused, and said in his reasons that he "was of opinion from the evidence adduced showed that these men were frequenters of canteens."

The accused appealed on the ground that the evidence adduced before the Court was insufficient to warrant a conviction, that the term "any recognised habitual fre-

quenters of a canteen" was vague and embarrassing, and that the condition thus imposed was *ultra vires*.

Mr. Buchanan, for the appellant: The condition is at variance with the body of the licence, which allows the accused to sell until ten p.m. The accused has no power of ascertaining who is a frequenter. He is prohibited by the licence from selling to a class of person which he cannot easily describe. The condition is *ultra vires*. Who is to decide what class of persons is comprised in the term "frequenter"? Even if any person is clearly proved to be a "frequenter," no prohibition to sell to him can be imposed without an Act of Parliament. See section 7, sub-section 2, of Act 28 of 1883, and *Pearson v. Uitenhage Licensing Court* (3 Juta, p. 363). The 89th section of Act 28 of 1883 makes provision for a worse class of persons than that dealt with here. *A fortiori*, an Act is required here. See *Regina v. Transfeldt* (5 Juta, 181); *Regina v. Robertson* (9 Juta, 299); *Roozboom v. Piquetberg Licensing Court* (10 Juta, 195). The condition in the present case did not amount to an absolute prohibition, but only provided a possible penalty.

Mr. Howel Jones, for the Crown: The licence must be read with and be subject to the conditions imposed therein. The words are clear, and amount to an absolute prohibition after the closing of the canteen with regard to this class of persons. The persons themselves admit they are frequenters of the canteen.

De Villiers, C.J.: If there was a condition in the licence in the following terms, it would be perfectly valid, viz.: "And such person shall not serve or sell to recognised habitual frequenters of the canteen at his hotel bar after the prescribed hours for the closing of the canteen." The only question is whether such a prohibition has been imposed by the licence. I quite agree that the conditions must be read with the licence, and if there had been a clear prohibition the Court would give effect to it. But the Licensing Court has not made a clear prohibition. It is clear from the words used that the intention of the Licensing Court was that only a certain penalty should follow a breach of the condition. The Court will allow the appeal.

Buchanan, J., concurred.

[Appellant's Attorneys, Messrs. Findlay and Tait.]

REGINA V. GRAPENTION { 1900.
AND OTHERS. { Dec. 18th.

Act 15 of 1893 - Proclamation 189 of July 3rd, 1894—Net fishing—Governor.

Act 15 of 1893 gives the Governor power to make regulations in regard to fishing with nets and provides a penalty for the contravention of any such regulations. The Governor by proclamation prohibited the fishing with nets in the Nahoon River. The appellants contravened the proclamation and were fined.

Held on appeal, that the proclamation was not ultra vires, and that there was no necessity to provide a penalty by such proclamation as the Act itself did so.

This was an appeal from a decision of the Resident Magistrate of East London. The accused were charged with contravening the schedule to Proclamation No. 189 of 3rd July, 1899, framed under the provisions of section 2 of Act 15 of 1893, in that on the 19th October, 1900, at Nahoom, in the district of East London, they were both and each or one or other of them wrongfully and unlawfully laying down, using, or fishing with a net in the Nahoom River, thereby subjecting themselves to the penalty provided by the said Act 15 of 1893.

The evidence showed that the accused were found fishing with a net at 9.15 p.m. on the 19th October, 1900. They caught 25 fish in the net, which was 10 feet deep, 100 feet long, and 1½ inches from knot to knot in each mesh.

They were convicted, and each fined 2s. 6d.

The accused appealed on the following grounds:

(a) That the said conviction is contrary to law, and is not supported by the evidence given before the Court.

(b) That there is no penalty provided by Act 15 of 1893 for the contravention of a schedule to a proclamation or by a proclamation.

(c) Neither the proclamation nor the schedule provides any penalty for the alleged offence.

(d) That even if the proclamation be taken to constitute a regulation, that regulation is *ultra vires* of Act No. 15 of 1893.

(e) That the summons discloses no offence.

Mr. McGregor, for the appellants: The Act 15 of 1893 empowers the Governor to make regulations with regard to fisheries. Here a schedule merely has been published, and no regulation made. There is no power given in the Act to absolutely prohibit net fishing. The words of the Act are ambiguous, and are not strong enough to take away a common-law right. Sub-sections 3 and 5 of section 2 expressly acknowledge net fishing. If the Governor is held to have the power under section 1 to prohibit fishing, then sections 2 and 3 are meaningless. The prohibition is *ultra vires*.

Mr. Howel Jones, for the Crown, was not called upon.

De Villiers, C.J.: It is not necessary that the proclamation should provide a penalty, as the Act itself does so. The more substantial objection is that no power is given to the Governor to make a regulation prohibiting net-fishing altogether. But I do not think that objection will hold good. The widest possible powers were given by the Act to the Governor. It seems to me that the prohibition that there should be no net-fishing is a prohibition for the regulation of fishing, and that the Governor has power to prohibit net-fishing in the river altogether. The appeal must be dismissed.

Buchanan, J., and Maasdorp, J., concurred.

[Appellant's Attorneys, Messrs. Silberbauer, Wahl and Fuller.]

REGINA V. KLEINBOOY. { 1900.
{ Dec. 18th

Scab Act 20 of 1894—Proclamation 67 of 1898.

In order to obtain a conviction under Proclamation No. 67 of 1898, framed under Act 20 of 1894, it is necessary to prove that the person charged did actually introduce the sheep from one district to another.

This was an appeal from the decision of the Resident Magistrate of Elliot in a case in which the accused was convicted for introducing sheep from the district of Barkly East into Elliot contrary to the 21st section of Proclamation 67 of 1898, framed under Act 20 of 1894. There was a conviction on the record against accused for the theft of the same sheep.

Mr. Currey, for the appellant: The record does not show that there was any bringing by the accused of the sheep from Barkly East to Elliot, nor that he refused to show his permit. He was never asked if he had a permit.

Mr. Jones, for the Crown: I do not propose to argue against this appeal.

De Villiers, C.J.: The appeal will be allowed on the ground that there is no evidence on the record to prove that the sheep were brought to Elliot by the prisoner.

[Appellant's Attorney, J. J. Michau.]

REGINA V. ROSE AND OTHERS. { 1900.
Dec. 18th.

Act 27 of 1882—Sentence.

Where two persons were charged with riotous behaviour and resisting the police, and the one was found guilty on both counts, and the other on the second count, and the Magistrate sentenced them both to three months' imprisonment, The Court, on appeal, upheld the conviction and sentence.

This was an appeal from a decision of the Assistant Resident Magistrate of Durbanville. John Rose, Albert Rose, and David Delport were charged with contravening section 9 and sub-section 5 of section 8 of Act 27 of 1882, in that they, firstly, all and each or one or more of them behaved in a riotous manner and did fight in the public street, and secondly, that they all and each or one or more of them did wrongfully and unlawfully resist, hinder, and disturb Constables Shelly and Moore in the execution of their duty. The first two accused were convicted and sentenced to three months' imprisonment with hard labour, and the third named was acquitted.

The evidence led showed that Constable Shelly was called from his dinner on October 1, 1900, and found the first-named accused struggling with several other people in front of a shop, and behaving in a riotous manner. After warning him the constable attempted to arrest him for his insolence and refusal to desist from struggling, etc., but on doing so was set upon by the others. Constable Moore came to his assistance, and was also set upon so furiously that they had to use their batons, one of which was used on the first accused. The accused all got away, Moore having identified the two second named as being in the row.

The part played by the third named was very small. The defence raised was that the first-named accused went into the shop to buy cheese, and finding himself cheated, he remonstrated with the shopman, who immediately, with two others, set upon him. The police then came and trod upon, struck, and dragged accused.

The grounds of appeal were as follows:

(a) That the verdict was against the evidence, and that the conflict of evidence admitted by the Magistrate ought to have been decided in favour of the accused.

(b) That there was no separate and distinct verdict recorded or given in each charge, and that this being so, the accused have a right to have the verdict recorded as on the lighter and first charge.

(c) That the prosecution failed to produce the best evidence, or to prove that the accused Rose was lawfully in custody at the time that he was arrested. The whole evidence rebuts this, and if he was not lawfully arrested in the first instance, he could not be convicted of resisting the police.

(d) That there was no serious injury, and in the case of the second accused a difference, according to the Magistrate, in the finding, and yet the same punishment.

Should the verdict be confirmed, a fine is desired.

The Magistrate, in convicting the prisoners, gave the following reasons: "The evidence in this case is very conflicting, and is one in which the credibility of witnesses must be considered; and after carefully observing the witnesses, and weighing their evidence, I had no hesitation in arriving at the conclusion I have, viz., John Rose guilty on both counts, and Albert Rose guilty on second count. As to the sentence: D'Urban-road being within easy distance of Cape Town, it is a great resort for coloured people, especially on holidays, when they are very rowdy, and cases of this nature are frequently occurring. Two of the crowd who resisted the police on the 2nd October were arrested at the time, and tried by me on the 3rd October, and sentenced to three months' hard labour, and nothing has been adduced in this case to alter my judgment 'that an exemplary punishment is necessary.' It may be argued that a difference should have been made in the sentence of John Rose and Albert Rose. On this point I may state that, although the riotous behaviour of John Rose was the primary cause, it was the resisting of the police in the execution of their duty that I considered."

Mr. Benjamin, for the appellants: Under sub-section 5 of section 8 of Act 27 of 1882 the penalty is £20, or six months' imprisonment, but according to section 9 the option of a fine must be given. The Magistrate has not apportioned the punishments, although he has found the prisoners guilty on different counts. The evidence was very unsatisfactory. In the case of *Regina v. Meyer Bros.* (6 H.C. 130), it was held that where there was a conviction on more than one count, and a general sentence imposed, the whole conviction must fall through if the conviction of one count was found to be bad. Here there should have been the option of a fine. The irregularity here lay either in the record or the sentence.

Mr. Howel Jones, for the Crown, was not called upon.

De Villiers, C.J.: The Magistrate evidently sentenced the men on the serious charge, that of resisting the police, and he was quite within his rights in doing so. The appeal will be dismissed and the conviction confirmed.

Buchanan, J., and Maasdorp, J., concurred.

[Appellants' Attorney, D. Tennant, jun.]

DOOBEY AND OTHERS V. SALA { 1900.
AND OTHERS. { Dec. 18th.

Mahommedan Church property—
Leave to sell.

S. applied for leave to sell certain property belonging to the Mahommedan Church and after granting a rule nisi the Court on hearing objections thereto made the rule absolute. D. and others applied on the day before the advertised sale for a rule nisi to stay the order authorising the sale on the ground that the sale of church property was contrary to the Mahommedan religion, as stated in the Koran.

The Court, finding that the Koran was silent on the question of the sale of church property refused the application.

This was an application for a rule nisi to stay a certain sale authorised by an order of the Court, which order was alleged to have been obtained by misrepresentation of facts. The respondents were Abdul

Wahap Sala, priest in charge of the Malay community of Port Elizabeth, and his competitors in the original petition for leave to sell. The sale was authorised by the Court after publication of a rule nisi calling upon all persons interested to show cause why the application should not be granted.

The present applicants stated that they were Mahommedans, and worshipped at the Mosque in Strand-street, Port Elizabeth, and were, with a large number of others, strongly opposed to the sale of the Mosque, on the ground that it was contrary to their church law and religion. They further stated that the list of names submitted to the Court on the occasion of the original application for leave to sell was obtained fraudulently. A large number of the signatures were obtained by representing to the persons so signing that the object was to obtain a complete list of the church members. Other names appeared on the list, which were not placed on it with the authority or consent of the persons whom the names represented. It was clearly opposed to the Mohammedan religion and the church law to sell any land or building once set aside for worship, and any such sale would be a desecration. No advantage would be gained by selling the Mosque and grounds. The priest was about to sell the property on the 19th December, acting under the authority of the Court. The previous application had been opposed by only one person, as the present applicants thought it sufficient that one person should oppose on the merits. Annexed to the petition was a memorial signed by 405 Mahommedans. Shaid Pandey, the person who opposed the previous application, stated that the present respondent told him that if he could produce evidence to show that it was against the Mohammedan religion to sell church property, he (the respondent) would not sell. A meeting was arranged, but although the respondent knew that he (Pandey) and others were at the meeting place, he refused to appear.

There were several other affidavits filed by persons opposed to the sale. Amongst these were statements by five Mohammedans, who said that they knew nothing of the previous application until they were informed that their names were affixed to the memorial signed in connection with the original application.

The opinions of three high officials of the Mohammedan Church at Bombay were filed, showing that the sale would be con-

trary to their religion. These were opinions from persons who would, it was alleged, be the equals of English bishops and judges.

The affidavits for the respondents stated that three of five Mohammedans who now made affidavits to the effect that their names were not placed on the list of signatories in the original petition were present at the two meetings at which the decision to sell was arrived at, and signified their consent at that meeting. Another affidavit by Laarle Jobaar was to the effect that the other two signed the original petition in his presence, full knowing what they were signing.

The priest in his affidavit stated the reasons which induced the Court to allow the sale; these were the noise and disturbance caused by the increase of traffic in the neighbourhood, and the fact that the majority of the congregation had removed to another part of the town.

Mr. Schreiner, Q.C., for the applicants: It is a question whether the sale is not contrary to the Mohammedan religion.

[De Villiers, C.J.: That has been decided in the previous application. The Koran was referred to, and there was not a word in it prohibiting such sale.]

The order to sell was obtained in an improper manner; only 44 supported the prior application for leave to sell, whereas 405 signed the present memorial to stay the sale. I would ask for a rule *nisi* staying the sale; this will allow the Court an opportunity of sifting the matter thoroughly. The proper authorities on the question might then be quoted, and the persons whose names are said to be improperly on the list might be brought before the Court to see whether their names have been wrongfully used or not.

Mr. Searle, Q.C., for the respondents, was not called upon.

De Villiers, C.J.: The petition for leave to sell the land was presented by the priest in charge of the Malay community, and as trustee for the community. He is also the registered owner of the property. The petition gave the reasons why leave to sell should be granted. These were that owing to the extensive expropriation of land by the Cape Government for railway purposes in the vicinity of the Mosque, the large community which had resided in the immediate neighbourhood was compelled to leave, and practically the whole congregation now resides at the other end of the town; that whereas the Mosque was originally in a quiet situation, it is now situated

in one of the most noisy parts of the town. and that the constant noise and disturbance are by no means conducive to the quiet which is essential for the due exercise of religious services and worship. Not only were these grounds stated, but a resolution of the congregation, by whom it was resolved that it was for the benefit of all parties that the property should be sold, was presented to the Court. The minutes of the meeting were put in, signed by the priest in charge and the churchwardens. The Court then, anxious to avoid in any way offending the religious principles of these people, took every precaution that before they gave the full order, notice should be given, and the rule was granted, returnable upwards of a month after the application was made, such rule to be read publicly at two successive weekly meetings of the congregation, and published once in a Port Elizabeth newspaper. This was done. When the matter came up again a petition was presented in support of the application signed by about 50 persons, and only one person appeared to object. Every opportunity was then given to the objector to show grounds why the rule should not be made absolute. It was stated that the Koran prohibited the sale of church property, and the Koran was sent for, but nothing of the kind could be found in it. Now, when the petitioner is about to sell the property, the present applicants object, for two reasons: first, that they did not understand what they were signing when they signed the original petition, and secondly, because it is against their religion that the property should be sold. A book called the "Toofa" has been mentioned, which contained a revelation said to be made to a priest by Mohammed, that they are not allowed to sell church property. It is impossible upon a revelation of that kind to say that by the law of this colony there exists any prohibition against selling land belonging to the Mohammedan Church simply because it is church property. I think there should be some finality in the judgments of this Court. The order was given after full hearing and consideration, and no sufficient grounds have been stated for setting it aside. The application will be refused with costs.

Buchanan, J., and Maasdorp, J., concurred.

[Applicants' Attorney, Gus Trollip; Respondent's Attorney, Messrs. Walker and Jacobsohn.]

ROOIKOP V. BESTER. { 1900.
Dec. 19th.

Malicious prosecution—Summons—
Exception—Magistrate's discretion—Amendment.

R. sued B. for malicious prosecution, but failed to set out in his summons that B. in causing his arrest and his being charged acted "falsely and maliciously and without reasonable and probable cause. B. excepted to the summons and the exception was upheld, whereupon R. applied to amend the summons. This the Magistrate refused.

Held, on appeal, that the summons was bad and that the Magistrate was not shown to have done anything improper in the exercise of his discretion in refusing to allow the amendment.

This was an appeal from a decision of the Resident Magistrate of King William's Town in an action in which the plaintiff (present appellant) sued the defendant (present respondent) for £20 damages for annoyance, disgrace, loss of time, money, credit, and reputation, caused to him by the defendant having caused him to be arrested and afterwards charged with contravening section 4 of Act 23 of 1879, as amended by Act 27 of 1889. He was found not guilty and acquitted. The summons did not allege that the defendant caused the arrest and charging of the plaintiff "falsely and maliciously, and without reasonable and probable cause." At the trial the defendant excepted to the summons, on the ground that it disclosed no cause of action. The plaintiff applied to have the words above set out inserted, on the authority of *Field v. Steytler* (7 Juta, p. 60). In reply, the defendant relied on *Smith v. Muff* (11 S.C.R., p. 20), and prayed that the summons be dismissed. The Magistrate allowed the exception, on the ground that the omission of the words above set out was fatal to the summons, and that, by allowing the amendment, he would have caused the defendant to be prejudiced on the merits.

Mr. Close, for the appellant: The exception is purely a technical one. In an action for false arrest it is not necessary to prove malice. The defendant knew what case he had to meet. The Magistrate should have

allowed an amendment of the summons. The defendant could not have been prejudiced in his defence on the merits. The parties and their witnesses were all in court.

Mr. Searle, Q.C., was not called upon.

De Villiers, C.J.: As the summons stands, it discloses no cause of action. It alleges that the plaintiff was given into custody, tried, and acquitted; but this is not sufficient. It should state that the prosecution was malicious, and without reasonable and probable cause; and in the absence of any such statement, the exception to the summons was a good one. The question is: "Ought the Magistrate to have allowed the amendment applied for?" Now the Magistrate had a judicial discretion to exercise, and there is nothing to show that he exercised this discretion improperly. I think that the plaintiff would have done better by taking out a new summons, instead of incurring the costs of an appeal. The appeal will be dismissed, with costs.

Buchanan, J., and Maasdorp, J., concurred.

[Appellant's Attorneys, Messrs. Godlonton and Low; Respondent's Attorneys, Messrs. Innes and Hutton.]

ORSMOND V. STEYN. { 1900.
Dec. 19th.
1901.
Jan. 12th.

Promissory note—Agreement to renew—Oral evidence.

An oral agreement alleged to have been entered into between the parties to a promissory note at the time when it was made that, upon its falling due, an extension of time would be given, constitutes such a variance from the terms of the note as to be inadmissible in evidence, and therefore affords no defence to an action on the note

This was an appeal from a decision of the Acting Resident Magistrate of Aliwal North, given on September 17, 1900, in a case in which the plaintiff (present respondent) sued the defendant (present appellant) for the sum of £33 6s. 8d., being the amount due on a certain promissory note.

At the trial the plaintiff had put in the promissory note, which became due one year after the date on which it was made, the defendant tendered evidence to the effect that the plaintiff had at the time of the

LOUBSEE V. CASHEL. { 1900.
Dec. 20th.

**Resident Magistrate's Court—Costs
—Judicial discretion.**

In an action brought in a Resident Magistrate's Court for damage to the plaintiff's gate, the defendant stated that on a certain Sunday the plaintiff demanded twenty shillings for the damage, and that he (the defendant) answered he would not give a shilling. The defendant further stated in evidence that he would have been willing to pay 2s. 6d. or 5s. if asked for it on a week day. The Magistrate held that the plaintiff had lawfully placed the gate at the spot, and that the defendant was liable for the damage. He found that the damage done actually amounted to only one shilling, but gave judgment for five shillings, being the amount which the defendant had said he would have been willing to pay. The majority of the Court being of opinion that the sum of five shillings was a reasonable compensation for the damage done,

Held, that in the absence of any tender or of anything improper in the plaintiff's conduct, the Magistrate ought to have awarded to him his costs.

Buchanan, J., dissentiente.

This was an appeal from a decision of the Resident Magistrate for Hopefield in an action in which the plaintiff (present appellant) claimed the sum of £1 10s. as and for damages done to a certain gate on his property by the defendant (present respondent). The Magistrate gave judgment for the plaintiff for the sum of 5s., but made no order as to costs.

The evidence taken in the Magistrate's Court showed that the plaintiff was the lessee of a certain farm through which a private road passed. On the boundary of the farm the plaintiff placed a gate at the spot where the road enters the farm. The defendant, a medical man, who had never

been forbidden to use the road, while driving along it one dark night, injured the gate. The plaintiff valued the gate at £1 10s., and said that he was occupied a full day in repairing the damage done.

The Magistrate, in his reasons, discussed the evidence at length. His remarks were as follows: "I am of opinion that the plaintiff was at liberty to place a gate or other *bona fide* structure at the spot on the farm leased by him, and that when the defendant damaged it he was liable to an action for damages. The plaintiff and two of his witnesses value the injury caused to the gate at 30s., but judging from the samples of wood produced, I do not think the material was of such a kind as the plaintiff asks me to believe. Mr. Sinclair, a carpenter, values the damage done at anything from 1s to 2s. 6d. I do not think injury to the extent claimed was done, even though the plaintiff said he worked at it from 9 a.m. to 4 p.m. The defendant states that he was willing to pay 2s. 6d. or 5s., if asked for it on a week-day, but as the request was made on a Sunday he refused on the instant to pay anything, but I am of opinion that the plaintiff is entitled to damages, which I assess at 1s. But in view of the defendant's statement that he was willing to pay a sum up to 5s., I adjudge that sum to plaintiff, but under the circumstances set forth make no order as to costs.

The plaintiff says that a few days after the occurrence he went to Vredenburg, with the intention of seeing the defendant, but ascertained that he was not at home. He saw the defendant's coachman, who told him something, and it appears to me that he went more for this than for anything else. Nothing further was done by the plaintiff in the matter until some days after, when he casually met the defendant driving over his farm, and a conversation took place between them about the gate. I prefer to take the defendant's version of the conversation to that of the plaintiff's, for the following reasons:

1. The plaintiff, in his examination in chief, forgets to mention all about the 20s. that he asked the defendant to pay for the damage done, until it is wrung out of him in cross-examination.

2. He denies that the two pieces of wood produced in court are similar to those of which the gate is made, a fact which is clearly proved by the evidence on defendant's part—one piece being admitted by one of the plaintiff's witnesses.

3. That the defendant apologised for the accident at the time of the conversation. This the plaintiff denies.

The plaintiff should have asked a reasonable amount for the paltry injury caused to the old gate, or hurdle, as the defendant styles it, and at sight of which the carpenter says he laughed, and there is no doubt in my mind that if he had done so in the first instance, the defendant would have settled the matter. I believe the defendant when he says that after he had jokingly asked the plaintiff if he was going to bring him into court, he seriously asked him the amount of the damages he expected him to pay. When the defendant said 20s., he thought it was an extortionate price to pay for an accident to an old piece of wooden paling which his horses walked into. I consider the plaintiff's conduct was such as to amount to a waiver of his right to insist upon a tender of the amount found to be really due. *Fraustaedter v. Sauer and Another* (9 Juta, p. 512). Summons was then issued without any further demand (either written or personal) for the sum of £1 10s., a sum which indicates on what a loose footing the plaintiff based his claim. The nearest available legal assistance the defendant had at the time was Hopefield. I rely on *Campbell v. Green* (10 Juta, 375), and *Van Rooyen v. Klerck* (2 Juta, 109). For the above-mentioned reasons I exercised my discretion as to the costs, as I think the plaintiff did not act in a proper and reasonable manner, and could have avoided litigation."

Mr. McGregor, for the appellant: The amount awarded as damages was not sufficient. The respondent committed a trespass. The plaintiff did not act in a vexatious manner. The plaintiff ought to get his costs unless he has done something to disentitle him to them. The defendant made no tender. See *De Villiers v. Van Zyl* (Foord, p. 77). The Magistrate finds his case on *Fraustaedter v. Sauer* (9 Juta, 512), and *Campbell v. Green* (10 Juta, 375). These are peculiar cases. The case of *Van Rooyen v. Klerck* (2 Juta, 109) is distinguishable from the present case. See also *Bennet and Webster v. Coetzee* (1 Juta, 285); *Van Wyk v. Faber* (2 E.D.C, 152); *Kirsten v. Van Noorden* (9 Buchanan, 232); *Adams v. Sparkre* (2 Sheil, 100).

Mr. Schreiner, Q.C., for the respondent: The effect of a letter of demand on costs was discussed in *Redelinghuis v. Jones* (3 Juta, 250). The defendant was prepared to pay a reasonable amount, but he got no letter of demand. He actually allowed judg-

ment to be entered for a larger amount than the damage held to have been sustained. The Court is always averse to interfere with a Magistrate's exercise of his discretion. In this case the Magistrate exercised it to discourage litigation. The Magistrate found there was a waiver by the plaintiff of a formal tender.

Mr. McGregor, in reply: The Magistrate in his reasons seems to have relied on the principle of the Roman law *plus petitio*. This does not hold in our law.

De Villiers, C.J.: The amount in dispute in the Court below was a small one, but the principle upon which costs should be withheld or awarded is by no means unimportant. The action was for damage done to the plaintiff's gate, and the Magistrate was of opinion that the plaintiff had lawfully placed the gate at the spot, and that the defendant was liable for the damage. The only question then was as to the amount of such damage. The Magistrate found that the damage done amounted to only one shilling, but strangely enough, he gave judgment for five shillings, because, as he said, the defendant himself was willing to pay 5s. The defendant, however, never tendered the 5s., nor in any other way expressed his willingness to pay that or any other sum. On the contrary, he admitted that on a certain Sunday he told the plaintiff that he would not pay him a shilling. It is true that the defendant further stated that if he had been asked for 5s. on a weekday he would have been willing to pay it, but this statement made in the witness-box as to what he was willing to do under certain circumstances was no tender, and could hardly form the basis for assessing the damages. A safer basis was the labour expended by the plaintiff in repairing the gate, but this point seems to have been lost sight of altogether by the Magistrate. The value of the wood destroyed may have been only one shilling, but the damage done includes the cost of repairing the gate. The Court must really assume that the Magistrate, in awarding 5s., considered that to be a fair compensation for the damage done. But he ordered each party to pay his own costs, his reason being that if the plaintiff had asked for this amount in the first instance the defendant would have paid him. There is no justification, however, for this opinion, except the statement made by the defendant in the witness-box as to what he would have done if asked for 5s. He admits that the plaintiff had in the first instance asked for no more

than 20s., and the difference was not so great as to justify the defendant in saying, as he did say, that he would not pay one shilling. I am always loth to interfere with the judicial discretion of magistrates, and if there were anything vexatious or improper in the plaintiff's conduct, I should certainly not interfere with his decision as to costs in the present case. But as the plaintiff has done no more than assert a right to which in the result he was held to be entitled, he ought to have obtained judgment with costs.

Buchanan, J.: I would have dismissed the appeal on totally different grounds altogether. Here was a doctor driving over a road at night, when in the dark he comes across a gate which he unintentionally damaged. There was no principle involved, no right asserted, no right refused. It was a simple accident on the road. I think that such an action is a trumpery one, and one which might fairly be classed as vexatious, and I am of opinion that the Magistrate's action in checking litigation of this kind was a good exercise of judicial discretion. The Magistrate assessed the damage at 5s., not because this was the amount of damage done, but because the defendant offered to pay this sum. No demand was made except in a conversation on a Sunday. I think the Magistrate was quite right in discouraging an action of this kind by refusing to give costs. It was not a question of a poor man or a rich man. Where damage was done unintentionally, and injury to the amount of a shilling so caused, I think the matter might have been allowed to rest. On these grounds I would certainly have dismissed the appeal.

Maasdorp, J., concurred in the judgment delivered by the Chief Justice.

[Appellant's Attorneys, Messrs. Fairbridge, Arderne and Lawton; Respondent's Attorneys, Messrs. Van Zyl and Buissinne.]

MAXWELL V. TABLE BAY HARBOUR BOARD. 1900
Dec. 20th.

Warehouse—Rent—Damages for negligence.

It is no defence to an action for rent charged by the Table Bay Harbour Board under its regulations in respect of imported goods left in its warehouses that the goods had been so negligently packed that the importers' agents had been

unable to collect all the goods within a reasonable time. Damages for such negligence being unliquidated, cannot be set off against the rent, but must be sued for by claim in reconvention or by a separate action.

This was an appeal from a decision of the Resident Magistrate for Cape Town, dated September 25, 1900, in an action in which the plaintiffs (present respondents) claimed payment of the sum of £7 8s. 6d. as and for rent of certain premises for the storing of goods, between the months of April to July, 1900, and in which case the Resident Magistrate gave judgment for the plaintiffs, with costs.

From the record it appeared that certain goods belonging to the defendants (present appellants) were left in the Harbour Board warehouse beyond a period of 72 hours, and that the Harbour Board accordingly charged rent for the storage of these goods, under Regulation 36 of the Harbour Board Regulations. The rent was charged in accordance with the tariff on page 59 of the regulations. The defendants denied that they were liable to pay rent in connection with the goods, as they could not obtain possession of them owing to the block at the Docks, and also that the Harbour Board had packed the goods so negligently that their agents had been unable to collect all the goods within a reasonable time. The defendants further said they had sustained considerable damage owing to the negligence of the Harbour Board, and claimed £20 as such, by way of counter-claim. At the trial, however, the defendants withdrew the counter-claim, and admitted that the amount of rent charged was correct, but denied liability for it.

The Magistrate, in his reasons, said: "Under the Table Bay Dock and Harbour Regulations, duly approved of by the Government, and in force at the time this action arose, the Harbour Board is authorised to charge certain rents for storage of goods left in warehouses, or on quays beyond a certain time. During the months of April to June last certain goods arriving by a number of different steamers, consigned to defendants, were not removed within the prescribed time, and the charges under the tariff were imposed. The defendants claim that, as they were unable to remove the goods owing to the congestion caused by the abnormal amount of cargo

(military and other) received at the Docks, they are not liable to pay the charges imposed. The Harbour Board denies any liability for the delay of goods not removed within the prescribed time, and have licensed a number of agents on behalf of consignees to discharge and deliver goods received. The agents must provide their own transport facilities for removal of goods, and the Board imposes the rent charge as a lever to prevent congestion. The defendants admit that the charges are according to tariff, and the only question is whether under the circumstances the Board is entitled to recover the charges imposed under the Regulations or not. I am of opinion that the Board is so entitled, and therefore gave judgment for the amount claimed (£7 8s. 6d.), with costs."

Mr Schreiner, Q.C., for the appellants: The goods were warehoused in such a way as to make it impossible for the defendants to obtain them. The Harbour Board could not find the goods, and now claim rent for our failure to remove goods which they could not deliver to us. The Harbour Board is like any other warehouseman, and if delivery of the goods cannot be given, there can be no claim for rent after the failure to give such delivery. See Rule 36 of the Regulations, which uses the word "left"; here there was no "leaving." The defendants could not get their goods away despite every effort. If the regulation means by the word "left" anything more than leaving by negligence or fault on the part of the owner, then it is *ultra vires*. The present claim is not a claim for rent; it is a penalty, and no one can be made liable to a penalty unless he has done something wrong.

[De Villiers, C.J., referred to *Epstein v. East London Harbour Board* (10 Sheil, Part IV., p. 697).]

If the regulation imposes a penalty on anyone for not doing something he could not possibly do, then the regulation is *ultra vires*.

Mr. Searle, Q.C., for the respondents, was not called upon.

De Villiers, C.J.: The regulations relied upon by the Harbour Board were in my opinion justified by the Act. Reading the regulation and the tariff together, I have no doubt whatever that rent may be charged for goods remaining in the plaintiffs' warehouses after the 72 hours, even although the delay may not have been due to the importer's default. The rent is charged for the use of the warehouses, and that use the defendants have had, whether it was voluntary or compulsory. But then

it is said that the goods were so negligently packed that the defendants' agents had the greatest difficulty in collecting them, and that considerable damage was sustained by the defendants in consequence. Compensation for such damage would be an unliquidated demand, which could not be set off against the claim for rent, but must be sued for by claim in reconvention or by a separate action. Strangely enough, the claim in reconvention in the present case was withdrawn at the trial. Upon the evidence the Magistrate was justified in giving judgment for the rent claimed, and the appeal must therefore be dismissed with costs.

Buchanan, J., and Maasdorp, J., concurred.

[Appellants' Attorneys, Messrs. Innes and Hutton; Respondents' Attorneys, Messrs. J. and H. Reid and Nephew.]

WALLWORK AND HARRIS V. FREEMAN. { 1900.
{ Dec. 21st.

Agent—Broker—Sale of shares.

The defendants as brokers were intrusted by the plaintiff with the sale of 100 shares in a joint-stock company at not less than 19s. per share. The defendants informed the plaintiff that they had sold the shares at 19s. 6d., and accounted with him upon that basis, but the plaintiff subsequently discovered that although the defendants did purport to sell the shares at 19s. 6d. to one W., who purported to sell them at £1 2s. 6d. to H., who again, according to the defendants' statement, sold them to R. at £1 4s., such intermediate sales were not bona-fide, and that the real sale was by the defendants to R. at £1 4s. The Magistrate upon the facts and the state of the defendants' books having found these facts to be proved gave judgment in favour of the plaintiff, The Court refused to interfere with the finding.

Held, that the plaintiff was entitled to recover the difference between 19s. 6d. and £1 4s.

This was an appeal from the decision of the Acting Resident Magistrate of Cape Town.

is an action in which the plaintiff (present respondent) sued the defendants (present appellants) for the sum of £22 10s. (reduced to £20 to bring it within the Magistrate's jurisdiction), being the difference between £120 and £97 10s., the price of certain shares sold by the defendants for and on behalf of the plaintiff and the amount accounted for by the defendants.

It appeared from the record that the respondent in December, 1899, instructed the appellants to sell on his behalf certain 100 preference shares in the South African Supply and Cold Storage Company, at not less than 19s. per share. The appellants accordingly sold the shares, and accounted to the respondent for the sum of £97 10s., stating that they had sold them to one Whally at Port Elizabeth. The respondent not being satisfied that this was the case, made inquiries, and found that the shares had been sold to one Reid for £120, and accordingly sued the appellants for the balance less £2 10s., to reduce the claim to £20. Reid gave evidence on behalf of the respondent, stating that he purchased the shares at 24s. each. The evidence for the defence was to the effect that the shares were sold to Whally at Port Elizabeth for £97 10s., on 28th December, who afterwards, through the appellants, sold them to Holroyd at 22s. each, who then sold them to Reid at 24s. each. Whally, on interrogatories having been put to him, replied that he did buy the shares at 19s. 6d. each, and subsequently sell them at 22s. each. No broker's note, however, was produced, and no cheque was passed. From an examination of the appellants' books it appeared that certain alterations and erasures had been made in connection with the transactions in regard to the shares, whereas the records in connection with other matters were very neatly kept.

The Magistrate, as a result of this examination of the books, characterised the intermediate sales as transactions which were not *bona fide*, and found that the shares were sold by the appellants to Reid at 24s. each. He accordingly gave judgment against the appellants.

Mr. Benjamin, for the appellants: The Magistrate should not have discredited the evidence of Whally.

[De Villiers, C.J.: From an examination of the books, it appears that, on the 28th December (the day on which the shares are alleged to have been sold to Whally), 35 of the shares were sold to Reid at 24s.]

Mr. Schreiner, Q.C., for the respondent, was not called upon.

De Villiers, C.J.: The plaintiff intrusted the defendants, who are brokers, with the sale of 100 shares in the Storage Co. fixing the lowest limit of price at 19s. If they *bona fide* sold the shares on his behalf for 19s. 6d., they were bound to account to him for that amount only. If, however, it be true, as alleged by the plaintiff, that the sale to Whally at 19s. 6d., the sale by him to Holroyd at 22s. 6d., and the sale by Holroyd to Reid at 24s., were merely colourable, and that the real sale was by the defendants to Reid at 24s., then they must account to the plaintiff at the full price of 24s. There was considerable conflict in the evidence, but the Magistrate was satisfied from the demeanour of the witnesses and the state of the defendants' books that the intermediate sales were not made *bona fide*. After seeing the books for myself, I am not prepared to dissent from the Magistrate's view. It follows that he was right in awarding to the plaintiff the difference between 19s. 6d. and 24s., and the appeal must be dismissed with costs.

Buchanan, J., and Maasdorp, J., concurred.

[Appellants' Attorneys, Messrs. Innes and Hutton; Respondent's Attorneys, Messrs. Van Zyl and Buissinne.]

ROE V ROE. } 1900.
} Dec. 21st.

Mr. Nathan applied on behalf of the wife for leave to sue the husband *in forma pauperis* for restitution of conjugal rights, and failing that, divorce. The petitioner resided in Hanover, in the jurisdiction of the Eastern Districts Court.

The petitioner was referred to the Eastern Districts Court.

APPENDIX.

[In the Special Court (constituted under Act 6 of 1900), sitting in the Supreme Court Buildings.]

[Before the Hon. Mr. Justice SOLOMON, the Hon. Mr. Justice LANGE, and Mr. MAASDORP, Q.C.]

REGINA V. SMITH.

{ 1900.
Oct. 29th.
„ 30th.

Soldier—Murder—Superior officer—
Commands—Legality—Execution
by inferior—Justification.

The orders of a superior officer so long as they are neither obviously and decidedly illegal nor opposed to the well-established customs of the Army, must be completely and unhesitatingly obeyed by a soldier subordinate to such officer.

But if such commands are obviously illegal, the inferior will be justified in questioning or even refusing to execute them.

An officer or soldier acting under orders from his superior which are not necessarily nor manifestly illegal, will be justified in obeying such orders.

In this case Peter William Smith, a member of the Cape Police Force, was charged with the murder, on 22nd November, 1899, of one John Dolley, a native servant, in his lifetime in the employ of Henry van der Walt, of Jackhalsfontein, Colesberg, Cape Colony. The case was heard before the Special Court constituted under Act 6 of 1900, because, in the opinion of the Attorney-General, it was one arising from political disturbances.

The evidence generally was very conflicting.

The facts placed before the Court by the Crown were as follows: On the 22nd November, 1899, in the district of Colesberg, when numbers of the enemy (Orange Free State and Transvaal Forces) were in the district, a patrol of British troops under the direct command of Captain Chas. F. Cox, and consisting of P. W. Smith (the accused) and others, proceeded from the town of Colesberg to the farm of Jackhalsfontein for the purpose of arresting some persons on the

farm who were suspected of having been in communication with the enemy. The patrol arrived between 6 and 7 o'clock in the morning, and the members thereof, under orders from Cox, proceeded to get together seven horses to take them back to Colesberg. It was found that one bridle was missing, and Cox ordered the deceased to fetch it. The deceased thereupon went from the front of the house, where he received the order, to the back, where the bridle presumably was. Cox then told the accused to follow him, and said "If he (meaning Dolley) does not look sharp, put a hole through him." Smith followed the deceased, and on coming up with him to the door of the wagon-house, shot him, as he had neglected to get the bridle.

For the defence, evidence was led to show the unsettled and disaffected state of the district, the proximity at the time of the occurrence of the enemy to Jackhalsfontein, the fact that there was signalling by means of flashing between the farm and some surrounding kopjes, that on the approach of the patrol a horseman endeavouring to proceed from the farm to the kopjes on which the Boers were known to be located, was headed off and forced to return to the farm, and that communications between the enemy and the farm had been intercepted. Besides these circumstances, there was evidence that the position of the patrol on the morning in question was extremely dangerous, and that the safety of the members of the patrol depended on the despatch with which their duties were carried out. The evidence given by the accused was to the effect that he shot the deceased, who remained deaf to all his requests for the production of the bridle, on the orders of his commanding officer, Cox. The deceased had been in the service of the Van der Walts for a period of twenty years or more.

Captain Cox stated that he told the accused to shoot the deceased if he did not produce the bridle. After the occurrence he reported the matter to General French. The deceased, according to Smith's report, had refused to bring the bridle when ordered to do so.

Mr. Innes, Q.C., A.G. (with him Mr. Ward), for the Crown: The shooting is not denied. Even supposing the deceased knew where to find the bridle, the shooting would not increase the chance of finding it. On the legal position of a soldier acting under his superior's orders, see section 45 of Act 32 of 1892, and the second schedule of the

Act, section 10: the Army Act, section 9, quoted in the "Manual of Military Law" (p. 22). If a command is obviously illegal, a subordinate is bound to refuse to obey. The civil authorities go further than the military authorities. See *Stephen's History of the Criminal Law* (Vol. I., pp. 204, 205). The order should be reasonably necessary. The doctrine that a soldier is bound under all circumstances to obey orders would be fatal to military discipline, as a subordinate officer might order the men under him to shoot his superior officer. It is always necessary that a command should be lawful. This rule holds good in peace and war, circumstances necessarily modifying its application in time of war. The subordinate must judge whether the order is legal or not. Some cases would be quite clear, such as knocking out the brains of a baby, while others would shade off in one direction or the other. The *mens rea* is presumed in a case of shooting in cold blood. See *Russell on Crimes* (vol. 3, p. 94); *Stephen's Digest of the Criminal Law* (p. 127); *Bishop's Criminal Law* (Book 4, chapter 23, section 355, p. 216) (5th edition). On the facts the order was not lawful, and the shooting was only meant as a punishment.

[Solomon, J.: Will not the accused be protected by Act 6 of 1900?]

The Act might protect Cox, but not his subordinate. The Act will not make an unlawful order lawful.

Sir Henry Juta, Q.C. (for the defence). The rules of all the civil authorities refer to times of peace: if every soldier had to reason out the question of the legality or lawfulness of the orders given him, it would be a queer war. The dicta of Stephens only apply to times of peace. In other nations a soldier must obey.

[Solomon, J.: Our soldiers are subject to civil authority.]

But how do they stand to civil law in time of war? The necessity of an act must be presumed by a soldier. The Indemnity Act 6 of 1900 covers all illegal acts, which are not wanton. On the facts this act was necessary, and the deceased and the other inmates of the farm were endeavouring to delay the patrol. The bridle was produced immediately after the shooting. The *mens rea* cannot be presumed in accused's case: it is the essence of the crime. Rules framed for times of peace, cannot apply in times of war.

Solomon, J.: In this case the prisoner is charged with the crime of murder, and as

in the opinion of the Attorney-General the charge is one of a political character, this Court has jurisdiction. I need scarcely say that this case is a very serious and a very painful one, and this Court, sitting without a jury, feels very much the responsibility placed upon it in having to decide not only the law applicable to the case, but also the facts. The Court is very much indebted for and has been much assisted in coming to a decision by the arguments which have been addressed both on the part of the Crown and on behalf of the prisoner; and I may say at once that I feel no doubt as to what our decision will be. Before considering the question of law involved, I will take the facts of the case. I need hardly say that it is not easy to exactly determine all the details of what took place on this occasion, and perhaps it is not altogether surprising; that it should be so. The occurrence took place about a year ago, and the preliminary examination was held many months afterwards, so it is not altogether surprising that on many matters of detail there are considerable discrepancies in the evidence given both for the Crown and for the prisoner. Though there are such discrepancies, the Court does not feel very much difficulty in deciding what the substantial facts of the case are. It appears that a patrol was sent to the farm on which the deceased lived because there were suspicions, caused by an intercepted letter, that persons on the farm were about to join the enemy. The war had been on for a month, and the Colesberg district was admittedly very much disaffected at the time. Martial law had been proclaimed, and Captain Cox and the men forming the patrol had knowledge of the presence in the neighbourhood of the enemy and of their actions just prior to this occurrence. In these circumstances there was considerable force in what has been said on behalf of the prisoner as to the expedition being one of considerable danger, and as to the undesirability of any delay in carrying out the orders which Captain Cox was sent to execute. When the patrol approached the farm a person was seen to ride away on a grey horse, and at a very fast pace. There are discrepancies in the evidence as to whether the person was a boy or a man, but it is agreed that a person did so ride away. When the patrol arrived at the farm it was desirable, although not absolutely indispensable, that they should have a second bridle for the horse on which one of the young Van der Walts was to ride to Naauwpoort with the patrol. It was

reported to Captain Cox that a bridle was missing. He ordered Dolley, the deceased, to fetch it. There are discrepancies as to what he said, but whatever he did say was interpreted to the native. It is probable that in order to induce the man to hurry he used a threat, though not with the intention of carrying it out. Everyone standing near understood what was said to the deceased, for three persons swear to having interpreted it to him. The deceased had been employed on the farm for over twenty years, and consequently most probably knew where the saddles and bridles were. Such knowledge was not denied, and the deceased went away to the stables on receiving the order. It is reasonable to suppose that, when he saw his old master's property being taken away, he did not act with the best of grace. We are inclined to believe that the sergeant went with the man, but that Smith did not make two journeys. It is not suggested for a moment that Captain Cox's statement is deliberately untrue, but we are inclined to think that he could not remember exactly what occurred. He reported the occurrence, and thought no more would come of it, and has since then been continually engaged on active service. The accused did not say at the preliminary examination that he made two journeys to the stables, and it is only now that we have it from Captain Cox that the accused says he did. The Court is also inclined to believe that Captain Cox was satisfied that the deceased knew where the bridle was. That he had such knowledge is not denied by anyone who was there at the time, and Captain Cox is satisfied that Dolley was deliberately and wilfully refusing to obey the order. On Smith, the accused, receiving his order from Captain Cox, he followed the deceased to the wagon-house. As to what took place there the Court is entirely dependent upon the evidence given by Smith himself and by Sergeant Gould. Now, I am not prepared to accept implicitly all that Smith said with regard to what took place. I do not believe, for instance, that when he (Smith) raised his rifle the deceased laughed at him. It is extremely improbable that he would do so. I am inclined to think that at that stage Dolley was becoming more and more sullen, and simply stood there, not carrying out the order to get the bridle and not explaining to those present that he did not know where it was, and was therefore unable to carry out the order. Thereupon Smith obeyed the order given him by Captain Cox, who had told him to shoot the

man if he did not get the bridle. Now this being substantially the conclusion as to the facts of the case, the question remains whether, under the circumstances, Smith is guilty of the crime of murder, it is perfectly clear in the first place that Smith shot the deceased deliberately and intentionally, and of course the ordinary rule of law is that when one man kills another deliberately and intentionally, that killing is murder, unless it can be justified by some legal valid excuse. Now what justification had been set up? It is that Smith was obeying the order of his superior officer, and the question therefore for the Court to consider is whether in all the circumstances of the case this made the killing justifiable homicide or murder. There is nothing between; it is either murder or nothing at all. It is clear that Smith did not kill the man on his own responsibility, but acted in obedience to the order received from Captain Cox, and believed that he was carrying out the order. This brings us to the next question raised: Was the order a lawful one? Was it a necessary and proper order in all the circumstances? It is further argued that whether or not it was a lawful order, Captain Cox and Smith are protected by the provisions of the Indemnity Act, No. 6 of 1900, and that in the event of it being an unlawful order, Smith is protected in obeying the order he received from his superior officer. It is not necessary that the Court should express any decided opinion as to whether or not the order given by Captain Cox was a lawful one, or whether, if it were not lawful, Captain Cox and Smith are protected by the provisions of Act 6 of 1900. It is not desirable or necessary to express an opinion on these matters, since such an opinion would have reference more to Captain Cox than to the prisoner. The point which the Court thinks it should decide and can decide in favour of the prisoner, is whether, assuming that the order was an unlawful one, Smith, in carrying it out, is protected, because he was carrying out the orders of his superior officer, and this leads the Court to consider the important point of law as to how far a private soldier is protected in carrying out his superior's orders. Curiously enough, this question has never yet been decided in any English Court of Law, and we therefore have now, as far as we are able and with such authorities as we have before us, to express our opinion as to the rule which is to guide us in the present case. Two extreme propositions of law have

been laid down by each side. On the one hand it is argued that absolute, implicit, and unquestioning obedience is required from a soldier in carrying out the orders of his commanding officer. That, however, is a rule of law which the Court does not think it would be justified in adopting in the present case. The proposition has been discussed by Mr. Justice Stephen in his History of the Criminal Law. Now, a soldier is always subject to the civil law, and amenable to the civil courts, if he breaks the civil law. According to Mr. Justice Stephen, in his History of the Criminal Law (Vol. 1, pp. 204, 205), it is monstrous to suppose that a soldier would be protected if he carried out any act that he was ordered to by his superior officer, where the order was grossly illegal. The Court cannot therefore decide that a soldier is bound to obey any order that may be given to him. The second proposition made is that a soldier is only bound to obey lawful orders, and will be responsible if he obeys an order not strictly legal. That is an extreme proposition which the Court cannot accept for its guidance. Under the Army Act a soldier is only responsible for disobedience if the order given him is a lawful one, but at the same time for the protection of a private soldier it goes a good deal further. Although he is only bound to obey lawful orders, he is protected in obeying some orders not strictly legal. If in any doubtful case a soldier is entitled to judge for himself, to consider the circumstances of the case, and to hesitate in obeying the orders given him, that would be subversive of all military discipline. One must remember that especially in time of war immediate obedience to orders is required from a private soldier, and that therefore it is not desirable that a soldier should be encouraged to question the order given him by his superior in cases where there may be some doubt as to whether the order is lawful or not. It is clear that we cannot adopt as a rule either of these two extreme propositions. After looking at the authorities quoted from the bar, and such other authorities as were accessible to me, it appears to me that the rule laid down in the Manual of Military Law (at p. 26) is a reasonable and proper rule to apply in such a case as this. The rule states that if the commands are obviously illegal, an inferior will be justified in questioning or even refusing to execute such commands; but as long as the orders of the superior are not obviously and decidedly in opposition to the laws of the land,

or to the well-known established customs of the Army, so long must they meet with complete and unhesitating obedience. Mr. Justice Mills, in the case of *Keighly v. Bell* (4 F. and F., p. 763), cited by Dicey (Law of the Constitution) states his opinion to be that an officer or soldier acting under orders from his superior, which were not necessarily or manifestly illegal, would be justified. The rule is a reasonable one, and one which is a well-established principle of law. The well-known principle of criminal law demands that there must be some blameworthy condition of mind, some guilty knowledge shown to the Court, to justify it finding a person guilty of a crime. It would shock one's ideals of what is right and just if a man were convicted of a crime if there was no blame in some way or other attaching to him. If he did a thing without knowing he was doing wrong, or had reasonable grounds for believing that certain facts existed which justified his doing it, he would be excused, on the ground that there was no guilty knowledge on his part. I think it is a safe rule to lay down that if a soldier honestly believes he is doing his duty in obeying the commands of his superior officer, and if the orders are not so manifestly illegal that he must or ought to have known that they were unlawful, the private soldier will be protected by the orders of his superior officer. The last question then to consider is whether the order given by Captain Cox was so manifestly and obviously illegal that a man of Smith's intelligence must or ought to have known he was doing wrong in obeying it. If it were not so obviously illegal, then Smith is, in the opinion of the Court, protected in carrying it out. In considering this question, I do not think I need say much. There is a good deal to be said in favour of the view urged upon the Court by counsel for the defence that, in all the circumstances of the case, the order was not altogether an unreasonable or unnecessary one. That point, however, need not be decided. The Court is satisfied that the order was not so plainly illegal that Smith would be justified in the circumstances in refusing to obey it, and that being so, we have come to the conclusion that Smith was protected in carrying out the order he received from his superior officer to shoot the deceased man if he did not get the bridle. We therefore find Smith not guilty of the charge of murder.

[Before the Judicial Committee of the Privy Council.]

GALLIERS AND OTHERS V. { 1900.
RYCROFT. { July 3rd.

Will—Construction—Condition *si sine liberis decesserit*—"Children"—"Kinderen"—Substitution—*Fidei-commissum*—Vesting.

A., by his will bequeathed his whole estate to his wife for the use of herself and his children during her lifetime, and directed that such estate should, after her decease, be equally divided among his children "or such of them as may be then alive." He died in 1864 leaving him surviving his wife, one son and three daughters. The son, died in 1875 after executing a will by which he bequeathed all his property to his wife. He left him surviving his wife and one son, B. A's wife died in 1897, leaving her surviving her three daughters and her grandson B. Held, reversing the judgment of the Natal Supreme Court, that the three daughters were entitled to the whole estate to the exclusion of the grandson B. and his mother. The rule of the Roman law that the condition *si sine liberis decesserit* must be implied where a father or grandfather has instituted his son or grandson who has no children with a *fidei-commissum* to restore the inheritance to a third person is not applicable to the case of a direct substitution. The term "*kinderen*" or "*children*" used in a will must be taken to refer to descendants of the first degree only unless it can be gathered from the context of the will that the testator had regard to descendants of a remoter degree also.

The words "or such of them as may then be alive" in the above

will prevent such a vesting of the inheritance in any child dying before his or her mother as would make the inheritance transmissible to his or her heirs.

Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of *Galliers and Others v. Rycroft and Another*, from the Supreme Court of Natal, delivered 3rd July. 1900.

Present at the hearing :

Lord Davey,
Lord Robertson,
Lord Lindley.
Sir Henry de Villiers,
Sir Ford North.

[Delivered by Sir Henry de Villiers.]

The will which their lordships are called upon to construe was executed in Natal, but the testator, William Galliers, sen., was an Englishman who had married in England before he settled in Natal. The will is in the English language, and is in the following terms: "I give and bequeath all and singular my real and personal estate . . . unto my dear wife Matilda Galliers (born Sabin) for the use and benefit of herself and my children during her lifetime, and after her decease I direct that the same may be equally divided among my children or such of them as may be then alive." The testator died in 1864, leaving him surviving his wife, one son, and three daughters. The son, William Galliers, junior, died in 1875, after executing a will by which he bequeathed all his property to his wife, Fanny Galliers. He left him surviving his wife and one son, William Elton Galliers. The wife of the testator (William Galliers, senior) died in 1897, leaving her surviving her three daughters already mentioned and her grandson, William Elton Galliers. The executors of William Galliers, senior, thereafter awarded the whole of his estate to the three daughters. Objections were filed against the distribution on behalf of the widow and the son of William Galliers, junior, they claiming to be entitled to share in the distribution of the estate. The Supreme Court, by its order, the Chief Justice dissenting, directed the executor "to frame and file an amended account so as to include in it William Elton Galliers, junior, as taking his father's share in the capital of the estate of William Galliers, senior, and also his father's share in the income of that estate from the

date of the death of the widow of William Galliers, senior." Against this judgment the three daughters have appealed. The widow of William Galliers, junior, has joined her son in supporting the judgment, but she claims that, if her son should be held not to be entitled to his father's share, she as the sole heiress under her husband's will is entitled to it.

The ground upon which a majority of the Natal Supreme Court supported the claim of the testator's grandson was "that the law of Natal (differing in this respect from English law but following Roman law) applies to cases of the present kind a rule of construction that where a parent has appointed children (or remoter descendants) as heirs and directed that upon their death their share should go over either to a stranger or to another child, then the going over or substitution is subject to the tacit condition implied by law that the deceased child left no issue." This statement of the rule, if confined to the case of fidei-commissary substitutions, appears to their lordships to be a fair deduction from the Roman and Dutch authorities on the subject. The rule had its origin in a response given by Papinian and quoted in Digest (35, 1, 102), as follows: "A grandfather having instituted as his heirs a son and a grandson born of another son requested the grandson, if he should die within his thirtieth year, to restore the inheritance to his uncle. The grandson died within the age mentioned, leaving children. From a conjecture of dutiful conduct, I answered that the condition of *fidei-commissum* has failed, because it would be found that less had been written than spoken." It is obvious that in this brief opinion Papinian was not referring to the case of a direct or ordinary substitution, that is to say, the substitution of the son on failure of the grandson to take under the will, but to the case of a fidei-commissary substitution, that is to say, the substitution of the son for the grandson by virtue of a trust imposed on the latter to restore the inheritance on the happening of a certain event after he had entered on it. The term *fidei-commissum* used by Papinian would not be applicable to a direct substitution, nor would the grandson be requested or able to restore (*restituere*) an inheritance which he had never entered upon. The law relating to *fidei-commissa* had been fully developed in his time, and it was a very common practice for Roman testators, in creating such trusts, to make them conditional upon the fiduciary heir dying without children. Papinian held, in

effect, that this condition *si sine liberis decesserit* should be read into every will whereby the burthen of *fidei-commissum* is imposed on a grandchild of the testator. The authority of Papinian stood so high that the response was accepted as law, and it was confirmed by two Imperial rescripts quoted in the Code (6, 25, 6, and 6, 42, 30), which extended the application of the rule to the case in which descendants of whatever degree are burthened with *fidei-commissum*, and even to the case of natural children who are so burthened. The terms of both rescripts clearly show that the condition *si sine liberis* was intended to be read only into wills by which *fidei-commissa* were created. None of the Dutch Commentators on the Digest or the Code who were cited in the judgment of the Court below has extended the rule any further. Voet (36, 1, 17, *et seq.*), Perezius, Wittenbach, and Strykius treat the matter as part of the law relating to fidei-commissary dispositions, and all the illustrations given by them are cases of fidei-commissary substitution. Bruneman, in his Commentary on the cited passage of the Digest, confines the rule to fidei-commissary substitutions, and, in his Commentary on the Code (6, 42, 30), he expressly states, on the authority of Peregrinus (*de fidei-commissis*) and other writers that the condition is not implied in the case of ordinary substitution unless the instituted heir is also burthened with a *fidei-commissum* in favour of the substituted heir. Burge, in his Commentaries (Vol. 2, p. 109), says: "The condition *si sine liberis* is in certain cases implied when it has not been expressed. If a father or grandfather institute his son or grandson who at the time has no children, with a *fidei-commissum* to restore the inheritance to a third person, this condition *si sine liberis* is implied." He then proceeds, following Voet, to specify the limitations upon the rule of construction thus broadly stated, and he treats the matter as falling entirely under the law relating to fidei-commissary substitutions. No decision of any Court administering the Roman-Dutch law has been cited to show that the condition has ever been implied in the case of a will under which the heir or legatee, if he took his inheritance or bequest at all, would take it free from any trust or burthen. The case of *Mylne* (1 Natal Law Reports, p. 88), which was mainly relied upon by the Court below, was treated by the Court, which decided it as one of fidei-commissary substitution. The testator in that case bequeathed the annual proceeds of his

estate to the children of his daughter Jessie, who had been first married to one Robertson and then to one Tollner. The will then proceeded thus: "In the event of any one of these my heirs dying, whether of the Robertson or Tollner families, the dividend or share of the deceased shall revert to and be paid to the survivors of that family to which the deceased belonged." After the death of the testator, the children of Jessie received the annual proceeds, and two of them claimed payment of the *corpus* of the estate free from any limitation over, but Connor, C.J., decided that they were not entitled to succeed, on the distinct ground that the substitution was intended to apply after, as well as before, they had entered on their inheritance. So far as the substitution was intended to take effect after the testator's death it was clearly fidei-commissary, for the children of Jessie were mentioned as *heirs*, whose shares on their death should revert to the survivors of their respective families. That being so, the condition *si sine liberis* was read into the will; but, as it could not be known until the applicants' death whether they would die without issue, the Court refused to order the payment to them of the *corpus* of their shares as their absolute property. The case, therefore, is no authority for the proposition that the condition *si sine liberis* can legally be read into a will which merely substitutes one heir or legatee for another in the event of the instituted heir or legatee not entering on the inheritance or legacy.

By the will now in question, the testator, after giving a life interest in his estate to his wife for the benefit of herself and his children, directs that after her decease the estate shall be equally divided among his children, or such of them as might then be alive. The effect of this direction was virtually to institute the children as heirs on the death of their mother, and to substitute the survivors for such of the children as might die before their mother. It is a case, therefore, of direct, and not of fidei-commissary substitution. The children are not requested to part with their inheritance after they have once entered on it, and consequently those who survived their mother took their inheritance free from any burthen. Those who died before their mother entered upon no inheritance, and possessed nothing to restore. Their lordships' attention has, however, been called to the English case of *Sturges v. Pearson* (4 Mad., 411), in which it was held that a bequest to several or to a class, "or" to such

of them as shall be living at a given period, should be construed as a vested gift to all, subject to be divested in favour of those living at that period, and that, consequently, if none are then living, all are held to take. Their lordships are not aware that this doctrine of vesting and divesting has ever been adopted in the Roman or the Dutch law, but assuming that it has been so adopted, such a vesting and divesting would be a very different matter from the *aditio* and *restitutio* by an heir or legatee under a fidei-commissary substitution. If William Galliers, jun., had survived his mother, his inheritance would, under the will, have belonged to him absolutely. Having died before her, he acquired nothing in respect of which a *fidei-commissum* could be imposed on him. The will itself is free from ambiguity, and contains no indication of any desire on the testator's part to benefit his grandchildren in preference to his surviving children, and the question to be determined is whether this is a case in which a Court administering the Dutch law could legally supply the omission of a supposed natural duty. To read into a will words which the testator has not used, to presume an intention which the testator has not expressed, can only be justified by a positive rule of construction having the force of law. Such a rule cannot now be extended beyond the special circumstances to which the law originally confined it, even although the reason which led to the introduction of the rule may be applicable to other circumstances also. It is said that the principle underlying the rule of construction now under consideration is that the testator must be presumed to have overlooked the contingency of his instituted children or other descendants having issue. This principle would, no doubt, also be applicable to the case of direct substitution, but it would be equally applicable to many other cases than that of substitution, whether direct or indirect. The text of the Roman law has applied the rule of construction only to *fidei-commissa*, no text writer or decided case under the Dutch law has extended it any further, and those commentators who discuss the question whether the rule should be extended to wills which contain no fidei-commissary substitution answer the question in the negative. Their lordships are therefore unable to agree with the majority of the Court below that the rule should be applied to the construction of the will now in question. It is not implied in this decision that the application of the *conditio si sine liberis* to direct legacies

to children with a substitution has been an illegitimate extension of the principle by those Courts of Law (as in Scotland) which have derived it from the Roman law, and their lordships recognise the strength of the reasoning by which that extension is justified. It is enough for the decision of the present case to say that the Roman-Dutch law has not so proceeded, and it is for their lordships to apply the law as it stands.

But another rule of construction bearing a close resemblance to the one just considered, has been called in aid by the respondents, and it is this, that where a testator confers benefits by will on his "children" he must be presumed to have intended to include under that term all other descendants. The reason for this supposed rule is variously stated, and one of the grounds on which it is supported is the extreme improbability that the testator would have omitted to mention other descendants if he had thought of them. It is clear, however, from the reasoning of *Voet* (36, 1, 22), that in his time at all events no such hard and fast rule of construction was recognised. The conclusion at which he arrived is that the word "kinderen," which is the Dutch equivalent for "liberi" and for "children," must *prima facie* be taken to refer to descendants of the first degree, but that, if it can be gathered from the context of the will or from other circumstances that the testator had regard to descendants of a remoter degree, the word should be construed as having such wider signification. He adds that the question in each case is not one of law but rather of intention. It appears from later authorities, that in the case of a bequest to the testator's own "children" the Courts of Holland required much slighter evidence of a desire to benefit further descendants than in the case of a bequest to the children of another person.

It is difficult to find in the terms of the short will now under consideration such an indication of a desire to benefit the children of the testator's children as to justify their lordships in giving to the term "children" the wider signification contended for. The Judges in the Court below held the same view, and moreover relied upon the case of *Martin v. Lee* (14 Moore, P.C.C. 142), which was decided by their Lordships' Board on appeal from Lower Canada. There the testatrix, a married woman, domiciled in Lower

Canada, had made a will in the English language. By the will she devised her estate to her husband for his life, and after his decease to her children, living at the time of her decease. One of her children predeceased her, leaving a child, who was held by the Court of Lower Canada to be entitled to take under the will on the ground that the term "children" included grandchildren. Their lordships, however, held that, upon the true construction of the will, the intention of the testatrix was to restrict the gift to her children, which intention counter-acted the general force given by the law of Lower Canada to the word "enfants." Their lordships added that it might well be that the will "having been written in the English language, the proper mode of dealing with the case may have been for the Courts in Canada to ascertain what, according to the English law, was the meaning of the word 'children' as used in the will." The point was not decided, nor is it necessary for their lordships now to decide it, seeing that, in their opinion, the children of the testator's children would not have been included in the word "kinderen" even if the will had been in the Dutch language, and that word had been employed.

In regard to the respondent, Mrs. Rycroft, she claims to be entitled, as sole testamentary heiress of William Galliers, jun., to his share of the estate in case his son should fail in his claim. Their lordships, however, fully agree with the Judges of the Natal Court that the words in the will "or such of them as may then be alive" prevent such a vesting of the inheritance in any child dying before his or her mother as would make the inheritance transmissible to his or her heirs. It is only in the event of William Galliers, jun., dying after his mother that Mrs. Rycroft would have been entitled to his share of the inheritance. As he died before his mother, his sisters, being the persons substituted for him under their father's will, are entitled to the share which he would otherwise have taken.

The result is that, in their lordships' opinion, the judgment proposed by the learned Chief Justice was right, and they will humbly advise Her Majesty to allow the appeal, to disallow the objections to the distribution, and to order that the costs of all parties in the Court below be paid out of the estate of William Galliers, sen. The costs of all parties on appeal will also be paid out of the estate.

Standard Law Library



3 6105 063 309 327